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Environmental Law—Introduction

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IX. Environmental Law

Introduction

*Nicholas A. Robinson**

Despite the vast mountain ranges, rivers, parks, coasts and forests within the bounds of its jurisdiction, the Second Circuit has had little occasion to decide many cases in the area of environmental law.¹ Nonetheless, sufficient decisions do exist to indicate tentative outlines of the Second Circuit's disposition toward such cases. On balance, the Second Circuit has carefully and conservatively hewed to the mandate of Congress in its construction of statutes, has mediated the competing demands of development and environmental protection, and has cautiously supported conservationists while sharply criticizing some of their tactics in administrative proceedings. This characterization can be traced from the early cases of nearly a decade ago through the several decisions which construed the National Environmental Policy Act of 1969² [hereinafter referred to as NEPA], including the two cases treated in this issue of the *Second Circuit Review*.

The national reputation of the Second Circuit among conservation lawyers was established in *Scenic Hudson Preservation Conference v. FPC*.³ In that case, the court, with Judge Hays writing for a unanimous panel, held that Federal Power Commission licensing of an electrical generating plant on Storm King Mountain violated requirements of the Federal Power Act,⁴ by failing to consider the fact that

[t]he Storm King project is to be located in an area of unique beauty and major historical significance. The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world. The great German traveller Baedeker called it "finer than the Rhine."⁵

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¹ See, e.g., *Cumulative List of Reported Judicial Decisions Involving the National Environmental Policy Act of 1969*, 102 MONITOR at 5-23 (1973). The District of Columbia Circuit reported thirteen NEPA decisions; the Fourth and Fifth Circuits ten each; the Second, Ninth and Tenth Circuits five each; the First and Seventh Circuits four each; the Third Circuit three; and the Sixth and Eighth Circuits two each.

² 42 U.S.C. §§ 4321-47 (1970).

³ 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

⁴ 16 U.S.C. §§ 791(a)-828(c) (1970).

⁵ 354 F.2d at 613.

Having found the Federal Power Commission in violation of Congress' mandate, the court ruled that the Scenic Hudson Preservation Conference, then an unincorporated association, was an "aggrieved party" entitled to defend its special interest. The decision presaged the holding in *Sierra Club v. Morton*⁶ on the issue of standing.

*Citizens Committee v. Volpe*⁷ further evidenced the Circuit's adherence to the literal language of the controlling statute, along with its liberal view toward the issue of standing in environmental suits. Again for a unanimous panel, comprised of Circuit Judge Kaufman and District Judge Ryan, the court, with Senior Circuit Judge Moore writing the opinion, affirmed the district court's order voiding a permit issued to the Army Corps of Engineers. The permit approved construction of a dike or causeway for the then-proposed Hudson River Expressway. The court found that Congress alone could approve such construction on a navigable river.⁸ In addition, standing was held to have been established under the "aggrieved" person provisions of the Administrative Procedure Act.⁹ "The public interest in environmental resources,"¹⁰ together with the plaintiffs' demonstrated "'special interest in' the preservation of the natural resources of the Hudson Valley,"¹¹ satisfied the elements of standing.

With the adoption of the NEPA, the Clean Air Act amendments of 1970,¹² and the Federal Water Pollution Control Act amendments of 1972,¹³ Congress vastly expanded the mandates for environmental protection. The two cases hereinafter discussed involve NEPA in particular; the Clean Air Act and Water Quality amendments remain, for the most part, untested.¹⁴

The NEPA decisions were led off by another round of *Scenic Hudson Preservation Conference v. FPC*.¹⁵ Judge Hays, writing for himself and then-Chief Judge Friendly, ruled that the FPC had complied with applicable federal law. The court noted that

⁶ 405 U.S. 727, 738 n.13 (1972).

⁷ 425 F.2d 97 (2d Cir. 1970).

⁸ Rivers & Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (1970).

⁹ 5 U.S.C. § 702 (1970).

¹⁰ 425 F.2d at 105.

¹¹ *Id.* at 103.

¹² 42 U.S.C. §§ 1857 *et seq.* (1970).

