THE IMPACT OF THE NATIONAL ENVIRONMENTAL POLICY ACT ON THE MOTOR CARRIER INDUSTRY

PAUL C. REMUS*

The plethora of recent environmental legislation[1] is having a profound impact on many industries, particularly industries tightly regulated by the Federal Government. The environmental legislation with the most impact on such industries is the National Environmental Policy Act of 1969[2] (NEPA).

It is only now, after at least 50 decisions construing NEPA have been written,[3] that the full impact of NEPA is beginning to come into focus. For NEPA is, in the words of Judge Friendly, "so broad, yet opaque, that it will take even longer than usual fully to comprehend its import."[4] Clearly, NEPA is a blessing. To undertake major Government action without considering its long term effects on the environment is obviously folly. However, contrary to the views of some writers,[5] this author shares the opinion that NEPA is a mixed blessing.[6]

The purpose of this article is to examine the impact of NEPA on a typical closely regulated industry, the motor carrier industry, and to catalogue the resulting benefits and difficulties. Section I is a general description of NEPA, and Section II is a description of the motor carrier industry as it is regulated by the Interstate Commerce Commission[7] (ICC). Section III is an integration of the two previous sections and examines NEPA's impact on the motor carrier industry.

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* Attorney, Berry & Howard, Hartford, Conn.; B.A., Yale College (1967); J.D., University of Michigan (1971).

1. *See, e.g.*, Environmental Education Act, 20 U.S.C.A. § 1531 (1971 Pocket Part); Air Quality Act of 1967, 42 U.S.C.A. §§ 1857 *et seq.* (Supp. V 1965-1969); Clean Air Amendments of 1970, 42 U.S.C.A. §§ 1857-1858 (1971 Pocket Part); Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4374 (1971 Pocket Part); and Water and Environmental Quality Improvement Act of 1970, 33 U.S.C.A. §§ 1152 *et seq.* (1971 Pocket Part).

2. 42 U.S.C.A. § 4321 *et seq.* (1971 Pocket Part). The Act is described in the text accompanying notes 8-11, *infra.*

3. *See* Environment Reporter-Decisions Binder, Vols. 1-5.

4. *City of New York v. United States*, 337 F. Supp. 150, 159 (E.D. N.Y. 1972).

5. *See, e.g.*, Hanks and Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

6. *See* Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace*, 72 COLUM. L. REV. 963 (1972).

7. Part II of the Interstate Commerce Act, 49 U.S.C.A. §§ 301-327 (1963), vests the regulation of the motor carrier industry in the Interstate Commerce Commission. The Act is described in the text accompanying notes 12-45, *infra.*

I. The National Environmental Policy Act of 1969 (NEPA)

NEPA[8] is composed of two titles. Title II of NEPA serves two functions. Section 201 requires the President to transmit to Congress an annual Environmental Quality Report, and Section 202 creates the Council on Environmental Quality[9] (CEQ).

Title I of NEPA, the more important of the two titles, also serves two purposes. It first declares a national environmental policy in broad general terms. For example, Section 101(b) provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy," to promote environmental goals. Section 102 then "authorizes and directs that to the fullest extent possible: (1) the policies, regulations, and public lands of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . . ." The courts have interpreted this language from NEPA to mandate that "every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment."[10]

To insure that every federal agency has considered environmental factors along with other relevant aspects of any proposed action, Section 102(2)(c) provides:

> ". . . To the fullest extent possible . . . all agencies of the Federal Government shall . . .(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."[11]

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8. 42 U.S.C.A. §§ 4321 *et seq.* (1971 Pocket Part).

9. CEQ serves primarily in an advisory capacity to the President. Its duties and functions are set forth in Section 204 of NEPA.

10. *Zabel v. Tabb*, 430 F.2d 199, 211 (5th Cir. 1970).

11. "By compelling a formal 'detailed statement' and a description of alternatives, NEPA provides evidence that the mandated decision making process has in fact taken place. . ." *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). *See also*, the CEQ's interim guidelines, published April 23, 1971 stating that "the objective of section 102(2)(c) of the Act and of these guidelines is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action. . ." 36 Fed. Reg. 7723, 7724.

