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## THE STORY OF CALVERT CLIFFS COORDINATING COUNCIL: A COURT CONSTRUES THE NATIONAL ENVIRONMENTAL POLICY ACT TO CREATE A POWERFUL, PROCEDURAL ENVIRONMENTAL CAUSE OF ACTION

“It is fitting that this environmental decade began with the signing of NEPA. In some ways, NEPA may turn out to be the most influential of our environmental laws, for it not only sets forth our basic national goals for environmental protection, it also tells us that essential to achieving them is a forethought...Rachel Carson in 1962 prefaced *Silent Spring* with the following statement by Albert Schweitzer: ‘Man has lost the capacity to foresee and to forestall. He will end by destroying the earth.’ In the early 1960s, for people thinking and writing about environmental problems, there was considerable agreement with this pessimistic view. But since then, much has in fact changed.” *Environmental Quality—1979, The Tenth Annual Report of the Council on Environmental Quality* 15 (1979).

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### *The Social and Legal Background*



*Calvert Cliffs Coordinating Council, Inc. v. Atomic Energy Commission*<sup>2</sup> played a pivotal role in creating modern environmental law by providing an effective environmental cause of action to challenge a wide range of federal activities. Both the case and statute that made it possible, the National Environmental Policy Act of 1969<sup>3</sup> [NEPA], are the products of a moment in time, 1968-1972, which has long passed. The political consensus that produced the statutory foundations of modern environmental law no longer exists, and our naive faith in ability of science to provide simple, objective environmental quality criteria and decision standards has long given way to a much more wickedly complex view of environmental protection. However,

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<sup>2</sup> 449 F.2d 1109 (D.C. Cir. 1971).

<sup>3</sup> 42 U.S.C. §§ 4321- 4370f.

the statutes and judicial glosses on them produced by this moment of time live on in an increasingly contested environment.

*Calvert Cliffs* challenged the then powerful Atomic Energy Commission's [AEC] recently adopted NEPA compliance rules. Judge J. Skelly Wright's opinion invalidated parts of the rules and announced in ringing tones that courts must ensure that agencies strictly comply with NEPA's environmental impact assessment duties at all stages of decision making. Not only did the opponents of nuclear energy score a rare, tactical victory in the fight to slow down and eventually turn the industry away from the nuclear option, but the decision launched the law of environmental impact assessment (EIA)<sup>4</sup> and institutionalized NEPA compliance within the federal bureaucracy. Whether *Calvert Cliffs* contributed to making NEPA an effective, long term source of substantive environmental policy, as its drafters hoped, is a more complicated question.

There are two stories of *Calvert Cliffs*. The first is how a small group of young lawyers used a moment in time to produce new, radical legal ideas about our relationship to nature. The decision gave life to a new fundamental idea--advance environmental impact assessment--which has transcended both NEPA's statutory context as well as the immediate litigation to become one of the foundational principles of domestic and international environmental law.<sup>5</sup> The second

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<sup>4</sup> The law has its own treatise. Daniel R. Mandelker, *NEPA Law and Litigation* (2<sup>nd</sup> ed. 1992), and the preparation of environmental impact assessments has become an academic subject, e.g., Larry W. Canter, *Environment Impact Assessment* (2d ed. 1996).

<sup>5</sup> United States experience after *Calvert Cliffs* helped to spread the concept of advance environmental impact assessment to the states and then throughout the world. Some seventeen states have adopted little NEPAs, Daniel R. Mandelker, *NEPA Law and Litigation* § 12.01 (2<sup>nd</sup> ed. 2001), as has the European Union. Community Directive, 85/337 (1985). Over 100 countries and federal states, developed and developing, have some form of EIA legislation or administrative regulations. International legal scholars have speculated that the duty to prepare an environmental impact statement for activities with substantial potential adverse cross-border environmental impacts may be a customary international law duty. Patricia Birne and Allen Boyle, *International Law & the Environment*

story is more sobering because it is about the limits of courts to change the decisions we make about our relationship to the natural world. *Calvert Cliffs* launched a powerful principle, but the agency practice that it induced ultimately became progressively divorced both from the transformative ethical vision of the drafters of NEPA and the District of Columbia Circuit Court of Appeals' understanding of the Act. As a result, the NEPA process has come under increasing criticism and political attack from a wide variety of perspectives as a formal, costly, and ineffective one which often fails to advance the larger substantive goals of environmentalism.

***A. The Case: A Product of the Two "60s"***

*Calvert Cliffs* construed the recently enacted NEPA, but the decision ultimately reflects the convergence of three ideas contributed by the environmental movement which emerged in the late 1960s. One of the many ironies of the case is that it is a marriage of the two parts of the now mythic 1960s. Although formulated and enacted at the height of one of the most turbulent periods of twentieth century social unrest<sup>6</sup>, NEPA, the statute, is actually a product of the more optimistic, technocratic, and decidedly non radical early 1960s. NEPA, the practice area, is the product of the more familiar, radical 60s. NEPA was formulated at the end of the Kennedy and Johnson administrations (1960-1968) which laid the foundations for the burst of important

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130 - 137 (2<sup>nd</sup> ed. 2002). A separate opinion of an International Court of Justice case asserts that all countries have a continuing duty of environmental assessment for major projects with potential adverse environmental impacts: "EIA, being a specific application of the larger principle of caution, embodies the obligation of continuing watchfulness and anticipation." In Case Concerning the Gabcikovo-Nagymaros Project (*Republic of Hungary v. Slovak Federal Republic*) 1997 IJC Rep. 7, 112, 116 *International Law Reports* 1, 122 (2002).

<sup>6</sup> The worldwide political protests over the Vietnam war, racial and gender discrimination and repressive governments and authority generally have been well documented. E.g., Todd Gitlin, *The Sixties: Years of Hope, Days of Rage* (1988) and Arthur Marwick, *The Sixties: Cultural Revolution in Britain, France, Italy, and the United States* (1998).

environmental legislation enacted between 1969 and 1973.<sup>7</sup> Led by Secretary of the Interior Stewart Udall<sup>8</sup>, the Congress and the two Democratic administrations undertook many important legislative and administrative environmental protection efforts. In contrast, Judge Wight's opinion reflects the growing skepticism, triggered by the racial and social unrest of the late 1960s, with the ability of the state to address modern social and technological problems and more generally with the idea of *a* public interest articulated by "expert" administrative agencies. Among its many legacies, the radical 60s, which lasted until about 1973, produced a fundamental power shift by allowing non-governmental organizations [NGOs] to participate in regulatory processes which had previously been a closed conversation between the regulators and the regulated community.

*Calvert Cliffs* grew out of challenges to nuclear power plants in 1960s. Opponents and those challenging other federal licensing and construction decisions faced a fundamental problem: environmental consciousness was rapidly increasing but no viable "environmental" cause of action existed. Congress had not yet enacted the bulk of the statutes that permitted citizen suits. *Calvert Cliffs* construed NEPA to create the missing cause of action.

*Calvert Cliffs* has its immediate origins in the concern of Johns Hopkins University scientists that the discharge of heated cooling water from the plant would be detrimental to a crucial element of the Chesapeake Bay ecosystem, the bay's famed blue crabs.<sup>9</sup> This concern

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<sup>7</sup> This moment has been characterized as "republican moment" because both Republicans and Democrats cooperated to promote environmental protection. The contrast between 1969-1973 and the political gridlock that has characterized environmental politics since 1980 is explored in Richard J. Lazarus, *A Different Kind of "Republican Moment"* in *Environmental Law*, 87 Minn. L. Rev. 999 (2003).

<sup>8</sup> Stewart L. Udall's, *The Quiet Crisis* (1963) played a major role in putting environmental degradation on the political agenda in the Johnson Administration.

<sup>9</sup> Oliver Houck, *Unfinished Stories*, 73 U. Colo. L. Rev. 867, 885 (2002).

reflected two seminal ideas of environmentalism. The first was that the “environment,” which was understood primarily as the protection of ecosystems and the reduction of visible pollution, was a suitable public policy focus, and the second was that ecosystems should be protected qua ecosystems. Modern environmentalism inherited the early twentieth century preservation movement’s idea that sacred and spectacular nature should not be disturbed by human intervention and gave it a scientific cast by making the presumed inherently stable ecosystem the focus of protection.<sup>10</sup>

The second idea turned the still dominant New Deal State on its head by venerating guerilla legal warfare and strategic law suits seeking aggressive judicial review of administrative action.<sup>11</sup> The environmental movement, along with the women’s movement and the civil rights movement, is one of the lasting legacies of the 1960s. They all adopted guerilla litigation out of necessity.<sup>12</sup> In brief, the movement fused diverse public health fears with a growing concern about the rate of loss of the natural landscape. Concern about radiation had been building since

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<sup>10</sup> Richard N. L. Andrews, *Managing The Environment, Managing Ourselves: A History of American Environmental Policy* 202 (1999), observes, “[t]he most revolutionary element of the new public consciousness was the powerful new awareness of the environment as a living system--a ‘web of life’ or *ecosystem* --rather than just a storehouse of commodities to be extracted or a chemical machine to be manipulated.”

<sup>11</sup> Two lawyers led the way. David Sive, a New York lawyer and Sierra Club member, successfully obtained the first remand of an administrative decision for environmental reasons. See David Sive, *The Litigation Process in the Development of Environmental Law*, 13 Pace Env’tl. L. Rev. 1 (1995) reprinted in 19 Pace Env’tl. L. Rev. 727 (2003). The extraordinarily creative mind of Professor Joseph L. Sax, who quickly established himself as the leading environmental law scholar, provided the theory for this strategy in his book, *Defending the Environment: A Strategy for Citizen Action* (1971).