¹³ 33 U.S.C. §§ 115-75 (1970).

¹⁴ The most famous Clean Air Act case is really one of non-decision. See *Fri v. Sierra Club*, 412 U.S. 541 (1973), based on a decision of the United States District Court of the District of Columbia; *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972).

¹⁵ 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

the "functional elements of the project remain the same"¹⁶ and reviewed the extent to which the FPC had complied on remand with the Federal Power Act. The court held that this review also satisfied section 102 of NEPA. In concluding, Judge Hays stated that:

We do not consider that the five years of additional investigation which followed our remand were spent in vain. The petitioners performed a valuable service in that earlier case, and later before the Commission. By reason of their efforts the Commission has reevaluated the entire Cornwall project. The modifications in the project reflect a heightened awareness of the conflict between utilitarian and aesthetic needs. Whether the project as it now stands represents a perfect balance of these needs is not for this court to decide. Since the Commission has fully performed the duties and responsibilities imposed upon it, it is our obligation to deny the petitions in all respects.¹⁷

In dissenting from the majority opinion, Judge Oakes noted that the FPC had inadequately evaluated the dangers of the project to New York City's Catskill Aqueduct and its polluting effect on the City's air.¹⁸

The division of the panel in the second *Scenic Hudson* ruling reappeared in Judge Medina's concurring opinion in *Monroe County Conservation Council, Inc. v. Volpe*.¹⁹ Dealing with a federally funded state highway surrounding the city of Rochester, the court held that the Department of Transportation had not complied with NEPA and other statutes. The court reversed and remanded to the district court. Judge Medina wrote:

I concur, but with some reluctance. I am reluctant because I think one unfortunate result of our decision in this case will be a further delay of four or five years that could easily have been avoided. And this delay will cause great hardship to the people of Rochester who have already waited too long for the completion of this Outer Loop around the city. What bothers me is that a study of this record makes it fairly certain that after all the i's have been dotted and all the t's crossed, the final construction will be substantially the same as the one now proposed and rejected by us.

On the other hand, I am persuaded that some state and

¹⁶ *Id.* at 465.

¹⁷ *Id.* at 481-82.

¹⁸ *Id.* at 484-85.

¹⁹ 472 F.2d 693 (2d Cir. 1972).

federal highway officials are inclined to look down on conservationists and environmentalists as trouble makers. The only way to change this attitude is to require full and strict compliance with applicable valid statutes and administrative regulations. That there has been no such compliance here is clearly established in my brother Anderson's well reasoned and persuasive opinion.²⁰

In *Hanly v. Mitchell*,²¹ which preceded *Hanly v. Kleindienst*,²² Judge Feinberg, with Judges Waterman and Hays rounding out the panel, dealt with the application of NEPA to the location of a jail in an urban setting. The court required the agency to consider whether the proposed federal action was major or minor, and, derivatively, whether or not it required review. The latter *Hanly* case, discussed hereinafter, reinforced the stipulation that the agency conduct a thorough review, even in a preliminary decision as to whether a NEPA impact review is needed. The consistent posture of the court has been to require close adherence to the statute's purposes and language.

There is an apparent dichotomy in these cases: on the one hand, the court has enforced the public policy of environmental protection and respected the environmental plaintiffs as private attorneys general; on the other hand, the court has rejected further administrative review which would delay rather than deny development. This ambivalence also appeared in *Greene County v. FPC*.²³ In that case, the court, with then-Judge Kaufman writing the opinion, invalidated FPC regulations for non-compliance with NEPA. The regulations did not provide for an inquiry into environmental impact, independent of the applicant's inquiry. The court, accordingly, voided an FPC license for a high-voltage transmission line, but refused to void two other high voltage lines approved on April 10, 1970, without compliance with NEPA. Construction of the lines was far advanced and petitioners were not timely in raising objections. The court noted that:

Although we might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA, . . . the Commission did require PASNY [Power Authority of the State of N.Y., applicant] in submitting its plans to 'give appropriate consideration to recog-

²⁰ *Id.* at 703.