II. Interstate Commerce Commission Regulation of the Motor Carrier Industry

Part II of the Interstate Commerce Act[12] divides into two groups persons commercially transporting passengers or property by motor vehicle in interstate or foreign commerce. The Act provides for comprehensive regulation by the ICC of "motor carriers,"[13] but exempts the other group, "private carriers,"[14] from all regulation except that dealing with safety.[15]

The Act defines the term "motor carrier" to include both common carriers and contract carriers.[16] A "common carrier" is a person who offers standardized for-hire carriage to the general public.[17] On the other hand, a "contract carrier" is a person who enters contracts only with specific shippers to supply the shippers specialized for-hire carriage.[18]

The Act then creates a separate regulatory scheme for common carriers and for contract carriers. However, the regulatory schemes are very similar and result in the comprehensive regulation by the ICC of all phases of both common and contract carriage.[19]

Thus, entry into the market by additional common or contract carriers is regulated by the ICC. No person can operate as a common carrier unless he is issued a certificate of public convenience and necessity by the ICC.[20] In issuing such a certificate, the ICC has statutory authority[21] to

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12. 49 U.S.C.A. §§ 301-327 (1963).

13. The term "motor carrier" is defined in the text accompanying notes 16-18, *infra*.

14. The term "private carrier" is defined to be any person not included in the term "common carrier" or "contract carrier" who "transports . . . property of which such person is the owner, lessee, or builder, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." 49 U.S.C.A. § 303(a) (17).

15. 49 U.S.C.A. § 304(a)(3). The purpose of this article, as stated in the text accompanying note 7, *supra*, is to examine the impact of NEPA on the motor carrier industry. Thus, the article will not further discuss private carriers.

16. 49 U.S.C.A. § 303(a)16.

17. 49 U.S.C.A. § 303(a)14.

18. 49 U.S.C.A. § 303(a)15. In actual practice it may be very difficult to determine whether a given motor carrier is a common carrier or a contract carrier. *See National Transportation Policy and the Regulation of Motor Carriers*, 71 Yale L.J. 307 (1961).

19. The Act specifies a number of exemptions from all ICC regulation, except that pertaining to safety, for certain common and contract carriers. 49 U.S.C.A. § 303(b). The two most important exemptions are for carriage by agricultural cooperatives and for carriage of certain commodities.

20. 49 U.S.C.A. § 306(a)(1). The certificate is entitled a "certificate of public convenience and necessity" because the ICC is required to grant it if "the applicant is fit, willing, and able properly to perform the services proposed and . . . the proposed service, to the

specify: the term of the certificate;[22] the routes to be followed;[23] and the service to be rendered, including the commodities to be carried[24] and the class of shippers to be served.[25]

In like manner, no person can operate as a contract carrier unless he is issued a permit by the ICC authorizing such contract carriage.[26] The ICC possesses statutory authority,[27] in issuing such a permit, to specify the business of the contract carrier, including the shippers to be served[28] and the commodities to be carried,[29] and the routes to be followed.[30]

Procedurally, the ICC renders a decision on an application for a certificate or permit only after conducting an adjudicatory proceeding.[31] Such proceedings are full evidentiary hearings.[32] However, if there is an urgent need for either common or contract carriage and no such carriage exists, the ICC may, without a hearing, grant temporary authority for such

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extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;" 49 U.S.C.A. § 307(a).

The statutory condition for granting a certificate, that it be required by the "present or future public convenience and necessity," is exceedingly vague. However, this phrase has been given a very definite meaning by the courts. *See, e.g., Dixie Highway Express Inc. v. United States*, 242 F.Supp. 1016 (S.D. Miss. 1965) and *Nashua Motor Express Inc. v. United States*, 230 F.Supp. 646 (D. N.H. 1964).

21. 49 U.S.C.A. § 308(a).

22. *E.g., Gateway Transport Co. v. United States*, 173 F.Supp. 822 (W.D. Wis. 1959).

23. *E.g., Boulevard Transit Lines v. United States*, 77 F.Supp. 594 (D. N.J. 1948).

24. *E.g., Mitchell Bros. Truck Lines v. United States*, 225 F.Supp. 755 (D. Ore.), *affirmed* 378 U.S. 125, *rehearing denied* 379 U.S. 872 (1964).

25. *E.g., Northcutt's Estate v. United States*, 263 F.Supp. 255 (D. N.M. 1966).

26. 49 U.S.C.A. § 309(a)(1). The ICC is required to grant such a permit if

> "the applicant is fit, willing, and able properly to perform the service of a contract carrier. . .and the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act. . . . In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shippers and the changing character of the shipper's requirements." 49 U.S.C.A. § 309(b).

27. 49 U.S.C.A. § 309(b).

28. *E.g., Scott Truck Line, Inc. v. United States*, 163 F.Supp. 118 (D. Colo. 1958).