<sup>12</sup> Many historians emphasize the post World War II roots of modern environmentalism such as leisure and the dissemination of information about the negative effects of the fruits of war research, pesticides and atomic power. Samuel P. Hays, *Beauty, Health and Permanence: Environmental Politics in the United States, 1955- 1985* (1987) and Richard N. L. Andrews, *Managing The Environment, Managing Ourselves: A History of American Environmental Policy* 201-202 (1999). *Council on Environmental Quality, Environmental Quality 10<sup>th</sup> Annual Report* 10 noted that “[t]he environmental outlook, with its opposition to careless impersonal use of technology in a way that destroys life, had strong spiritual ties with the peace movement and the ethical climate of the 1960s.”

the 1950s, visible pollution became a political issue after smog was linked to the internal combustion engine, and the 1969 Santa Barbara oil spill focused national attention on the dangers of inadequate pollution control technology.<sup>13</sup> These concerns were ultimately folded into some of the energy of the anti-Vietnam War movement. The net result was that faith in technological progress and the ability of the expert New Deal state to control technology and to adapt to new values was severely undermined. All three ideas were captured in Rachel Caron's best-selling brief against synthetic organic pesticides, *Silent Spring*. Secretary of the Interior Stuart L. Udall later wrote of the book, "it spurred new lines of thought about resources and the limits of technology that began to alter the thinking of my generation" and "it is undeniable that Rachel Carson's concepts inspired . . . the enactment of National Environmental Policy Act. . ."<sup>14</sup>

In the late 1960s, litigation was not a promising means of channeling these concerns, but lawyers turned to it because administrative agencies seemed unresponsive to environmental degradation and few could imagine how quickly Congress would take up the issue in the early 1970's. Litigation to contest government actions that caused environmental damage was daunting because New Deal administrative law immunized almost all agency exercises of

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<sup>13</sup> James E. Krier and Edmund Ursin, *Pollution & Policy: A Case Essay on California and Federal Experience With Motor Vehicle Air Pollution, 1945-1975* 263-277 (1977) discuss the relationship between pollution crises and new pollution control legislation.

<sup>14</sup> Stewart L. Udall, *The Quiet Crisis and the Next Generation* 195, 202-203 (1988). Udall defended *Silent Spring* in a 1964 Saturday Review of Literature review at a time when the chemical industry was spending large amounts of book money to discredit the book. Secretary Udall, among others, imported one the Carson's basic lessons into the legislative history of NEPA. During the July 17, 1968 Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Secretary Udall stated as his first principle for a national environmental policy: "We must begin to work with, not against, the laws of the planet on which we live, rejecting once and for all the false notion that man can impose his will on nature. This requires that we begin to obey the dictates of ecology, giving this mater science a new and central place in the Federal scientific establishment." Hearing Before the Committee on Interior and Insular Affairs United States Senate and Committee on Science and Astronautics U.S. House of Representative, 90 th. Cong. 2d Sess. 17 (1968).

discretion allocating natural resources from judicial review.<sup>15</sup> The immunization started with the law of standing which precluded NGO public interest suits.<sup>16</sup> Constitutional and common law challenges were equally unpromising. The idea of direct constitutional challenges enjoyed a brief flurry of interest, but the idea died because no express or implied Constitutional right to a decent or healthy environment exists. Attempts to characterize the impact of a project such as a power plant on the landscape as nuisance floundered on doctrine that the common law does not recognize aesthetic injuries and was loath to enjoin activities in advance of demonstrated harm.

## B. NEPA

The passage of NEPA made *Calvert Cliffs* possible, but Judge Wright's construction of NEPA was far from inevitable. There are at least three stories of NEPA relevant to *Calvert Cliffs*. The first is the most conventional. NEPA was intended as a simple, effective way to rationalize the federal bureaucracy's protection of the environment. Its sponsors, primarily Senator Henry Jackson of Washington State, considered themselves heirs to the New Deal

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<sup>15</sup> Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. Colo. L. Rev. 331, 375-376 (2004) describes the "unexpected" middle class rebellion against the location of interstate highways through parks and "good" neighbors, and the frustrations that highway location opponents faced bringing judicial challenges.

<sup>16</sup> Any one who participated in the development of environmental law will emphasize the importance of the liberalization of the law of standing. Standing historically limited access to courts to challenge administrative action to those who had suffered a common law, constitutional or statutory injury. In short, standing was directly tied to the merits of the plaintiff's claim. Section 10 of the Administrative Procedure Act, 5 U.S.C. s 702, granted standing to those who suffered a "legal wrong." In 1968, the Supreme Court detached standing from the merits and interpreted the Act to allow a person who was "injured in fact" to obtain standing. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1968). Even before this case, the Second Circuit granted standing to an NGO to raise aesthetic objections to a Federal Power Commission license. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Courts never adopted the theory any NGO could become a private attorney general and challenge administrative action, but one year after *Calvert Cliffs*, the Supreme Court created a factitious private attorney theory by allowing an NGO to obtain standing by pleadings that its members used the impacted area. *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Supreme Court has since taken a narrow, formalist view of standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), but it has not overruled the core principle that an NGO may obtain standing by alleging that an illegal action interferes with its use of a resource.

tradition of a strong, caring federal government and sought only to adapt the federal bureaucracy to cope with the newly emerging environmental consciousness. The second, which follows from the first, is that courts would play a limited role in this process because Congress and the Office of Management and Budget would be the chief enforcers.<sup>17</sup> In this scenario, the goals of the statute rather than the preparation of environmental assessments and impact statements, which is NEPA today, were the core of the Act. Senator Jackson's biographer reports that the Senator was vexed by the vast inflation of the impact statement because "[h]e has intended it to be a short document laying out the costs and benefits of a given project, rather than a labyrinthian process involving mountains of detail . . ."<sup>18</sup> to block projects. The third story is that NEPA was intended a vehicle to transform fundamentally our nation's values and relationship to nature but this objective has been frustrated by Congress, the executive and the courts.

### **1. A Brief History of NEPA**

NEPA is a relatively unique statute which makes it both easy and difficult to approach through the various standards of statutory interpretation. NEPA legislated major, new ideas--an

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<sup>17</sup> One of the most authoritative analyses of the contemplated judicial role is an article co-authored by one of the two principal drafters of Section 102. Daniel A. Dreyfus and Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 Nat. Res. J. 243 (1976). The authors note that one of the drafters, William J. Van Ness, Jr., was a lawyer, and the other, Daniel A. Dreyfus, a "student of administration and practitioner of bureaucratic infighting" and therefore that [t]here was no question that the original drafters of S. 1075 contemplated a role of for the courts." Id. At 255. They were aware of the landmark 1965 Second Circuit decision, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d. 608 (2d Cir. 1965) *cert. denied*, 384 U.S. 941 (1966), which remanded a federal power license for inadequate consideration of environmental impacts. However, no one foresaw the "hundreds of cases involving matters of purely regional or even local concern." Id. At 257.

<sup>18</sup> *Henry M. Jackson, A Life in Politics* 208 (2000). This view was confirmed by Jerry T. Verkler, Staff Director of the Senate Interior and Insular Affairs Committee, 1963-1974. Interview No. 2, January 30, 1992, p. 75 "One of Senator Jackson's contributions, which he felt has gone far beyond what we had in mind, was the passage of the National Environmental Policy Act in 1969." [http://www.senate.gov/artandhistory/history/resources/pdf/verkler\\_interview\\_2.pdf](http://www.senate.gov/artandhistory/history/resources/pdf/verkler_interview_2.pdf)

explicit federal environmental policy enforced in part by advance environmental impact assessment<sup>19</sup>--which were not completely formed. It was not the typical, hard-fought legislative compromise among powerful competing interests.<sup>20</sup> Senator Jackson had to make some crucial compromises with other Senators, notably Edmund Muskie of Maine<sup>21</sup>, but the basic idea behind the statute survived from start to finish and the entire process took place out of the public eye.

It was possible for Congress to pass a statute such as NEPA because environmental protection was still viewed as a nonpartisan issue<sup>22</sup>. Protection was seen as a logical extension of the long-standing federal stewardship over natural resources that began in the Progressive

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<sup>19</sup> Justice Thurgood Marshall, one of the most environmentally conscious justices to sit on the Court, wrote that “early consideration of environmental consequences is the whole point of NEPA. . .” *Kleppe v. Sirera Club*, 427 U.S. 390, 417 (1976). Professor William H. Rodgers, Jr. ranks Section 102 of NEPA as the fifth most influential of seven statutory provisions of United States environmental law. *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology* 27 Loyola L.A. L. Rev. 10009 (1994).

<sup>20</sup> *Richard A. Liroff, A National Policy for the Environment: NEPA and Its Aftermath* 10-11 (1976). Professor William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 Loyola L.A. L. Rev. 10009 (1994) identifies three components of NEPA’s enactment, strong leadership, an inspirational and radical message and growth and “sleeper” potential, as general characteristics of successful environmental laws.

<sup>21</sup> Like Senator Jackson, Senator Edmund Muskie, the father of the Clean Air and Water Acts, came from mill towns, but Senator Muskie’s experience as a Maine state legislator, governor and late Senator See Robert F. Blomquist, *In-search of Themes: Toward the Meaning of the Ideal Legislator--Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965-1968*. 28 Wm. & Mary Env’tl. L. & Pol’y Rev. 539-657 (2004).

<sup>22</sup> Leon G. Billings, the staff director of the Senate Pollution Control Committee when the Clean Air and Water Acts were passed has observed that “[m]embers of Congress developed today’s national environmental policy behind closed doors before Congress opened up its processes to the public and the media. . . . But as the person charged with the responsibility to write the legislation and legislative history . . . I can report . . . [that] the debate was vigorous, sharp, sometimes humorous, sometimes acrimonious, but always constructive and never partisan.” Leon G. Billings, Keynote Address, 75<sup>th</sup> Annual Meeting Missouri Water Environment Association, available at <http://www.muskiefoundation.org/leon/missouri.html>.

Conservation Era.<sup>23</sup> Thus, the best way to interpret the statute is to understand the problems that it attempted to address, the manner it chose to do so and the problems it did not address rather than to parse its specific language.

NEPA was enacted just as the idea of environmental protection was making the transition from a public policy problem identified and defined by elites to a mass political issue that demanded a swift Congressional and Executive response. During the 1950s and early 1960s, no general concept of environmental protection existed within the federal agencies that developed or regulated natural resources from public lands to wetlands. The failure of the two Roosevelt administrations to develop a coordinated federal conservation policy and comprehensive resource planning process left a legal landscape of federal agencies with narrow statutory mandates. When an agency action was challenged as environmentally harmful, the agency's response was either that it had no power to consider environmental values or if they had, the agency had virtually unlimited discretion to trade them off against developmental ones.<sup>24</sup>

NEPA was the creation of a collaboration between Senator Henry Jackson and Lynton K. Caldwell, a political scientist at Indiana University, Bloomington. The legislation was signed by a Republican president because the growing environmental movement created pressure for more comprehensive government responses to the perceived "crisis," and the new Nixon

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<sup>23</sup> See *Future Environments of North America: Transformation of a Continent* (F. Fraser Darling and John P. Milton eds. 1966) for an example of the efforts of the "old" conservation community to address the emerging new issues such as ecosystem and habitat conservation.

