INTRODUCTION

Whether and to what extent there exists a substantive right to a clean and healthful environment has been the source of considerable debate in recent years. A few states now unequivocally recognize such a right, and a few others accomplish virtually the same result by statutorily providing their citizens with the right to bring suit for the protection of the environment. Although the significance of these enactments on the state level cannot be ignored, their impact is greatly diluted by the fact that they generally apply only against citizens and instrumentalities of the particular state involved and they operate to benefit individuals only as citizens of that state. Basic principles of federalism dictate that an individual asserting such a state-created right in an action against an agency of the federal government will meet with little success. Moreover, federal legislation dealing with the environment will often preempt similar state legislation in cases of conflict, thereby negating in many cases the substantive rights afforded by the state. So the search for a viable basis upon which to assert a universally recognized right to a decent environment continues.

With the enactment of the National Environmental Policy Act (NEPA), Congress took a major step toward creating such a right. NEPA is not only a definition by Congress of a national environmental policy, but it is also an effort to put that policy into practice by initiating certain procedural mandates. Section 101(b) of the Act sets forth certain substantive goals to be
attained by the national government,7 and § 102 directs that those goals be achieved by requiring that all federal agencies comply with procedures designed to insure that environmental values be given full and meaningful consideration.8 NEPA, therefore, represents a
to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

7. The stated goals of NEPA § 101(b), 42 U.S.C. § 4331(b) (1970) are:
   (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
   (2) to assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
   (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
   (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
   (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
   (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

8. The procedures required by NEPA § 102, 42 U.S.C. § 4332 (1970), include:
   (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
   (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
   (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
      (i) the environmental impact of the proposed action,
      (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
      (iii) alternatives to the proposed action,
      (iv) 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 irrevocable commitments of resources which would be involved in the proposed action should it be implemented.
   (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
   (E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;
   (F) make available to States, counties, municipalities, institutions,
major congressional attempt to make the environment a significant factor in decisionmaking.

Initial litigation under NEPA was disappointing to environmentalists. Although a few suits were successful in enjoining federal projects injurious to the environment, federal courts construed NEPA narrowly with the majority of opinions holding that NEPA did not create substantive rights, only procedural ones. Initially, it appeared that judicial interpretation would forestall NEPA from being the basis of a substantive right to a healthful environment. However, a recent case from the Eighth Circuit indicates that the trend may be changing.

In Environmental Defense Fund, Inc. v. Corps of Engineers (EDF), the Eighth Circuit held that NEPA not only requires procedural compliance, but that courts should also review agency decisions to assure compliance with the substantive goals of the Act. This was a dramatic departure from earlier decisions in other circuits regarding the substantive/procedural effect of NEPA, and marked a major step toward judicial recognition of a substantive right to live in a clean environment. This article will explore the significance of that case through an examination of NEPA and the ramifications of the EDF decision.

ENVIRONMENTAL DEFENSE FUND, INC.
V. CORPS OF ENGINEERS

The EDF case involved the construction of a dam on Arkansas' Cossatot River pursuant to a major flood control project authorized by the Flood Control Act of 1958. The plaintiffs, four conservationist groups and two individuals, sought an injunction in the United States District Court for the Eastern District of Arkansas to restrain construction of the dam, although some initial work on the project had already begun. The complaint argued that NEPA had been violated because of the inadequacy of the environmental impact statement filed by the defendants, as required under § 102 of the Act.***
Specifically, the plaintiffs charged: (1) that the impact statement was not an objective evaluation of the environmental consequences of the project, (2) that the impact statement made an insufficient disclosure of facts and contained significant errors, and (3) that the defendants had failed to study and describe appropriate alternatives to the project.14

The district court initially handled the case in a series of memorandum opinions, holding that NEPA had, in fact, been violated but that no injunction would be issued pending a hearing on the merits.15 Subsequently, a new impact statement was submitted by the defendants and an agency decision was made to proceed with the project. At trial, the plaintiffs argued that the new statement was still insufficient; they argued further that the agency decision to proceed with the project was a violation of their substantive rights created by §101 of NEPA. The district court held that NEPA was a procedural statute and created no such substantive rights; but the court did find that the defendants were still in violation of NEPA because the new impact statement was "essentially the same" as the first one, and therefore a temporary injunction was issued to halt construction of the dam.16 About one year later, the defendants filed still another environmental impact statement, coupled with a motion for summary judgment and a request to vacate the injunction. The plaintiffs again contended that the statement did not satisfy the §102 impact statement requirements, but this time the district court disagreed and the injunction was set aside.17 The plaintiffs then appealed that ruling to the Eighth Circuit Court of Appeals.