²¹ 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

²² 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

²³ 455 F.2d 412 (2d Cir. 1972).

nized guidelines for protecting the environment' and also conducted its own independent investigation of alternative routings.²⁴

In *Greene County*, the court refused to grant the plaintiffs expenses or reasonable attorneys' fees, although it was clear to the court

that a refusal to award petitioners expenses as they are incurred, particularly expenses related to production of expert witnesses, may significantly hamper a petitioner's efforts to represent the public interest before the Commission.²⁵

The court claimed that no statute authorized the fees and declined to award costs and fees under the court's equity powers.

The issue of costs and attorneys' fees have progressed along the same line as the issue of standing.²⁶ If environmental plaintiffs are to defend the public interest effectively, they will require more than liberal standing doctrines. The court in *Greene County* did not reject the equity award; rather it did "not find compelling need for it at this point"²⁷ The Second Circuit's position on this issue thus remains uncharted.

The pattern emerging from these rulings shows cautious reliance on the governing statute and a grateful recognition of the conservationists' public dedication in bringing governmental bodies to task for ignoring environmental laws, tempered (1) by a preference for the completion of beneficial developments, such as electrical energy or needed roadways and (2) by holding conservationists at arm's length, perhaps, for fear of stirring them to excessive action. The latter fear is groundless, in light of the relatively few environmental cases both nationally and in the Second Circuit.²⁸

The court in *Hanly v. Kleindienst*²⁹ grappled with the necess-

²⁴ *Id.* at 425 (citations omitted).

²⁵ *Id.* at 426.

²⁶ For recent developments permitting attorneys' fees in environmental cases, see Robinson, *Court Awarded Counsel Fees in Environmental Litigation*, I & II, 169 N.Y.L.J. Nos. 16 & 39 at 1, col. 1 (1973); Robinson, *Environmental Litigation: Trend Factors Awarding Counsel Fees*, 170 N.Y.L.J. No. 79 at 1, col. 1 (1973).

²⁷ 455 F.2d at 427.

²⁸ As indicated by the statistics in note 1 *supra*, environmentalists have not flooded the courts with litigation. Their cases, like those in the civil rights field, have been carefully chosen and professionally prosecuted. In all but a handful of environmental suits, the plaintiffs have prevailed. Because environmental cases touch upon vastly different topics, courts of general jurisdiction are most appropriate for the review of environmental administrative decisions.

²⁹ 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

ity of an environmental impact evaluation under NEPA in the gray area between "major" projects which require review and "minor" projects which do not. Again, the Second Circuit experienced difficulty in compromising between environmental protection and development, as pointed out by Judge Mansfield's majority opinion and Judge Friendly's dissent.

In *Port of New York Authority v. United States*,³⁰ the court declined to require a NEPA evaluation for proposed tariffs licensed to the Perm Control by the Interstate Commerce Commission. The court found it impossible to entertain "the careful balancing analysis mandated by NEPA,"³¹ in that the inevitable choice between development and environmental protection was not presented to them. Rather, the issue was the environmental effect of a tariff change for freight barge lighterage service in New York Harbor.

The court declined to weigh environmental impact at the early stage of tariff approval; instead, it required the complainant to raise these issues directly before the ICC, noting that

[o]ne might argue that a simple solution to the problem caused by the constraint of time is to require the Commission to preserve the status quo pending the preparation of an environmental impact statement. In the instant case this would mean staying Penn Central's proposed tariffs. But such a solution is too simple. It overlooks the fact that preserving the status quo can be as detrimental to the environment as permitting changes in the status quo. Just as cities can argue that increases in tariffs cause the diversion of traffic to trucks, thereby increasing air pollution, so railroads can argue that losses incurred on one line must be made up on another either in the form of increased tariffs or decreased quality of service, which in turn discourage the use of this other line, thereby diverting traffic to trucks (or, in the case of passenger lines, to automobiles), which diversion in turn causes an increase in air pollution.³²

Port of New York Authority, therefore, can be read to require a thorough evaluation of environmental impact by the administrative agency. Court review was not undertaken on the theory that it was premature, just as eleventh-hour reviews were dismissed as tardy in *Greene County*. Such judicial reasoning is not compatible with *Hanly*, which required that the agency itself

³⁰ 451 F.2d 783 (2d Cir. 1971).