<sup>24</sup> During a 1968 Joint House-Senate Colloquium to Discuss A National Policy for the Environment, Secretary of the Interior Stewart Udall testified that when he pointed out to Tennessee Valley Authority Officials that the agency's coal contracts were destroying the hills of Eastern Kentucky, "their very blunt and direct answer was their mission was to produce electric energy as cheaply as possible . . . and that if this destroyed resources, rivers and hillsides, and ruined parts of the country outside the TVA area for all time, this was none of their business." Hearing Before the Committee on Interior and Insular Affairs United States Senate and the Committee on Science and Astronautics U.S. House of Representatives, 90<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 15 (1968).

Administration did not want to be outflanked on what it considered an important issue in key states such as California, Florida and New York.<sup>25</sup>

Henry Jackson, the son of Norwegian immigrants, was elected to the Senate in 1952, bucking the Eisenhower landslide. He became the chairman of the Senate Interior and Insular Affairs Committee in 1963 and pursued an aggressive pre-environmental decade conservation agenda which included passage of the Wilderness Act of 1964, major extensions of the National Park system, the Wild and Scenic Rivers Act as well as major water resources development and planning legislation. Jackson's major concern was not pollution but out of control mission agencies who were destroying scenic natural resources. Opposition to the interstate highway program, begun in the mid-1950s, was growing as highways began to encroach on urban parklands, older low income neighborhoods and scenic mountain areas. The United States Army Corps of Engineers was building dams, channelizing streams and turning inland areas into ports as fiscal and environmental criticisms of the programs mounted. The Atomic Energy Commission was a cheerleader for nuclear power plants on large lakes, rivers and bays. Jackson, however, cannot be described as a modern environmentalist; he remained a "Teddy" Roosevelt conservationist who saw no incompatibility between the selective preservation of nature and its rational, regulated exploitation.<sup>26</sup>

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<sup>25</sup> President Nixon signed NEPA on January 1, 1970. The biggest news story of the day was whether Texas, which defeated Notre Dame in the Cotton Bowl, or Penn State, which downed Missouri in the Orange Bowl, should be the national football champion. J. Brooks Flippen, *Nixon and the Environment* 3-53 (2000) details the largely unsuccessful early efforts of the administration to confront the rising popularity of environmentalism, which culminated the massive Earth Day demonstrations on April 22, 1970. He argues that President Nixon decided make NEPA, especially the Council on Environmental Quality, that it created the centerpiece of an administration environmental offensive, in part, to counter the growing national popularity of Senator Henry Jackson and Edmund Muskie, both of whom subsequently ran for president.

<sup>26</sup> Robert G. Kaufman, *Henry Jackson: A Life in Politics* 164 (2000).

NEPA was enacted to address agency indifference or hostility in a transformative, across the board manner by sending a Congressional directive to the federal mission agencies to assess the environmental consequences of their activities, to presume sufficient authority to protect the environment unless Congress had expressly withheld the authority, and to coordinate more effectively their activities with each other. The original version had no environmental impact statement requirement; it only authorized the Secretary of Interior to conduct ecological research<sup>27</sup> and created a Council on Environmental Quality. The bill met with general public indifference, even within the small conservation community, although there was initial opposition from the new administration of Richard M. Nixon and a few members of Congress. The opposition was more jurisdictional. Senator Jackson adroitly maneuvered around this opposition, but in the process NEPA was both strengthened and weakened. A provision recognizing a right to was dropped, but the “action-forcing” EIS requirement was added.

### **B. The Birth of the “Action-Forcing” Environmental Impact Statement**

The change in NEPA was the addition of the “action-forcing” requirements of Section 102. “Action Forcing” was the brainchild of Professor Caldwell,<sup>28</sup> who had been asked by the Senate Interior and Insular Affairs staff to strengthen the bill.<sup>29</sup> In the mid-1960s, one of the

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<sup>27</sup> Senator Jackson’s faith in the Department of Interior was a tribute to Secretary of the Interior Steward L. Udall (1961-1968) who was greatly influenced by Aldo Leopold’s *A Sand County Almanac* (1949) and later by Rachel Carson’s *Silent Spring* (1962), sought to synthesize the utilitarian and preservation strains of the old conservation movement to create a new conservation movement.

<sup>28</sup> William Rodgers reports that Professor Caldwell developed the idea looking at a sunset upon Hong Kong Harbor. *The Most Creative Moments in the History of Environmental Law: The Whos*, 39 Washburn L.J. 1, 12 (1999). I remember a less poetic explanation. I taught at Indiana University Bloomington from 1968-1982, and Professor Caldwell told in 1969 me that he did not want NEPA to suffer the fate of the Full Employment Act of 1946: a good policy with no implementation mechanism.

<sup>29</sup>Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath 16* (1976).

major environmental non-governmental organizations was the Conservation Foundation, which primarily acquired open space, but it was also the center of nascent environmental thinking in Washington, D.C. It had a small advisory board and Caldwell was one of its members. At the request of the staff of the Senate Interior Committee, the Foundation funded a consultancy for Dr. Caldwell to work with the committee.<sup>30</sup>

Caldwell was the first political scientist to use the word “environment” as opposed to conservation and to propose it as an overarching public policy concept. He developed his ideas of environmental protection in two stages. The first stage was a critique of the way in which the country was beginning to deal with the problems caused by the exploitation of resources with little heed to the environmental costs. If environmental degradation was being addressed at all, it was done in a segmented manner as opposed to a holistic, forward-looking manner. Reflecting the then prevailing faith in comprehensive rationality (the ability to evaluate a wide range of options systematically), Caldwell argued in 1963 that environmental protection should be a public policy objective because it “will provide a common denominator among differing values and interests”<sup>31</sup>

The question was how to enlighten the federal bureaucracy. In a major piece of Senate

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<sup>30</sup> Oral History Interview with Russell E. Train (first chairman of the Council on Environmental Quality), available at <http://www.epa.gov/history/publications/train/04.htm>. Train noted that “I don’t think that this is a story and association that has been particularly well-known.” I met Professor Caldwell in 1969, during my first year teaching at Indiana University, Bloomington, and remember him telling me how jealous some of his political science colleagues were of his increasing public recognition. In typical academic back-biting, they criticized his lack of traditional scholarship, although he has produced a great deal of that. I remember him proudly telling me, “I now publish in the Congressional Record.”

<sup>31</sup> Lynton K. Caldwell, *Environment: A New Focus for Public Policy*, 23 *Public Admin. Rev.* 132, 138 (1963). See also Lynton K. Caldwell, *Authority and Responsibility for Environmental Administration*, 389 *Annals* 107, 113 (1970) and *Administrative Possibilities for Environmental Control*, in *Future Environments of North America* 648, 666-667 (F. Darling and J. Milton eds. 1966).

Interior testimony that preceded his more famous “action-forcing” proposal, he framed the issue as the most effective governmental structure for the development of environmental policy. He came down in favor of a general policy which would apply to all government agencies, enforced by an agency like the Council on Economic Advisors. He and the other proponents of NEPA thought that environment impact issues would be a closed dialogue between the United States Congress and the "mission" administrative agencies moderated by the Office of Management and Budget.<sup>32</sup> This approach led directly to the need for an “action-forcing” mechanism. In his widely cited testimony, Caldwell argued that it was essential that federal agencies, especially the mission agencies, be required “in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment to insure that the policy declarations did not remain unimplemented.”<sup>33</sup> Today we have forgotten that the action that NEPA was intended to force was not the detailed environmental impact statement churned out by government agencies and consultants but the disclosure of “bad” projects that should be nipped in the bud.<sup>34</sup> Professor Caldwell later wrote:

“...the procedural requirements of NEPA are intended to force attention to the policies declared in the Statement of Purpose (Section 2) and in Title I (Section 101) of the Act.

The purpose is to write impact statements. To regard the action-forcing provision of

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<sup>32</sup> The drafters of NEPA envisioned that the executive Office of Management and Budget [OMB] would control the preparation of impact statements. Frederick R. Anderson, *NEPA and the Courts: A Legal Analysis of the National Environmental Policy Act* 11 (1973). Professor Caldwell has written extensively about NEPA, e.g., L. K. Caldwell, *The National Environmental Policy Act: An Agenda for the Future* (1998).

<sup>33</sup> Hearing on S. 1075, S. 237 & S. 1752 Before the Senate Comm. Interior & Insular Affairs, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 116 (1969).

<sup>34</sup> Matthew J. Lindstrom & Zachery A. Smith. *The National Environmental Policy Act: Judicial Misconstruction, Legislative Indifference and Executive Neglect* 39 (2001).

Section 102 (the so-called NEPA Process) as the essence of the Act is to misinterpret its purpose--the substance of which had been under consideration in the Congress for at least a decade before the concept of the environmental impact statement (EIS) was introduced in 1969. Impact analysis is an important aspect of planning and decision-making and has been applied to a wide range of policy determinations--but it ought not be substituted for the declared policies which it is intended to activate.”<sup>35</sup>

### ***Factual Background***

*Calvert Cliffs* was one of the many efforts to stop nuclear power plants or at least site them in safer and more environmentally suitable locations in a regulatory environment structured to ignore these problems.<sup>36</sup> Concern about the military and civilian use of nuclear power had been building since the 1950s after the initially reluctant<sup>37</sup> public utility industry jointed “the Great Bandwagon Market for nuclear power”<sup>38</sup> The AEC was one of the early bete noirs of the environmental movement because of its political power, the determination to use it to promote

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<sup>35</sup> Lynton Keith Caldwell, *The National Environmental Policy: An Agenda for the Future XVI-XVII* (1998).

<sup>36</sup> The history of this campaign is told in Constance Ewing Clark, *Nuclear Power and Legal Advocacy* (1980). Nuclear energy is a bi-product of the development of the atomic bomb during World War II. The first nuclear power plant came on line in 1957. Utilities were initially reluctant to invest in nuclear power generation but improvements in plant technology, rising energy demand and strong promotion of the nuclear option by the Atomic Energy Commission resulted in a large number of new plant orders in the late 1960s, especially in the Midwest and the East. Fred Bosselman, Jim Rossi and Jacqueline Land Weaver, *Energy, Economics and the Environment: Cases and Materials* 944 (2000)..