29. *E.g., Andrew G. Nelson, Inc. v. United States*, 150 F.Supp. 181 (N.D. Ill.), *affirmed* 355 U.S. 554, *rehearing* 356 U.S. 934 (1958).

30. *E.g., Midwest Truck Lines, Limited v. Interstate Commerce Commission*, 269 F.Supp. 554 (D. D.C. 1967).

31. 49 C.F.R. § 1100.1 (1972).

32. *See* 49 C.F.R. Part 1100 (1972).

common or contract carrier service for a period of up to 180 days.[33] The grant of such temporary authority does not create any presumption that corresponding permanent authority will subsequently be granted.[34]

Once an applicant is granted a certificate or permit, it cannot in most cases be summarily withdrawn.[35] It can be revoked only upon his application or after notice and a hearing, for

> "willful failure to comply with any provision of this chapter (49 U.S.C.A. Chapter 8), or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license."[36]

After an applicant receives a certificate or a permit, he may operate as a motor carrier. However, he is still subject to tight regulation by the ICC of the rates he may charge. All common carriers have a duty to charge reasonable rates.[37] Correspondingly, upon complaint or its own initiative, the ICC may, after a hearing, fix a reasonable rate or the maximum and minimum reasonable rates that a common carrier may charge.[38] The ICC may also determine after a hearing whether any new rate proposed by a common carrier is reasonable.[39] Pending such a hearing and decision, the ICC may temporarily approve the proposed new rate or suspend the proposed new rate for up to seven months beyond the time it would otherwise have gone into effect. If no decision has been

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33. 49 U.S.C.A. § 310a(a). For a description of the accelerated procedure used by the ICC in granting a common or contract carrier temporary authority see 39 C.F.R. Part 1131 (1972).

34. 49 U.S.C.A. § 310(a)(a).

35. Those instances in which the ICC may summarily withdraw a certificate or permit are noted in 49 U.S.C.A. § 312(a).

36. 49 U.S.C.A. § 312(a).

> "*Provided, however,* that no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in Section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder." 49 U.S.C.A. § 312(a).

37. 49 U.S.C.A. § 316(a) and (b). Every common carrier must file with the ICC and keep open to public inspection tariffs showing all of its rates. 49 U.S.C.A. § 317(a). No common carrier may charge rates different from those contained in such tariffs. 49 U.S.C.A. § 317(b).

38. 49 U.S.C.A. § 316(e).

39. 49 U.S.C.A. § 316(g).

issued after seven months have elapsed, the proposed new rate becomes effective.[40]

Contract carriers are also subject to rate regulation. All contract carriers have a duty to observe reasonable minimum rates.[41] Thus, the ICC may prescribe a reasonable minimum rate if after a hearing it determines that the rate in force contravenes the national transportation policy declared in the Interstate Commerce Act.[42] Also, whenever any contract carrier proposes a reduction in its rates, the ICC may after a hearing determine the lawfulness of the proposed rate.[43] Pending such a hearing and decision, the ICC may temporarily approve the new rate or suspend the new rate for up to seven months beyond the time it would otherwise have gone into effect.[44]

In summary, all motor carriers are subject to regulation by the ICC in five primary areas:

1. The grant of a certificate or permit,
2. The revocation of a certificate or permit,
3. The grant of temporary operating authority,
4. The setting of reasonable rates, and
5. The temporary approval of proposed new rates.[45]

III. The Importance of the National Environmental Policy Act (NEPA) to the Motor Carrier Industry

The major substantive provision of NEPA mandates the filing of environmental impact statements. "To the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation for legislation or other major Federal actions significantly affecting the quality of the human environment,"[46] a detailed environmental impact statement. Thus, to examine the impact of NEPA on the motor carrier industry, it is necessary initially to identify which of the five types of action by the ICC in regulating the motor carrier industry constitute "major federal action" significantly affecting the environment, and therefore require the filing of an environmental impact statement.

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40. *Id.*

41. 49 U.S.C.A. § 318(a). Every contract carrier must, with certain limited exceptions, file with the ICC and keep open to public inspection schedules containing the actual rates it charges. 49 U.S.C.A. § 318(a).

42. 49 U.S.C.A. § 318(b).

43. 49 U.S.C.A. § 318(c).