On appeal, the plaintiffs reiterated that the impact statement was inadequate, but they also argued that the defendant’s decision to construct the dam was reviewable on the merits. The circuit court, in a unanimous decision, affirmed the district court regarding the defendants’ compliance with §102, but reversed the lower court’s ruling as to reviewability of the defendants’ decision to build the dam.18 The court held that agency decisions were subject to judicial review on the merits in order to assure that those decisions were in accord with the substantive mandate in §101 of NEPA.19

15. 470 F.2d at 293.
17. Id. at 749.
20. Id. at 297.
Before discussing the ramifications of the EDF decision, it is necessary to make a preliminary consideration of the various other legal bases of the substantive right to a healthful environment.

THE RIGHT TO A HEALTHFUL ENVIRONMENT

It is now undisputed that all persons should enjoy a decent environment, yet that interest has thus far not been regarded as a legally-protected right. Several common law doctrines to some extent recognize and protect ecological values. Nuisance, trespass, and water law, for example, have all been used successfully to abate certain environmental abuses. None of these, however, has been able to serve as the basis for a general right to a healthy environment. Another doctrine related to nuisance which affords protection for environmental interests is the federal common law right of a state to be free from impairment of its natural resources.


22. Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953) (the court found that defendant's oil refinery, which emitted nauseating gases and odors over plaintiff's land, constituted a private nuisance); Columbia River Fisherman's Protection Union v. City of St. Helens, 160 Ore. 654, 87 P.2d 195 (1939) (defendent's discharge of waste into a river, which polluted the stream and killed fish used in the plaintiff's fishery business, was a public nuisance).

23. Relaxing the requirement that there be a physical entry upon the plaintiff's land, Martin v. Reynolds Metal Co., 221 Ore. 86, 342 P.2d 790 (1959), held that an aluminum reduction plant which emitted fluoride gases and particles onto plaintiff's land had committed a trespass. A similar result, with respect to a mica mining plant which caused clouds of silicone dioxide dust to settle on plaintiff's property, occurred in Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956).

24. Riparian rights (water rights belonging to owners of land which is contiguous to a body of water) were asserted in American Cyanamid Co. v. Sparto, 267 F.2d 425 (5th Cir. 1959), to prevent a chemical company from further polluting a stream used by farmers for crop irrigation. See also Ratzlaff v. Franz Foods, 250 Ark. 1003, 468 S.W.2d 239 (1971), where the courts ruled that plaintiff landowners, who were asserting riparian rights in order to stop the defendant from discharging sewage into a creek, had stated facts sufficient for a cause of action.

25. A private nuisance is an invasion of a person's use and enjoyment of land and a trespass is an interference with the possession of land. These torts, then, cannot be used to prevent the pollution of a river or destruction of a forest if the plaintiff's interest in those resources is solely recreational. Riparian rights allow landowners to reasonably use contiguous water, but these rights belong to the polluter as well as to others.
This doctrine, however, serves to protect the public interest by way of a state right and therefore probably cannot be expanded to encompass a common law right for individuals to be free from environmental abuse. It has been urged that the so-called "public trust" doctrine could be an effective tool for asserting new environmental rights. This doctrine holds, generally, that certain resources are held in trust by the state for the benefit of all citizens, thereby rendering those resources inalienable. It might be argued that citizens, as beneficiaries of the trust, are entitled to protection of the corpus against environmental abuse, and that a right to an unimpaired environment is thus implicit in the public trust doctrine. But such an interpretation has not yet gained judicial favor.