<sup>37</sup> Ralph Nader and John Abbots, *The Menace of Nuclear Energy* 26-29 (1977) summarizes the initial difficulties that the Atomic Energy Commission had in convincing the electric utility industry to “go nuclear.” Daniel Ford, *The Cult of the Atom: The Secret Papers of the Atomic Energy Commission* (1982) argues that the AEC consistently suppressed doubts of reactor safety to promote nuclear power. The Calvert Cliffs plaintiff’s lawyers, Anthony Roisman and Myron Cherry, contributed information to the book.

<sup>38</sup> Boyd Norton, *A Brief History: The Early Years, in Nuclear Power: Both Sides* 15, 20 (Michio Kaku and Jennifer Trainer eds. 1982). In 1954, Lewis L. Strauss, the chairman of the AEC, uttered a much quoted prophecy that “our children will enjoy . . . electrical energy too cheap to meter . . .”

nuclear power and its insistence that environmental protection was not part of its statutory mission. By the mid 1960s, concern about the environmental impact of cooling towers joined concerns of reactor safety, and radiation leaks.<sup>39</sup> The various citizen groups springing up around the country to question nuclear power plants faced a kind of comedy of the absurd starting with the calculation of future energy demand and ending in a Kafkaesque regulatory structure riddled with gaps. There were many regulatory checks on a nuclear plant, but each stage addressed only a limited issue<sup>40</sup> and the only searching evaluation was the two-tier AEC licensing process. The commission required separate construction and operating licenses, but AEC jurisdiction was still partial as its authority was shared with state and local governments.

Nuclear power plants were industrial facilities and had to obtain local zoning approval, but this was often perfunctory and obtained after the siting decision had been made. Power plants were seen by many small communities as an ideal guest; they paid high taxes but required few services. The decision to site and build Calvert Cliffs followed this pattern. Baltimore Gas

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<sup>39</sup> Thermal Pollution--1968, Hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1968). A nuclear plant is basically a large tea kettle supplied by large amounts of fresh or salt water. Two types of reactors are in widespread use. Boiling water reactors boil water within the reactor itself. Pressured water reactors remove heat by water flowing in a closed pressurized loop and transfer the heat to a second water loop through a heat exchanger. The lower pressure in the second loop causes the water to boil. Nuclear fission heats the intake water to over 500 degrees and converts it to steam to drive the turbines that produce electricity. Additional water must be used to cool the condensed steam, and in the 1960s, this water was discharged directly into the lake, river or bay from which it was taken. Nuclear plants have a thirty-three percent thermal efficiency rate, compared to forty percent for fossil fuel plants and therefore, they need 60 percent more cooling water compared to coal-fired fuel plants. Nuclear plants must also heat cooling water to temperatures greater than twenty percent of the later. *Report of the Association of the Bar of the City of New York Special Committee on Electric Power and the Environment, Electricity and the Environment: The Reform of Legal Institutions* 39 (1971). There was great concern that these large discharges of heated water or thermal pollution would impair fish and shell fish production in many systems, especially in warmer receiving waters. The Calvert Cliffs' two units each required 1.2 million gallons per minute.

<sup>40</sup> Report of the Association of the Bar of the City of New York. Special Committee on Electric Power and the Environment, *Electricity and the Environment: The Reform of Legal Institutions* (A Report of the Association of the Bar of the City of New York 1972) survey the difficulties of incorporating issues such as energy demand and environmental impact into the then existing structure of power plant regulation.

and Electric Company purchased the land for the plant in 1966, quickly applied for a rezoning which was granted and ordered the first two turbines in December of 1966. The utility did not publicly announce its plan to build a plant at Calvert Cliffs until May of 1967<sup>41</sup> and construction started the next year.

State public utility commission approval was required, but these bodies generally did not question a utility's demand projections or evaluate the environmental impacts of the plant.<sup>42</sup> In the 1960s, energy regulatory agencies and the industry used a simple time basis projection to estimate future demand; past growth in electric demand was projected into the future. This method produced projections incrementally rising demand leading to a potential capacity "crisis" by the then distant target year of 1980. For example, the cover of the Federal Power Commission's<sup>43</sup> 1970 *National Power Survey* summarized a widespread consensus that many new power plants were urgently needed with a graphic which featured a steep upward slopping demand curve formed by the words "*Guidelines for Growth of the Electric Power Industry.*"<sup>44</sup>

*Calvert Cliffs* quickly morphed from a challenge to the specific plant into a test case to challenge the AEC's post-NEPA rules for the consideration of the environmental impacts of

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<sup>41</sup> Daniel A. Bronstein, *The AEC Decision-Making Process and the Environment: A Case Study of the Calvert Cliffs Nuclear Power Plant*, 1 Ecology L. Q. 689,700-701 (1971).

<sup>42</sup> Maryland's Public Service Commission was one of the first to take environmental impacts seriously. It issued Baltimore Gas and Electric a certificate of public convenience and necessity on January 19, 1971 and conditioned it on the utility backfitting the plant to provide the technology which would reasonably protect public health and safety and the environment. Brief for Petitioners, February 16, 1971.

<sup>43</sup> In the 1960s, the Federal Power Commission (FPC) had jurisdiction over the siting of hydroelectric plants on navigable rivers and the interstate transmission of electricity and natural gas. The Atomic Energy Commission (AEC) had jurisdiction over nuclear plants. In 1974, the AEC's promotional functions were given to the newly created Department of Energy and the regulatory functions combined with the FPC's in a new agency, the Federal Energy Regulatory Commission (FERC).

<sup>44</sup> Federal Power Commission, *The National Power Survey* (U.S. Government Printing Office 1971).

power plants in licensing proceedings. *Calvert Cliffs* Coordinating Committee was picked over other groups challenging plants in the East and Midwest as the lead plaintiff because the site was well known to the small environmental law community in Washington and their standing to bring the suit seemed easy to establish should it be contested. Many members of organizations such as the Sierra Club or the Conservation Foundation had homes on Maryland's western shore or sailed in the area. The Committee was an ad hoc group formed in response to a study by a group of John Hopkins University scientists, now deceased, about the potential adverse impacts of radiological emissions and thermal discharges from the proposed plant on the Chesapeake Bay's ecosystem. After the study was made public, Jess W. Malcolm, the executive director of the recently founded Chesapeake Bay Foundation<sup>45</sup>, founded the Coordinating Committee to serve as an umbrella for all groups protesting the plant.<sup>46</sup> Their representation of all but one of the groups that had participated in the AEC licensing proceedings allowed them to challenge the AEC's NEPA rules, as an agency aggrieved party, directly in the United States Court of Appeals for the District of Columbia.<sup>47</sup>

Originally, the Committee approached James Moorman, a young lawyer practicing in a small nonprofit NGO, the newly created Center for Law and Social Policy, James Moorman,

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<sup>45</sup> The group was founded between 1964 and 1967 by a group of Baltimore businessmen who sailed, fished and hunted on the bay and were concerned with the growing stresses on the bay from increased boating, industrial discharges and urban development. Congressman and soon to be Secretary of the Interior Rodgers Morton encouraged them to form an organization that would organize public and private support to address the bay's problems. The group has been a major force in galvanizing federal and state action to protect the entire watershed and now has over 116,000 members. [www.cbf.org](http://www.cbf.org).

<sup>46</sup> Daniel A. Bronstein, *The AEC Decision-Making Process and the Environment: A Case Study of the Calvert Cliffs Nuclear Power Plant*. 1 Ecology L. Q. 689 (1971).

<sup>47</sup> The court's jurisdiction was based on 28 U.S.C. 2342, and the court apparently concluded without discussion that Calvert Cliffs was an aggrieved party entitled to challenge a final AEC order.

who later served as the Assistant Attorney General for Lands and Natural Resources during the Carter Administration, was one of the first lawyers to practice what we now call environmental law, took on the case on behalf of the Sierra Club and National Wildlife Federation. Moorman prepared a memo which outlined a wide range of possible federal and common law theories of relief in anticipation of a federal district court case.<sup>48</sup> However, an overworked Moorman quickly gave the case to another small recently formed for profit public interest law firm<sup>49</sup>, Berlin, Kessler and Roisman.<sup>50</sup> Tony Roisman had been drawn into environmental law through the efforts of Malcolm Baldwin, the Senior Legal Associate at the Conservation Foundation and a major strategic thinker about the need for an environmental law (theories that could be used to sue government agencies and polluters) which did not then exist.<sup>51</sup> Another plaintiff's lawyer,

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<sup>48</sup> Telephone Interview with James Moorman, August 10, 2004. Moorman recalls being very busy at the time with the litigation to cancel DDT's registration and to challenge the Trans-Alaska Pipeline and thus did not devote a great deal of time to the case.

<sup>49</sup> Moorman recalls trying to shift cases which had potential paying clients to lawyers in more traditional practice so that the Center for Law and Social Policy could concentrate on pure public interest litigation. Telephone Interview with James Moorman, August 10, 2004.

<sup>50</sup> Mr. Roisman, now an environmental attorney in New Hampshire was an IRS tax attorney who formed a small firm for profit public interest firm in January of 1969 with Edward Berlin, an Assistant General Counsel of the Federal Power Commission and Gladys Kessler, who had worked in Congress and is now a federal district judge in Washington, D.C. Judge Kessler has issued a number of major, high profile decisions. In July of 2003, she issued an injunction against the U.S. Army Corps of Engineers to reduce water levels in the Missouri River below South Dakota to protect the habitat of two endangered species. The three initially thought that they would do FPC consumer work, lobbying and offer tax advice to the growing number of public interest firms. They each took home \$1,300.00 their first year. Telephone Interview with Anthony Z. Roisman, August 5, 2004.

<sup>51</sup> In the late 1960s, a small number of young lawyers who had either large firm or high level government experience began to join small public interest firms in Washington, D.C. which the foundations were beginning to fund. Mr. Baldwin brought these lawyers together for regular luncheons. He also played a major role, along with David Sive, in the development of environmental law by organizing a conference of academics, lawyers and politicians, who were trying to create a new area out of whole cloth, on Law and the Environment at Arlie House in Northern, Virginia in September of 1969. Those of us who were there date the birth of environmental law as a formal legal sub-specialty from that conference. The field was given form by the newly founded Environmental Law Institute's decision to publish the Environmental Law Reporter. The conference papers were published as *Law and the Environment* (Malcolm Baldwin and James K. Page, Jr. Eds. 1970). All three members of Berlin, Kessler and

Myron Cherry, was the leader of a largely then unsuccessful campaign of legal and political guerilla warfare against the AEC<sup>52</sup> and public utilities to stop the licensing of a number of newly planned nuclear power plants.