44. *Id.*

45. *See* text accompanying notes 16-45, *supra.*

46. *See* text accompanying note 11, *supra.*

The first step then is to look at the construction of the phrase "major federal action" by the courts. In *City of New York v. United States,*[47] the court held that the ICC was required to file an environmental impact statement before approving the abandonment of a 1.8 mile long railroad. The ICC's approval of abandonment of this minute railroad was held to be "major federal action." Moreover, there is no reason to limit the phrase "major federal action" only to ICC approval of the cessation of operations and not approval of the start of operations. Thus, ICC approval, by granting a certificate or permit, of the start of operations by a motor carrier is also "major federal action." Moreover, federal action need not be permanent, such as the grant or revocation of a certificate or permit, to be "major federal action." In *SCRAP v. United States,*[48] the court was faced with ICC approval of a temporary railroad rate increase. The court held the ICC's action was "major federal action:"

> "Nor is the Commission's (ICC's) order disqualified as a 'major federal action' because it is only temporary in nature. . . ."[49]

Thus, ICC grant of temporary operating authority to common or contract carriers is also "major federal action."

SCRAP v. United States also stands for the proposition that the approval of rate changes by the ICC constitutes "major federal action." Thus, ICC approval of rate changes, either permanently or temporarily, is "major federal action." It should be noted that the court in *Port of New York Authority v. United States*[50] held that ICC approval of a temporary rate increase did not require the filing of an environmental impact statement because the ICC was required to decide upon the temporary rate increase quickly. It is not clear whether the rationale for the court's decision was that federal actions that must be taken quickly cannot be "major federal action." In any case, such a rationale is not defensible. As the court in *SCRAP v. United States* subsequently stated:

> "The Commission seems to take the position that temporary rate increases are not major federal actions because they must be decided upon quickly and do not lend themselve to the sort of reflective deliberation which NEPA requires . . . THE PORT OF NEW YORK AUTHORITY v. UNITED STATES, SUPRA. *It seems*

47. 337 F.Supp. 150 (E.D. N.Y. 1972).

48. 4 ERC 1312 (D.D.C.), *stay pending appeal denied* 4 ERC 1369 (Circuit Justice Burger), *probable jurisdiction noted* Case No. 72-562, 41 U.S.L.W. 3346 (December 18, 1972).

49. *Id.* at 1319.

50. 451 F.2d 783 (2nd Cir. 1971).

> *clear, however, that these considerations are not relevant to the importance of the action undertaken.* The Commission's position appears to rest on the *non sequitur* that because an action is taken quickly it is therefore unimportant. Yet it hardly requires argument to demonstrate that some of the most important federal actions in our history have also been taken with great alacrity. To the extent that the need for speed is relevant at all, it goes not to the importance of the federal action, but to the provision in NEPA which requires compliance only 'to the fullest extent possible.' *See* 42 U.S.C. § 4332."[51]

Thus, ICC regulation of the motor carrier industry either by grant or revocation of a certificate or permit; grant of temporary operating authority; or by approval of permanent or temporary rate changes constitutes "major federal action."

Having concluded that such regulation by the ICC of the motor carrier industry is "major federal action," the next question is whether it is action "significantly affecting the quality of the human environment." The CEQ's interim guidelines[52] provide that any action in which "there is potential that the environment may be significantly affected" or in which the environmental impact is "likely to be highly controversial" is an action "significantly affecting the quality of the environment." Thus, one three judge District Court has concluded that "whenever the action *arguably* will have an adverse environmental impact," it is for purposes of NEPA an action significantly affecting the environment.[53]

Arguably, ICC action granting a certificate or permit or temporary operating authority will have an adverse impact on the environment by diverting traffic from barges and railroads. The increased use of trucks in place of railroads and barges will arguably increase air pollution.[54] Such action may also be detrimental to the environment by increasing consumption of limited supplies of gasoline, as opposed to other petroleum products in greater supply.[55] On the other hand, ICC action revoking a certificate or permit or approving either permanent or temporary rate changes is arguably harmful to the environment because it will cause increased use of aircraft for transportation, resulting in greater pollution of the upper atmosphere.

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51. 4 ERC at 1319 (footnotes omitted, emphasis added). For a discussion of the meaning of the phrase "to the fullest extent possible" see the text accompanying notes 57-59, *infra.*

52. 36 Fed. Reg. 7723 (April 23, 1971).

53. *SCRAP v. United States,* 4 ERC at 1320 (emphasis by the court).

54. *See City of New York v. United States,* 337 F.Supp. at 159.

55. *See City of New York v. United States,* 4 ERC 1646, 1651-52 (2nd Cir. 1972).