26. This doctrine was fully enunciated in Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971). Texas brought suit in federal court to enjoin several New Mexico property owners from spraying a pesticide on their land, arguing that such activity caused harmful pollution of the Canadian River, a source of water for eleven Texas cities. The primary issue on appeal was jurisdictional: whether the rights Texas sought to be protected were matters "arising under the Constitution, laws, or treaties of the United States" as required by 28 U.S.C. § 1331(a) (1970). The court held that the ecological right of a state to be protected from environmental abuse by foreign polluters rests in federal common law, and therefore the district court had jurisdiction to hear the case under § 1331(a). 441 F.2d at 242. The Pankey principle was affirmed by the Supreme Court in Illinois v. City of Milwaukee, 406 U.S. 99 (1972). See also United States v. Bushey, 4 BNA ENVIRONMENT RpTR.-DECISIONS 1389 (D. Vt. 1972).

27. The Pankey court noted that the basis for the doctrine rested upon the need for uniformity in matters of interstate pollution. Texas v. Pankey, 441 F.2d at 241.


31. See, e.g., Environmental Defense Fund, Inc. v. TVA, 4 BNA ENVIRONMENT RpTR.-DECISIONS 1892 (E. D. Tenn. 1972). A recent case from Maryland, however, indicates that judicial approval may be forthcoming. Maryland v. Amerada Hess Corp., 4 BNA ENVIRONMENT RpTR.-DECISIONS 1625 (D. Md. 1972), was a suit by the state of Maryland against a corporation to recover damages incurred as a result of an oil discharge which polluted Baltimore Harbor. The defendant contend that the state was unable to bring the suit by virtue of the fact that it was merely a trustee of, and had no property rights in, the waters of the harbor. The court disagreed: The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust — i.e., the waters — for the beneficiaries of the trust — i.e., the public.

4 BNA ENVIRONMENT RpTR.-DECISIONS at 1629. The court went on to say that the state, in its capacity as trustee of public resources, has the right to bring such a civil action to combat any type of pollution: For this Court to hold that unless a state has enacted legislation in the area of pollution control, it may not bring a common law suit to combat this problem, would be to unnecessarily tie the hands of the State in its war against pollution.
Constitutional arguments have also been advanced for a substantive right to a decent environment. Numerous commentators have urged that the Constitution guarantees all citizens the right to live in a healthy environment, and a similar claim has been proposed in several cases. The constitutional argument is based either upon the concept of "liberty" as embodied in the fifth and fourteenth amendment due process sections, or upon the notion that there exist certain peripheral rights associated with the Bill of Rights in general and the ninth amendment in particular. Plaintiffs in various cases have contended that the liberty guaranteed in the fifth amendment includes the right to enjoy the nation's natural resources; that one of the ninth amendment rights "retained by the people" is the right to live in healthy surroundings; and that the "penumbra" of protection associated with the Bill of Rights includes the right to enjoy a decent environment. As is generally true when constitutional claims are presented, the courts facing the issue usually find a way

Id. The reasoning used in the Amerada Hess case seems to lead to the conclusion that, as beneficiaries of the public trust, citizens of Maryland also have the right to be protected by the state against pollution of the public waters.


34. U.S. Const. amend. IX states: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

35. See McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971).


37. See United States v. 247.37 Acres, 3 BNA ENVIRONMENT Rptr.—DECISIONS 1098 (S.D. Ohio 1971). The now-famous case of Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court announced that the Bill of Rights is not necessarily limited to those which are enumerated but includes other "peripheral" rights, has served as the basis for the "penumbra" argument. Besides the right to privacy in the marital relationship recognized by Griswold, other unenumerated rights which have been recognized by the Supreme Court are: the right to pursue an occupation, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); the right of procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); and the right to educate one's children, Meyer v. Nebraska, 262 U.S. 390 (1923).
of avoiding the constitutional question.\footnote{38} Whether there exists a constitutional right to a healthful environment will ultimately require resolution by the United States Supreme Court. But because of the unwillingness of the lower courts to adjudicate, it may be difficult even to get the issue presented before the Court.\footnote{39}

It is clear by now that, although the law in certain respects recognizes ecological interests, constitutional and common law doctrines have so far been incapable of serving as the basis for a genuine substantive right for all individuals to enjoy a healthy environment. Whether such a right can be statutorily created is the subject of the remainder of this article.