Roisman changed the case from a potentially long federal district court trial to a direct appellate review of an agency rule making because he thought the case would be a perfect vehicle to put teeth into the recently enacted NEPA. He basically put aside the Moorman memo and began to prepare for a NEPA suit.<sup>53</sup> To do so, he began to appear in various individual AEC licensing proceedings to make an administrative record to support his challenge the AEC's NEPA rules. Roisman wanted the AEC to be the first major NEPA case because, unlike most

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Roisman, and James Moorman attended the conference.

<sup>52</sup>Mr. Cherry then a young lawyer in Chicago, has been described as perhaps the most important anti-nuclear lawyer in the 1970s. His career has been recorded on film and in books e.g., *Constance Ewing Cook, Nuclear Power Legal Advocacy* (1980). See Frank Graham, Jr., *The Outrageous Mr. Cherry and the Underachieving Nudes*, 57 Audubon 79 (September, 1977) and John Emschwiler, *Nuclear Nemesis: Using the Law's Delay, Myron Cherry Attacks Nuclear Power Projects*, *The Wall Street Journal*, March 10, 1978, p.1. Mr. Cherry's route to environmental law was even more fortuitous than those of the other young lawyers. In the mid-1960s, he was a partner at a large Chicago tax law firm which was retained by the president of Upjohn Pharmaceutical to ask questions about the Palisades nuclear power plant in Michigan. Wealthy Chicago and Michigan businessmen with second homes along the shore of Lake Michigan were becoming concerned about the impact of existing and proposed nuclear plants on the Lake. The president of Upjohn took the lead after his general counsel's sailboat was damaged by debris from the Palisades plant's recently constructed discharge pipe permitted by the U.S. Army Corps of Engineers. With the help of another leading lawyer in an anti-nuclear crusade, the late David Comey of the Chicago public interest organization Businessmen for the Public Interest, and the legendary Lake Michigan activist, Lee Botts, Mr. Cherry was able to mount a multi-front war on the nuclear industry. It was so successful that the Chicago banks financing the industry put pressure on his firm to fire him. While pressure was mounting, Mr. Cherry was invited by Harold Graves, General Counsel of Consumer Power of Michigan, to the Gull Lake Inn near Battle Creek, Michigan. Correctly anticipating a bribe, Mr. Cherry had a houseplant next to their table wired and the offer was broadcast live on the radio. The general counsel lost his job, and Mr. Cherry soon left the firm and founded his own, initially partially supported by foundation grants. Mr. Cherry remains a leading Chicago lawyer and active Democratic Party fund raiser. In addition to helping Mr. Roisman with the Calvert Cliffs brief, Mr. Cherry made an earlier crucial, direct contribution to the litigation. When NEPA was being considered in Congress, he approached Senator Jackson's staff and asked them to include an express right to sue to compel the preparation of an EIS. The staff refused but allowed him to draft some of the "legislative history" on which Judge Wright relied to reach the same result. *Calvert Cliffs*, 449 F.2d at 1114-1115. Telephone interview with Myron Cherry, September 14, 2004.

<sup>53</sup> Mr. Moorman agrees with this strategy. Telephone Interview with James Moorman, August 10, 2004.

other federal agencies, it had considerable environmental science expertise in the national laboratories that Congress had created to support the civilian use of nuclear power. As a former Internal Revenue Service lawyer, he was much more comfortable with appellate and understood the arguments necessary to convince a court of appeals to remand an administrative rule making.

The AEC helped Roisman's case by issuing NEPA compliance rules which shifted most of the burden of environmental reviews to the staff and utilities. After the Act's passage, the agency instituted a notice and comment rule making proceeding<sup>54</sup> and at the end of 1970 issued Appendix D to its licensing rules.<sup>55</sup> Appendix D required all applicants for a construction permit to submit an "environmental report." When the applicant applied for an operating license, a second report noting any changed factors had to be submitted. The Commission's regulatory staff had to use the reports to prepare a detailed statement of the environmental costs and benefits and alternatives of the plant. However, the environmental factors raised by this process did not have to be considered by the hearing board which made the ultimate license recommendations to the full Commission. Hearing boards had to conduct an independent review of all staff recommendations except environmental ones. An independent review was *only* required if outside parties or a staff member affirmatively raised an environmental issue.<sup>56</sup>

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<sup>54</sup> 35 Fed. Reg. 8594 (June 3, 1970). The Commission had earlier issued only a policy statement of the implementation of NEPA's procedural requirements. 35 Fed. Reg. 5463 (April 2, 1970).

<sup>55</sup> 35 Fed. Reg. 18449 (Dec. 4, 1970), 10 C.F.R. § 50, App.D 246-250 (1970).

<sup>56</sup> 10 C.F.R § 50 App.D at 249 provided: "When no party to proceeding ...raises any [environmental] issues...such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto

Roisman thought that it was clear that NEPA imposed affirmative duties on all federal agencies.<sup>57</sup> The trick would be to convince the court that the AEC's compliance efforts fell short of these duties because NEPA required a full consideration of the environmental impacts of each individual nuclear plant early in the licensing process and that NEPA created a cause of action for NGOs. The winning strategy was to identify four specific instances of noncompliance.<sup>58</sup> Two were challenges to the AEC's decision to limit the rules to proceedings commenced before the statute took effect.<sup>59</sup> However, the real targets were the provisions that excused the hearing board from analyzing environmental issues considered by the staff unless either outside members or the staff affirmatively raised them and the rules exempting the Commission from an independent evaluation and balancing of environmental factors if "other responsible agencies" had certified that their environmental standards were satisfied, i.e., state agency certification that the plant's discharges complied with applicable water quality standards.

### *The Court of Appeals Decision*

*Calvert Cliffs* was not the first NEPA case, but it was the first to make it clear the courts should enforce the statute against the entire federal bureaucracy. Lawyers litigating

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outside the hearing process."

<sup>57</sup>Justice William O. Douglas, the most committed environmentalist to sit on the Supreme Court, had characterized NEPA as follows in a dissent from a highway location controversy. "Congress has said that ecology has become paramount and that nothing must be done by federal agencies which does ecological harm when there are alternative, albeit more expensive, ways of achieving the result." *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.*, 400 U.S. 978 (1970) (dissent from denial of certiorai).

<sup>58</sup> The court's identification of the four deficiencies in Appendix D tracks the petitioner's brief. Brief of Petitioners, No. 24, 871, February 25, 1971, pages 9-25.

<sup>59</sup> Parties were prohibited for raising nonradiological environmental issues for any hearings noticed before March 4, 1970 and the Commission refused to consider environmental factors for plants which had a construction permit before NEPA compliance was required even though no operating license had been issued.

environmental claims immediately perceived the importance of NEPA, but the first cases either used NEPA as an additional reason to construe a statute<sup>60</sup> or dealt with issues such as party standing<sup>61</sup> or the retroactivity of the statute.<sup>62</sup> Good lawyering and a “dream panel”<sup>63</sup> allowed the Calvert Cliffs plaintiffs to influence the future of environmental law worldwide by creating a duty of strict compliance with NEPA’s “procedural” duties.

The opinion was authored by Judge J. Shelly Wright, whose background and close observation of Federal agencies made him very receptive to the plaintiff’s arguments. Judge Wright was appointed by President Truman to the Eastern District of Louisiana and distinguished himself by strictly enforcing *Brown v. Board of Education* and other anti-discrimination Supreme Court precedents in a hostile environment. When one of the leaders of southern resistance to segregation,<sup>64</sup> Senator James Eastland of Mississippi, blocked Wright’s

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<sup>60</sup> One of the first major environmental cases, *Zabel v. Tabb*, 430 F.2d 199 (5<sup>th</sup> Cir. 1970), cited NEPA in the course of holding that Section 10 of the Rivers and Harbors Act of 1899 gave the United Army Corps of Engineers the power to deny a dredge and fill permit solely for environmental reasons.

<sup>61</sup> In the first major environmental decision, *Scenic Hudson Preservation Council, Inc. V. FPC*, 354 U.S. 608 (2d Cir. 1965), *cert denied*, 384 U.S. 941 (1966) the Second Circuit allowed an environmental organization to sue to vindicate primarily aesthetic interests

<sup>62</sup> E.g., *Compare Investment Syndicates, Inc. V. Richmond*, 318 F. Supp. 1038 (D. Or. 1970) (NEPA does not apply to project where planning substantially completed prior to enactment of statute) with *Environmental Defense Fund v. Corps of Engineers of the Us Army*, 325 F. Supp. 749 (D. Ark 1971)(NEPA applies to on-going reservoir construction project).

<sup>63</sup> Judge J. Skelly Wright authored the unanimous opinion. The other two panel members, Edward Allen Tamm and Spottswood William Robinson, were both nominated by President Lydon Baines Johnson. Judge Robinson was the first African-American member of the District of Columbia Circuit Court of Appeals. He had been part of the NAACP legal team in *Brown v. Board of Education* and was serving as Dean of Howard Law School when President John F. Kennedy nominated him to federal district court.

<sup>64</sup> Jack Bass, *Unlikely Heros: The Dramatic Story of Southern Judges of the Fifth Circuit Who Translated the Supreme Court’s Brown Decision in a Revolution of Equality* 112 to 135 (1981) recounts Judge Wright’s courageous role in implementing *Brown* by issuing the first date certain desegregation order for New Orleans public

nomination to the Fifth Circuit, President John F. Kennedy appointed him to the District of Columbia Circuit Court of Appeals. Judge Wright's Louisiana experience made him a firm believer in the need for judicial protection for those excluded from political power.<sup>65</sup>

Environmental protection has never precisely fit this model because environmentalists have never lacked access to political power and are not an insular minority. However, in the late 1960s and early 1970s, the idea of the need for institutionalized environmental protection was just becoming recognized and few could foresee the breath and depth of the laws passed by Congress in the 1970s. Environmentalists felt themselves to be a small, embattled minority facing powerful, entrenched government agencies whose missions seemed to be to change irrevocably the natural landscape for the worse and to endanger public health. There was much talk of agency "capture" by the "regulated community" in those days.