Moreover, one court has ruled that a temporary railroad rate increase, as applied to recyclable goods, significantly affected the environment because it would increase the cost of shipping recyclable goods, thereby aggravating the disparity of shipping costs between these goods and primary goods and discouraging the use of recyclable goods.[56] Presumably, the same argument can be made for an approval by the ICC of a motor carrier rate increase. However, the actual examples are not important. The point here is that all of these actions by the ICC in regulating the motor carrier industry are actions "significantly affecting the quality of the human environment."

Thus, whenever the ICC regulates the motor carrier industry by granting or revoking a certificate or permit, by granting temporary operating authority, or by approving a permanent or temporary rate change, the ICC must "to the fullest extent possible" file a detailed environmental impact statement. The ICC in *SCRAP v. United States* argued that the phrase "to the fullest extent possible" allowed it to consider administrative difficulty or delay in deciding whether a given action required a detailed environmental impact statement.[57] However, the Senate and House conferees who wrote the "fullest extent possible" language into NEPA, had stated:

> ". . .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)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. . . ."[58]

Therefore, the court in *SCRAP v. United States* rejected the ICC's argument and concluded:

> " 'We must stress as forcefully as possible that this language ["to the fullest extent possible"] does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by

56. *SCRAP v. United States*, 4 ERC at 1313.

57. 4 ERC at 1319.

58. The Senators' views are contained in "Major Changes in S. 1075 as Passed by the Senate," 115 Cong. Rec. (Part 30) at 40417-40418. The Representatives' views are contained in a separate statement filed with the Conference Report, 115 Cong. Rec. (part 29) 39702-39703 (1969).

> the reviewing courts.' CALVERT CLIFFS' COORDINATING COMMITTEE v. U.S. ATOMIC ENERGY COM'N, SUPRA, 449 F.2d at 1114 [2 ERC 1779]."[59]

Hence, the ICC is required, without regard to administrative difficulty or delay, to file a detailed environmental impact statement before performing any of the regulatory actions here in question.

Mere *pro forma* compliance by the ICC with the requirement for filing a detailed environmental impact statement is not sufficient:

> "Thus a purely mechanical compliance with the particular measures required in § 102(2)(c) [the requirement for an impact statement] and (d) will not satisfy the Act if they do not amount to full good faith *consideration* of the environment."[60]

What then is required of the ICC to demonstrate "full good faith consideration of the environment?"

Procedurally, the ICC may not merely prepare an environmental impact statement at the last step of the decision making process. Section 102(2)(c) requires that a draft environmental impact statement must "accompany the proposal through the existing agency review process." Moreover, such a draft statement must be prepared by the ICC itself and not by the applicant.[61]

Furthermore, in its consideration of the environment, the ICC may not rely on certification by other agencies that their environmental standards are satisfied. The AEC has taken the position that with regard to water pollution, the AEC role is restricted to assuring itself that an applicant for a nuclear reactor license has procured the appropriate approval from the federal, state and regional agencies primarily concerned with water quality. However, the court reviewing the AEC's position rejected it. The court stated:

> "Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem:

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59. 4 ERC at 1319.

60. *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) (emphasis by the court). *See also* text accompanying note 11, *supra*.

61. *See Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2nd Cir. 1972) (The court required the FPC to prepare its own draft statement rather than rely on that prepared by the applicant).

> the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (*e.g.*, water pollution), but not quite enough to violate applicable standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed."[62]

It is also clear that for those actions requiring hearings the ICC cannot merely rely on the opinion of its staff as to environmental issues, even those not raised by a party, and not pass on such issues at the hearing. The court in *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission,* rejecting the AEC's reliance on such staff opinions, stated:

> "Compliance to the 'fullest' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs."[63]

Thus, when the ICC holds an adjudicatory hearing to consider granting or revoking a certificate or permit or approving a rate change, it must examine the adequacy of the staff review of environmental issues, whether or not they are raised by a party at the hearing, and independently consider "the final balance among conflicting factors that is struck in the staff's recommendation."[64]

However, the major theme that emerges from the recent cases construing NEPA "is that in an adjudicatory proceeding, the agency, here the ICC, itself must balance the economic and technical advantages against the environmental costs of each proposed action to ensure an optimum

62. *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission,* 449 F.2d at 1123.

63. *Id.* at 1118.