³¹ *Id.* at 790.

³² *Id.*

decide whether NEPA review was warranted.

More recently, in *United States v. American Cyanamid Co.*,³³ Chief Judge Kaufman succinctly restated what may be considered the Circuit's straightforward attitude toward implementing the congressional mandate for environmental protection. The ruling upheld a district court finding that the defendant had violated the Refuse Act of 1899. Judge Kaufman, writing for a panel comprised of Circuit Judge Smith and District Judge Bryan, stated:

The interpretation which appellant urges upon this Court is precisely the type of "cramped" reading that the Supreme Court has cautioned against. . . . Semantic gymnastics must not be allowed to undermine a Congressional purpose to preserve the purity of our waterways. Conservation of our once formidable natural resources is a matter of profound national concern. Congress has acted to accommodate the diverse, often conflicting, needs of our highly industrialized society through legislation, such as the Refuse Act of 1899. Moreover, in arriving at our conclusion we are not unmindful of Learned Hand's eloquent guide to statutory construction, that we must "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."³⁴

At present, it remains uncertain whether the Second Circuit requires strict adherence to NEPA, as *Hanly* and the dissent of Judge Oakes in *Scenic Hudson* might indicate; or whether the court has read into the environmental laws certain exemptions, as illustrated in Judge Hays' second *Scenic Hudson* ruling, Judge Moore's decision in *Port of New York Authority*, or Judge Medina's concurring opinion in *Monroe County*. Certainly, it is not the court's role to make normative decisions in favor of either rivers or roads, power lines or mountains. No means exist to simplify the process of weighing competing public policies.

It is apparent from Judge Anderson's decision in *Monroe County* that environmental protection is a consideration which must be addressed prior to the approval of *any* new development. "Congress has mandated that all federal laws shall be interpreted in accordance with the policies set forth in NEPA."³⁵ NEPA cer-

³³ 480 F.2d 1132 (2d Cir. 1973).

³⁴ *Id.* at 1135 (citations omitted).

³⁵ 472 F.2d at 700. "In other words, a road must not take parkland, unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so." *Id.*

tainly does not discourage environmental impact review; yet the tendency to find exemptions persists where projects are near completion or the agency deems its act not a "major federal action." The Second Circuit, which confronted the issue of whether a jail was "major," has not decided whether a nuclear research reactor is "minor."³⁶

How the Second Circuit will resolve its ambivalence toward environmental cases is unclear. Chief Judge Kaufman's ruling in *American Cyanamid* offers the most attractive lead, at once compatible with the *Hanly* rulings and the dissents of Judges Friendly and Oakes. Requirements of environmental protection are too far advanced, both legally and scientifically, to excuse inadequate administrative compliance with NEPA, the Refuse Act, the Clean Air Act, or other laws. Since most agencies, as their primary task, regulate economic development, the bias in favor of that priority often supplants the new interest in environmental protection. NEPA was intended to eliminate that bias, and unless the courts rule as the Second Circuit did in *Hanly* and *Monroe County*, that intent will not be served.

³⁶ See the ruling in *Morningside Renewal Council v. AEC*, 482 F.2d 234 (2d Cir. 1973), in which Judge Hays, writing for himself and Judge Mulligan, refused to reverse an AEC decision that the license for operation of Columbia University's TRIGA MARK II nuclear research reactor was not a major federal action, citing the *Hanly* jail cases as support therefor. Judge Oakes wrote an exhaustive dissent, also relying on the *Hanly* cases. Judge Oakes observed that "by upholding the AEC's determination that there would not be any such significant potential effect here [requiring NEPA review], the majority apparently adopted the "rational basis" standard of review rejected by the *Hanly* court. 471 F.2d at 829. The effect of the majority's decision is to provide the agencies with a loophole by which to render NEPA meaningless.