Judge Wright shared then growing skepticism about the federal bureaucracy's ability to adapt to these values given their entrenched missions.<sup>66</sup> Federal courts were beginning to abandon the cardinal principle of New Deal Administrative Law--extreme deference to agency expertise--and adopting more probing standards of judicial review as a reaction to the narrowness of agency decisions. The expert agency model was being replaced with one of the agency as forum for resolving conflicts among competing interests or, in contemporary terms,

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schools.

<sup>65</sup> E.g. *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970)(residential tenancies subject to implied warranty of habitability). See J. Skelly Wright, *No Matter How Small*, 2 Human Rights 115 (1972).

<sup>66</sup> See Arthur Sewlyn Miller, *A Capacity for Outrage: The Judicial Odyssey of J. Skelly Wright* 110 (1981). Judge Wright had vigorously defended the judicial activism of the Warren Court in the face of legislative unwillingness to act. J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society--Judicial Activism or Restraint*, 54 Cornell L. Rev. 1, 5-6 (1968).

stakeholders.<sup>67</sup>

The plaintiff's primary argument was that the rules did not comply with NEPA because they did not require early and independent agency evaluation of all environmental impacts of nuclear power plants. To counter this, the AEC and the public utility interveners tried to convince the court NEPA compliance duties were "flexible" and Appendix D constituted sufficient compliance because the agency accepted that NEPA expanded its jurisdiction.<sup>68</sup> The government's primary defense was that NEPA permitted, if not required, that the agency defer to state and federal water quality agencies and that this was good policy as the AEC was "without developed competence" in all environmental areas.<sup>69</sup> To support the flexibility argument, the Commission and the interveners relied on scattered statements in early district court decisions that NEPA duties were flexible, i.e. discretionary.<sup>70</sup> Ultimately, the case raised two fundamental, hard questions in addition to those raised by the AEC rules. Did NEPA create judicially enforceable duties and if so, what was the standard of compliance?

There is no doubt that the drafters of NEPA intended that it would have substantive

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<sup>67</sup> The classic articulation of this theory is Richard Stewart, *The Reformation of American Administrative Law* 88 Harv. L. Rev. 1667 (1975). The Supreme Court adopted the "hard look" doctrine for judicial review of informal agency action the same year that *Calvert Cliffs* was decided. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>68</sup> Prior to 1970, the AEC relied on *State of New Hampshire v. Atomic Energy Commission*, 406 F. 2d 170 (1<sup>st</sup> Cir. 1969), *cert. denied*, 395 U.S. 962 (1969) for the proposition that it did not have jurisdiction over thermal pollution, but it conceded that NEPA had expanded its jurisdiction. Brief for the Respondents, Page 13, March 22, 1971.

<sup>69</sup> Brief for the Respondents, No. 24, 871 Page 28, March 22, 1971.

<sup>70</sup> *Pennsylvania Environmental Council v. Barlett*, 315 F. Supp. 238 (M.D.Pa. 1970) and *Bucklein v. Volpe*, 2 Envir. Rptr. 1082 (N.D.Cal. 1970).

consequences. Section 101 declares a set of far-reaching aspirational policies that all federal agencies must apply and implement. However, judicial enforcement of these substantive policies does not follow from Section 101. Section 101's breath caused a problem for lawyers and judges because it did not easily yield a consistent set of standards. Courts require that a statute contain some ordering of competing, inconsistent interests before they will use a statute to control agency action.<sup>71</sup> One scholar speculates that Senator Jackson did not develop a detailed legislative record on the assessment process that might have structured judicial enforcement because he viewed the EIS process as a management tool, "largely internal to the federal bureaucracy" as agencies transformed themselves and, ironically in light of *Calvert Cliffs*, because "environmental lawyers had not yet become a force in administrative politics."<sup>72</sup> Judge Wright recognized the difficulty of deriving consistent standards from NEPA and dealt with it by a familiar dichotomy which has dominated NEPA jurisprudence.

His opinion styled Section 101 as substantive and thus soft<sup>73</sup> and Section 102 as procedural and hard. Although Judge Wright fundamentally shifted the focus of NEPA from the substantive to the procedural, he held out the tantalizing possibility that the Act was also

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<sup>71</sup> Another towering judge on the District of Columbia Circuit Court of Appeals said of *Calvert Cliffs*, "The new student who comes to *Calvert Cliffs* ' after having read *Overton Park* [401 U.S. 402 (1971) construing Section 4 (f) of the Federal Highway Act] may not fully capture its drama and significance. Whereas the statutory provision construed in *Overton Park* gives environmental values dominant significance under certain circumstances, NEPA does not assign relative weight to environmental concerns, and therefore leads courts to much broader governmental discretion in deciding whether or not these concerns prevail in any given case." Judge Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 520 (1974).

<sup>72</sup>Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* 32 (1976).

<sup>73</sup> The declaration of policies was characterized as a "flexible one . . . [which] leaves room fore the responsible exercise of discretion and may not require particular substantive results." *Calvert Cliffs*, 449 F.2d at 1112.

substantive in the rare case where “the actual balance of costs and benefits that was struck was arbitrary.”<sup>74</sup> Judge Wright was therefore able to answer the first hard question with a resounding “yes” in the ringing tones of an Old Testament Prophet and thus launched environmental law.<sup>75</sup> He asserted the need for a strong judicial role to enforce “the commitment of the Government to control, at long last, the destructive engine of material progress” and that<sup>76</sup> “[o]ur duty . . . is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy<sup>77</sup>” Thus he created a cause of action

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<sup>74</sup> *Calvert Cliffs*, 449 F.2d at 1115.

<sup>75</sup> Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases Never Before Published*, 65 U Colo. L. Rev. 459, 463 (1999).

<sup>76</sup> *Calvert Cliffs*, 449 F.2d at 1111.

<sup>77</sup> *Calvert Cliffs*, 449 F.2d at 1111. Mr. Roisman suggested that the AEC Solicitor, was responsible for the tone. One of the AEC’s key arguments was that the Commission did not need to make an independent determination of the environmental impacts of thermal discharges because the then federal water pollution control acts permitted the AEC to rely on a state certification that the plant complied with applicable water quality standards. When Judge Wright asked the AEC solicitor arguing the case, Marcus A. Rowden, to cite the specific section that excused further AEC consideration, Mr. Rowden reached for a copy of the United States Code Annotated and responded, “let us parse the statute together.” Roisman remembers Judge Wright immediately stiffening. Telephone interview with Anthony Z. Roisman, August 5, 2004. The response is a classic appellate mistake, especially since existing federal water pollution control legislation was a rather weak program that relied on state water quality standards to prevent pollution and did not deal at all with the relationship between compliance with state standards and AEC licensing. The AEC’s brief relied both on Section 104 of NEPA, 42 U.S.C § 4334 and Section 21 (b) of the 1970 Water Quality Improvement Act. Section 104 Re-enforces the authority of pollution control agencies (the EPA had not yet been created) to enforce their standards regardless of the outcome of the EIS process. Section 21 (b), the origin of Section 401, 33 U.S.C. § 1341 (a), of the Clean Water Act, prohibited a federal agency from a licensing project that did not comply with applicable state or interstate water quality standards. The brief did not reply on the language of the statute alone and in fact placed the greatest weight on the legislative history of both NEPA and the Water Quality Improvement Act. Brief for the Respondents, March 22, 1971, pages 23-39. The Petitioner’s reply brief had argued that neither the Federal Water Pollution Act or any state standard involved “the exhaustive case by case review and balancing of factor required by NEPA.” Reply Brief for Petitioners, No. 24, 871, April 12, 1971, pages 15-16. The court’s resolution of the merits of the AEC’s argument is discussed later in this chapter. For a discussion of the program that preceded the 1972 Clean Water Act, see William L. Andreen, *The Evolution of Water Pollution Control in the United States--State, Local, and Federal Efforts, 1789--1972* Part II, 22 Stan. Env’tl. L. J. 215 (2003).

in the face of legislative history that was ambiguous at best.<sup>78</sup>

This duty was primarily found in the language of Section 102(c) which provides that all agencies of the federal government shall:

“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) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.”

Judge Wright concluded that the NEPA the legislative history of Section 102 (2), some of which was written by Myron Cherry, envisioned full compliance unless clearly prohibited by existing law.<sup>79</sup> Thus, if an agency decision is “reached procedurally without individualized

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<sup>78</sup> The problem was that the Conference Committee deleted Senator Jackson’s language in Section 101 (c) which created a right “to a healthful environment” and gave no attention to the question of judicial review of impact statements. Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* 26-32 (1976). The best discussion of the legislative history and the case for judicial review of NEPA decisions is Eva A. Hanks and John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 239 (1970), quoted in *Calvert Cliffs*, 449 F.2d at 1115-1116fn. 13.

<sup>79</sup> Conference Report, 115 Cong. Rec. (Part 29) 39702-39703 (1969). The full compliance analysis also swept away Commission objections that it had to limit the application of NEPA to post 1971 license applications even no full operating license had been issued in order to ensure an “orderly transition” to full compliance. The final part of the opinion dealt with an issue that is no longer significant. In brief, the AEC rules allowed the Commission to accept a state water pollution agency certification that the plant met applicable water quality standards as the basis to conclude that there were no environmental impacts associated with the thermal discharge. To support this argument, the Commission invoked the Jackson-Muskie compromise reflected in Section 104. 42 U.S.C. § 4344. Section 104 provides that nothing in NEPA shall affect the obligations of federal agencies to comply

consideration of and balancing of environmental factors--conducted fully and in good faith--it is the responsibility of courts to reverse.”<sup>80</sup> His rejection of the Commission’s argument that they lacked the authority to consider thermal pollution followed from the court’s “to the fullest extent possible” doctrine. The court construed Sections 102 and 103 of NEPA to create a presumption of authority to comply unless compliance was clearly inconsistent with the agency’s existing statutory mandate. This conclusion is consistent with the intent of Senator Jackson, although the wording supports only a more limited reading. If an agency could comply with NEPA under their existing authority, they must.<sup>81</sup>

The substance-procedure dichotomy solved one barrier to invalidation of the AEC’s rules by avoiding the hard question of whether NEPA contained sufficient substantive standards to evaluate an agency outcome. However, the focus on procedure did not fully justify the remand for two reasons. First, the AEC, unlike some other agencies, had not ignored NEPA; it was quite

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with environmental quality standards. This section was added at the insistence of Senator Muskie who was concerned that NEPA could be used to weaken the existing and future strong air and water technology-forcing standards which would eventually become the Clean Air and Water Acts. Judge Wright found the legislative history too weak to support the AEC’s position and held that the AEC could impose additional discharge limitations. However, Congress reversed holding this holding in 1972. 33 U.S.C. § 1371 (c)(2), and in general, the thermal pollution problem has substantially been mitigated. Most of the plants built in the 1970s use cooling towers rather than once through cooling.