64. *Id.*

result."[65] Thus, in the *Calvert Cliffs* decision the court appears to require the agency to undertake "a rather finely tuned and 'systematic' balancing analysis in each instance."[66] In this balancing, the agency is required to examine a wide range of issues to arrive at its determination. The court in *Calvert Cliffs* stated:

> "NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values . . . . The part of the individualized balancing analysis is to ensure that, with possible alteration, the optimally beneficial action is finally taken."[67]

An indication of the range of the issues that must be considered can be gathered from the decision of the Court of Appeals in *National Resources Defense Council v. Morton.*[68] In that case the court sustained the agency's refusal to examine alternatives not technologically available. However, the court rejected the agency's allegations that there was no need to consider alternatives that were beyond the power of the agency to effectuate.

The requirement that the ICC make an independent determination of each issue coupled with the wide range of issues that must be considered presents a serious difficulty. As one observer of the administrative process stated:

> "If an administrator, each time he is faced with a decision, must perforce evaluate that decision in terms of the whole range of human values, rationality in administration is impossible. If he need consider the decision only in the light of limited organizational aims, his task is more clearly within the range of human powers. The fireman can concentrate on the problem of fires, the health officer on problems of disease, without irrelevant considerations entering . . . . If the fire chief were permitted to roam over the whole field of human values—to decide that parks were more important than fire trucks, and consequently to remake his fire department into a recreation department, chaos would displace organization, and responsibility would disappear."[69]

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65. *See Murphy, supra,* note 6 at 973.
66. 449 F.2d at 1113 (footnote omitted).
67. *Id.* at 1123.
68. 458 F.2d 827 (D.C. Cir. 1972).
69. H.A. SIMON, ADMINISTRATIVE BEHAVIOR 13 (1957) quoted in Murphy, *supra* note 6.

In every hearing before the ICC regarding the grant or revocation of a certificate or permit or the approval of a rate change there are, conceivably, countless issues. If no standards are binding on the ICC in its determination of these issues, its task is immeasurably complicated.

Thus, NEPA clearly has a major adverse impact on the ICC as it regulates the motor carrier industry. But what does NEPA's adverse impact on the ICC mean to the motor carrier industry? The most noticeable effect of NEPA on the motor carrier industry will be the delays motor carriers encounter when seeking to take any action requiring ICC approval. As we have seen, before granting or revoking a certificate or permit, granting temporary authority, or approving a permanent or temproary rate change the ICC must make an independent determination of each one of a great number of issues. Such determinations will take time, especially for those actions requiring hearings by the ICC.

Moreover, such hearings may be further delayed by other factors. It is no surprise to anyone familiar with the field that "there are some environmentalists who do not want hearings to end."[70] To such environmentalists any delay in granting a certificate or permit is an environmental victory. Thus, they may be tempted to try to further expand the environmental issues to be considered in any hearings conducted by the ICC.

Another effect of NEPA on the motor carrier industry will be the motor carriers' need to become more sophisticated in environmental issues. It is only by becoming sophisticated in environmental matters that the motor carriers can present their case to the ICC in the most favorable light. Moreover, motor carriers will need such sophistication to assist agencies in giving proper consideration to all environmental issues. "Otherwise, (the motor carrier) industry will suffer from costly delays resulting from judicial reversal of an overly acquiescent agency."[71]

Obviously, the need for environmental sophistication and the delays suffered by motor carriers will also cause the motor carriers to incur increased costs. Many of the smaller, less profitable motor carriers may well be unable to absorb such increased costs and may be forced to close their doors.

To this point, NEPA's impact on the motor carrier industry appears to be wholly adverse. What are the benefits of NEPA, if any, to the motor carrier industry? Motor carriers will probably not reap any unique benefits from NEPA because of their status as motor carriers. However, as a part of society, they will clearly participate in the beneficial aspect of

70. Murphy, *supra* note 6 at 981.

71. Cramton & Berg, *Enforcing the National Environmental Policy Act in Federal Agencies*, 18 PRAC. LAW. 79, 86 (May 1972).

NEPA, and the benefits of NEPA to society as a whole are large in magnitude. NEPA is a long overdue step in reordering national priorities. Many federal agencies, including the ICC, had become absorbed in the agency's special mission and its special constituency. Such isolationism and parochialism are partially displaced by NEPA. Now all federal agencies must place every proposed action in the larger perspective of the national policy to avoid degradation of the environment. And, as we have seen, the vigilance of the federal courts in implementing the requirements of NEPA insures that they will not be undermined by an observance of form that fails to grapple with the underlying environmental issues. Thus, the benefits of NEPA to society are the lower levels of air, water, and other pollution resulting from the good faith consideration of environmental factors by all federal agencies.