<sup>80</sup> *Calvert Cliffs*, 449 F.2d at 1115.

<sup>81</sup> The existing language replaced language that read, “[t]he Congress authorizes and directs that policies, regulations and public laws, to the fullest extent possible, be interpreted and administered . . . “ The enacted version was inserted in conference by the leading opponent of NEPA, Congressman Wayne Aspinall of Colorado. He clearly did not intent to create the strong presumption that Senator Jackson and Congressman Dingell of Michigan did. However, Senator Jackson and Congressman Dingell outmaneuvered Congressman Aspinall by inserting language in the conference report, on which Judge Wright relied, which contained the strong presumption interpretation. Major Changes in S. 1075 as Passed by the Senate, 115 Cong. Rec. 40417-10418 (1969) and Conference Report, 115 Cong. Rec. 39702-39703 (1969). The Report was accepted without series challenge by both houses of Congress. Richard A. Liroff, *A National Policy for the Environment: NEPA and Its Aftermath* 26-31 (1976).

aware that it was one of the principal targets of the legislation. Second, it was not clear what procedure the statute mandated. There was no pre-existing model for an environment impact assessment. An assessment is not a classic trial type-procedure<sup>82</sup> because the inevitable scientific uncertainties about future impacts make it more than a search for “the truth.” To construct a model of good NEPA procedure, Judge Wright fell back on another familiar legal principle then much in vogue and suggested to Petitioners<sup>83</sup>: the need to balance competing factors and combined it with the idea of an affirmative duty to consider environmental values. He found the AEC’s environmental policy “a mockery of the Act” because it did not require an independent Commission balancing of environmental factors. The Commission’s “responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff’s evaluation and recommendation.”<sup>84</sup>

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<sup>82</sup> An earlier version of the statute, drafted by William Van Ness and Daniel Dreyfus, contained a provision for “environmental findings” but this was changed to the requirement for a “detailed environmental statement” during the negotiations with Senator Edmund Muskie. There is no record of the reason for this, Frederick R. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 8* (1973), and one court observed that the findings requirement would have provided a firmer basis for judicial review. *City of New York v. United States*, 344 F. Supp 929-936n. 16 (E.D.N.Y. 1972).

<sup>83</sup> Petitioners first introduced the idea of balancing in the context of their argument that NEPA should apply to plants that were not fully licensed. They argued that the alternatives requirement required a balancing of the costs and benefits of each alternative. Brief for Petitioners, February 25, 1971, page 39. However, the argument that NEPA required that agency to balance fully all the statutory factors appeared in their Reply Brief. Brief for Petitioners No. 24, 871, April 12, 1971, page 16.

<sup>84</sup> *Calvert Cliffs*, 449 F.2d at 1119. The quote is a paraphrase of language adopted by the Second Circuit in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). A political science asserts that NEPA was intended to shift the federal government’s role from an umpire to an environmental steward. Geoffrey Wandesford-Smith, *National Policy for the Environment: Politics and the Concept of Stewardship*, in *Congress and the Environment* 20 (Richard A. Cooley and Geoffrey Wandesford-Smith Eds. 1970). Judge Wright subsequently developed a general theory of substantive review of agency rule making, premised on the agency’s affirmative consideration of all relevant factors. J. Shelly Wright, *The Court’s and the Rule Making Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 388-393 (1974).

### *The Immediate Impact of Calvert Cliffs*

*Calvert Cliffs* had a dramatic immediate impact on the nuclear industry, although ultimately not on the Calvert Cliffs plant. Baltimore Gas and Electric decided to go ahead with the plant and prepared a full environmental impact statement; the first unit came on line in 1975. Today, the plant is a well-recognized landmark on Maryland's western shore. Two 850-megawatt generating units produce power for about one-third of the electricity customers in Maryland.<sup>85</sup> The initial licenses were valid through 2014 and 2016 from the Nuclear Regulatory Commission, but in 2000, Calvert Cliffs became the first nuclear plant to receive a license extension.<sup>86</sup> Somewhat ironically, the critical comments on the draft EIS prepared by the Union of Concerned Scientists noted the extensive discussion of fish and shellfish impacts but criticized the NRC staff for deeming the possible existence of a cancer cluster near the plant as "outside the scope of environmental reviews."<sup>87</sup>

An historian of the anti-nuclear movement described *Calvert Cliffs* as "the judicial opinion that had the most detrimental consequences on the development of nuclear power."<sup>88</sup> It

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<sup>85</sup> The plant is now owned by Constellation Nuclear, a unit of Constellation Energy Group. Information about the plant can be found at <http://www.constellation.com/generation/ccnpp.asp>.

<sup>86</sup> Robin Roy, *Nuclear Power Plants- Safety of Aging Power Plants*, in *The Wiley Encyclopedia of Energy and Environment* 1137, 1138 (1997) cited Calvert Cliffs unit one as an example of a reactor pressure vessel vulnerable to "embrittlement" from neutron bombardment.

<sup>87</sup> Comments on Draft Environmental Impact Statement for Calvert Cliffs License Renewal Application, April 12, 1999 available at [http://www.ucsuas.org/clean\\_energy\\_safety/page.cfm?pageID=201](http://www.ucsuas.org/clean_energy_safety/page.cfm?pageID=201). A history of what the AEC used to call "unscheduled incidents" relating to the plant can be found at <http://www.ecology.at.nmi/site.php?site=Calvert+Cliffs>.

<sup>88</sup> Constance Ewing Cook, *Nuclear Power and Legal Advocacy* 44 (1980). See also, Oliver A. Houck, *Unfinished Stories*, 73 Colo. L. Rev. 867, 887-888 (2002) for a discussion of the reason the AEC did not appeal to Supreme Court.

stopped the licensing of all nuclear plants for eighteen months and fundamentally changed the nature of AEC licensing.<sup>89</sup> The case is therefore a validation of the power of lawsuits to delay actions and ultimately bring about administrative and political change. Nuclear power's allure dimmed in the 1970s. The AEC's promotional and regulatory functions were split in 1974. The Carter Administration's decision not to reprocess spent fuel for national security reasons created a back-end waste disposal problem that remains unsolved to this day. The two oil price shocks in 1973 and 1979 helped to spur energy conservation and contrary to the FPC's once endless upward sloping demand curve, the demand for energy fell. No new nuclear plants came on line after Three Mile Island in 1979, and in the 1980s utilities, courts and public utility commissions struggled with the question of who should pay for cancelled or moth balled nuclear plants.

### *The Importance of the Case Today*

*Calvert Cliffs* cemented the principle that the potential adverse environmental impacts and available alternatives of a wide range of government sponsored and licensed activities should be rigorously assessed in advance of the activity. It created a "common law" of impact assessment with substantial consequences for agency noncompliance. *Calvert Cliffs* and its progeny democratized NEPA and environmental protection generally by (1) allowing citizens to challenge the agency's decision not to prepare an EIS as well as its adequacy, (2) creating inducements for agencies to open the scoping process to public involvement through comments, and (3) by defining adequacy with sufficient detail that the agencies have opened up their processes to public involvement and outside sources of information to foreclose legal challenges

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<sup>89</sup> Joint Committee on Atomic Energy Congress of the United States, Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath, 92<sup>nd</sup> Cong., 1<sup>st</sup>. Sess., Joint Committee Print 68-699 (February 1972) is collection of the relevant AEC reactions to Calvert Cliffs.

to the final EIS.<sup>90</sup> However, the formulation of affirmative environmental policies--the original purpose for enacting the statute--has become increasingly divorced from the EIS process<sup>91</sup> and NEPA has not developed in all the ways that Judge Wright envisioned. Both *Calvert Cliffs* and subsequent Supreme Court decisions contributed the emphasis on process over substance or outcomes.

Judge Wright seems to have envisioned a more extensive EIS process than did Senator Jackson, and Judge Wright's view briefly prevailed. Judge Wright assumed that the agency would assemble the relevant environmental information and then use this information to make a reasoned choice, balancing between environmental and non-environmental values. However, this "rather finely tuned and 'systematic' balancing analysis" was immediately criticized by environmental lawyers and others as undermined by the substance-procedure dichotomy. Instead of forcing agencies to prefer more environmentally sustainable options, the dichotomy ensures that all that an agency need only seriously consider<sup>92</sup> environmental values by displaying adverse impacts and agonizing a bit over the consequences of the proposed decision. There is no pressure to prefer consistently environmental to non-environmental outcomes.<sup>93</sup> Nonetheless,

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<sup>90</sup> Lynton K. Caldwell, *Science and the National Environment* Policy Act 72 (1982).

<sup>91</sup> Lynton Keith Caldwell, *The National Environmental Policy Act: An Agenda for the Future* 50-55 (1998).

<sup>92</sup> Courts have adopted the "hard look" standard e.g. *Kern v. United States Bureau of Land Management*, 284 F.3d. 1062, 1066 (9<sup>th</sup> Cir. 2002).

<sup>93</sup> Frederick R. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* 256-258 (1973); A. Dan Tarlock, *Balancing Environmental Considerations with Energy Demands: A Comment on Calvert Cliffs Coordinating Committee v. AEC*, 47 Ind. L.J. 645 (1972); Senator Edmund Muskie and Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 Me L.R. Rev. 163 (1973); and Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 20 Okla. L Rev. 239 (1973).

initially inspired by *Calvert Cliffs*, a few district and circuit courts of appeals used NEPA to probe deeply into agency decision-making.<sup>94</sup> The District of Columbia Circuit Court of Appeals continued to read NEPA broadly and did not draw a hard and fast distinction between substantive and procedural review. It reversed major agency constructions of the Act in the spirit of *Calvert Cliffs*. *Natural Resources Defense Council v. Morton*<sup>95</sup> held that, within reason, an agency had a duty to consider alternatives that it did not have the power to adopt or which required legislative authorization. In 1973, the Court, per Judge Wright, adopted a broad balancing test to determine when an EIS should be prepared for an on-going nuclear research program.<sup>96</sup>

The uneasy balance between substance and procedure did not hold. The “detailed” EIS process that characterizes NEPA compliance has become a much more formal process limited to information disclosure rather than the balancing envisioned by Judge Wright. In the end, the analogy between an impact statement and Securities and Exchange Commission filing prevailed over Judge Wright’s balancing theory. In 1972, a federal district judge tossed off the sentence that “[a]t the very least NEPA is a full disclosure law . . .”<sup>97</sup> This characterization of NEPA has

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<sup>94</sup> E.g., *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 342 F. Supp. 1211 (E.D. Ark. 1970-1971), aff’d, 470 F.2d 289 (8<sup>th</sup> Cir. 1972) and *Sierra Club v. Froelke*, 3 ELR 20248 (S.D. Tex. 1973).

<sup>95</sup> 458 F.2d 827 (D.C. Cir. 1972) (reversing Department of Interior refusal to discuss elimination of then-existing oil import quotas which benefitted independent southwest producers at the expense of New England). It is doubtful that this holding has much force today. *Department of Transportation v. Public Citizens*, 124 S. Ct. 2204 (2004) holds that the Department of Transportation did not have to issue an EIS for a North American Free Trade Agreement rule that allowed Mexican trucks into the United States. The Court conceded that the trucks would increase air pollution but concluded that the Department had no authority or ability to consider their environmental impacts. Only the President has the authority to prevent cross border truck traffic.

<sup>96</sup> *Scientists’ Institute for Public Information, Inc. V. AEC*, 481 F.2d 1079 (D.C. Cir. 1973) (Liquid breeder reactor research program).

<sup>97</sup> *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 759 (E.D. Ark. 1970)

been repeated consistently and has come to stand for the truthful teenager rule<sup>98</sup>: as long as the agency discloses the required range of alternatives and adverse impacts, it has fulfilled its NEPA duties regardless of the environmental impact of the decision.

Judge Wright's view of NEPA was ultimately quashed by a series of Supreme Court decisions which vary between indifference and hostility toward NEPA.<sup>99</sup> The Court has instructed lower courts to defer to agency determinations of the scope of relevant alternatives<sup>100</sup> and on whether the agency was in fact engaged in regional plan or other similar action.<sup>101</sup> It held that NEPA is limited to the physical environment<sup>102</sup> and has turned the intent of the drafters on its head by holding that the Act does apply to appropriations requests.<sup>103</sup> Finally, in 1980 the

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<sup>98</sup>Most parents of teenagers try to teach them to tell the truth about the misjudgements that they make and ultimately reward them for their candor.

<sup>99</sup>One of the many paradoxes of environmental law is that it has survived and thrived in the face of indifference or hostility from the Supreme Court. See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 U.C.L.A. L. Rev. 703 (2000). Daniel A. Farber, *Is the Supreme Court Irrelevant: Reflections on the Judicial Role in Environmental Law*, 81 Minn. L. Rev. 547 (1997).

<sup>100</sup>*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

<sup>101</sup>*Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>102</sup>*Metropolitan Edison Co. v. People Against Nuclear Power*, 460 U.S. 766 (1983) (Psychological risks of restarting Three Mile Island need not be included in EIS).

<sup>103</sup>*Andrus v. Sierra Club*, 442 U.S. 347 (1978). *Andrus* resolved a dispute which went to the heart of the original theory of NEPA compliance but not resolved in the legislation: the application of NEPA to the most powerful and least accountable agency, the Office of Management of Budget (OMB) or the Bureau of the Budget as it was known then. OMB's potential to force agencies to be more environmentally responsive was raised but not resolved in the legislative process. Frederick R. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* 11-12 (1973). Section 102 (c) finessed the issue by speaking only of "legislative proposals and recommendations." During the Carter Administration, the Council on Environmental Quality adopted regulations which excluded appropriations, although the Nixon Administration Council had included them in definition of "legislation." See Council on Environmental Quality, *Environmental Quality--1970: The Tenth Annual Report of the Council on Environmental Quality* 577-584 (1979). *Andrus* resolved the issue by deferring to CEQ's regulations, although they are not binding on agencies. The exemption of OMB from the NEPA process has allowed the agency to increase the burden on agencies to justify environmental regulations rather than force agencies to

Court held NEPA does not permit a court to question the substantive decision taken by the agency, regardless of the environmental consequences of the decision.<sup>104</sup> As the Court subsequently put it, “NEPA itself does not mandate any particular result, but simply prescribes the necessary process.”<sup>105</sup> More generally, the Court has often spoken glowingly about the importance of NEPA but it has never reversed an agency’s application of the statute.<sup>106</sup> In spite of the Supreme Court’s contraction of the Act, NEPA litigation has been a constant feature of environmental law. Litigation is fueled by the fact that since 1970, over 25,000 EISs have filed. Complete statistics on the number on the number of NEPA cases do not exist. The leading treatise, *NEPA: Law and Litigation*, lists over 3,000 Supreme Court, circuit court of appeals and district court cases decided since *Calvert Cliffs*. Not surprisingly, since agencies have become more adept at compliance, it is harder to win NEPA cases<sup>107</sup> alleging an inadequate EIS but plaintiffs continue to win them. The easiest case to win is when an EIS carries its own “death wound.” For example, courts have reversed and remanded EISs where the agency’s conclusion that there were no significant environmental impacts was inconsistent with the agency’s own experts.<sup>108</sup> Courts are also much more willing to remand an EIS for an inadequate discussion of

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consider the environmental consequences of budgetary decisions and alternative allocations.

<sup>104</sup> *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

<sup>105</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>106</sup> *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981). The court held that NEPA applies to the military but that matters of national security contained in an EIS need not be disclosed to the public.

<sup>107</sup> Professor Daniel R. Mandelker, author of *NEPA Law and Litigation*, disagrees and thinks that the government’s post rate 15 relatively constant. Personal communication with author. However, Professor Mandelker counts both cases which review agency decisions not to file a full EIS and those--like *Calvert Cliffs*--that review a completed EIS.

<sup>108</sup> *Sierra Club v. United States Army Corp of Engineers*, 701 F.2d. 1011 (2d Cir. 1983).

“secondary alternatives,” alternatives that do not modify the project but are much less environmentally destructive.<sup>109</sup> The Supreme Court, however, has indicted little willingness to require supplement EISs when new scientific information comes to light.<sup>110</sup>

In the end the importance of *Calvert Cliffs* lies in what it set in motion within the agencies and throughout the world rather than in specific decisions holding that an EIS was inadequate. One of the editors of this series argues that “NEPA’s greatest contribution is the environmental impact statement itself.”<sup>111</sup> Judicial enforcement quickly led to an agency and industry culture of compliance or at least begrudging acceptance. One of the most important, but difficult to measure, indices of NEPA is the dogs that it would not let hunt.<sup>112</sup> For example, the very beginning, the Council on Environmental Quality reported on projects dropped or changes made in them because problems exposed in the EIS process.<sup>113</sup>

Despite NEPA’s widespread acceptance in the United States and throughout the world it is difficult to evaluate NEPA’s long term impacts conclusion because no cross-disciplinary consensus exists on the relative criteria to assess the success of the Act.<sup>114</sup> What is clear is that the EIS process continues to be contested and criticized. Opponents of NEPA argue that the

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<sup>109</sup> *DuBois v. United States Department of Agriculture*, 103 F.3d 1273 (1<sup>st</sup> Cir. 1996).

<sup>110</sup> *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

<sup>111</sup> Oliver Houck, *Is That All?*, 11 *Duke Envtl. L. & Policy F.* 173, 188 (1998).

<sup>112</sup> See Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Strategy of Administrative Reform* (1984).

<sup>113</sup> Council on Environmental Quality, *Environmental Quality--1973*, 246-247 (1973); Council on Environmental Quality, *Environmental Quality--1975*, 628-632 (1975).

<sup>114</sup> Matthew J. Lindstrom & Zachary A. Smith, *The National Environmental Policy Act: Judicial Misconstruction, Legislative in Difference and Executive Neglect* 127 (2002).

process is too costly both in terms of EIS preparation and the delays that it causes to important activities.<sup>115</sup> Supporters of NEPA have criticized the gap between the collection of information and the actual decision.<sup>116</sup> They have sought ways to return NEPA to its original purpose: the reorientation of federal agencies.<sup>117</sup> NEPA debate is long standing, it has taken a new turn as the Administration of George W. Bush has engaged in a concerned effort to weaken the statute.<sup>118</sup>

### ***Conclusion***

*Calvert Cliffs* played a major role in establishing the EIS process as a fundamental principle of environmental law. *Calvert Cliffs* helped to initiate a worldwide transition in the way in which decisions that threaten to impair the physical environment are made. Unfortunately, the case also helped to divorce the process of EIA from the underlying objectives of NEPA. Ultimately, the United States practice has fallen short of the transformation that the drafters of NEPA and Judge Wright envisioned. Perhaps, no more than the launch of a powerful legal ideal can be expected from even a self-consciously transformative decision. As Dean

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<sup>115</sup> This criticism, couched in benign language, is the focus of *The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation* (September 2003), available at <http://ceq.eh.doe.gov/ntf/report/totaldoc.html>. A study of EISs prepared between 1978-81 found that only ten percent of the statements were the subject of litigation, Serge Taylor, *Making Bureaucracies Think: The Environmental Impact of Administrative Reform* 359 (1984).

<sup>116</sup> During the Clinton Administration, the Council on Environmental Quality conducted a major review of NEPA and not surprisingly pronounced it a success in need for reform. Council on Environmental Quality, *The NEPA--A Study of Its Effectiveness After 25 Years* (1997).

<sup>117</sup> E.g., Environmental Law Institute Research Report, *Rediscovering the National Environmental Policy Act: Back to the Future* (September 1995); Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 Colum. L. Rev. 903

<sup>118</sup> E.g., Carter, Leap and Snape, *Cutting Science, Ecology, and Transparency Out of National Forest Management: How the Bush Administration Uses the Judicial System to Weaken Environmental Laws*, 33 *Envtl. L. Rep.* (ELI) 10959 (2003). The Healthy Forests Restoration Act of 2003, Pub. L. 108-148, 11 Stat. 1887 (2003) expedites NEPA reviews and limits the range of alternatives which need to be considered.

Kathleen Sullivan has said of the recent criticisms that *Brown v. Board of Education* failed to achieve real racial integration, “[i]t is too much to ask of a legal decision that it generate on its own the vast and complicated set of social policies to fulfill it.”<sup>119</sup>

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<sup>119</sup> Kathleen Sullivan, *What Happen to ‘Brown’?*, L1 The New York Review of Books, 47, 52, No. 14, Sept.23, 2004.