**NEPA AND ITS INTERPRETATION PRIOR TO THE EDF CASE**

NEPA consists of two parts. Title I\footnote{40} contains an elaborate statement of substantive national goals,\footnote{41} as well as specific procedural requirements addressed to all federal agencies.\footnote{42} The most significant procedural provision requires the submission of an environmental impact statement to the President, to the Council on Environmental Quality and to the public regarding any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."\footnote{43} The environmental impact statement must reveal, among other things, the adverse environ-

---

\footnote{38} Among the rationales employed by various courts to keep from deciding whether there is a constitutionally-protected right to a decent environment have been: (1) that it is not proper for a trial court to create new substantive rights, either because to do so would constitute judicial legislation, or because only the Supreme Court should do so, (2) that the Bill of Rights applies as against the federal government and as against the states through the fourteenth amendment, but it does not apply in suits against private parties, or (3) that the plaintiff failed to show any injury upon which to base his asserted right. See cases cited note 33 supra.

\footnote{39} In most of the cases wherein the constitutional argument was advanced, the plaintiff has usually alleged other grounds for relief based on various environmental statutes. Indeed, the constitutional argument is most commonly pleaded as an alternative ground for relief. This, of course, further reduces the possibility that the Supreme Court might review the claim that there exists a constitutional right to a decent environment, because the Court usually declines to decide constitutional issues when there exist other grounds upon which to dispose of the case. The only case thus far in which the plaintiff's claim was based solely on constitutional grounds was Environmental Defense Fund, Inc. v. Hoerner Waldorf, 1 BNA Environment Rptr.-Decisions 1640 (D. Mont. 1970), where plaintiff's fifth, ninth and fourteenth amendment claims were dismissed because the suit was brought against a private party.

\footnote{40} Title I, II of NEPA are referred to as subchapter I, II 42 U.S.C. §§ 4321 et seq. (1970).

\footnote{41} NEPA § 101(b), 42 U.S.C. § 4331 (b) (1970). For the text of statute, see note 7 supra.

\footnote{42} NEPA § 102, 42 U.S.C. § 4332 (1970). For text of statute, see note 8 supra.

\footnote{43} NEPA § 102(2) (C), U.S.C. § 4332(2) (C) (1970).
sent mental effects of and the possible alternatives to any proposed ac-
tion.**

Title II of NEPA establishes the Council on Environmental Qual-
ity.** As a part of the Executive Office of the President, the Council
is generally responsible for studying ecological trends and assisting
and advising the President on matters relating to the environment.**

If NEPA creates an enforceable right to a healthy environment,
the source of that right will be found primarily in § 101 of the Act.
Section 101(b) not only sets forth the substantive goals mentioned
above, but also specifically directs that it is the responsibility of
the federal government to implement the national environmental policy
by making efforts to achieve those goals.** It might be argued that a
private cause of action exists under § 101(b) to insure that the govern-
ment honors that responsibility.**

Section 101(c) is also significant if one argues that NEPA creates
substantive rights.** The original language of that section, proposed
by the Senate, was much stronger and more explicit but was later
changed in the Conference Committee.** The initial version of § 101
(c) recognized a "fundamental and inalienable" right to a heathful
environment.** A plausible argument could be made that had NEPA

of the litigation under NEPA to date has involved issues concerning the environ-
mental impact statement requirement, either objecting to the failure of an agency
to file a statement or challenging the adequacy of the statement itself. See, e.g.,
Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972), ruling
on the adequacy of an impact statement under the other requirements of NEPA;
Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), involving the necessity of filing
an impact statement in connection with the planning of a federal jail in New York
City; Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), regarding the
retroactive effect of NEPA in general and the impact statement requirement in particular.
47. The language of § 101(b), 42 U.S.C. § 4331(b), states that:
   In order to carry out the policy set forth in this chapter,
   it is the continuing responsibility of the Federal Government
   to use all practicable means . . . to improve and coordinate
   Federal plans, functions, programs, and resources to the end that
   the Nation may —

   (2) assure for all Americans safe, healthful, productive, and
       esthetically and culturally pleasing surroundings . . . . (Emphasis
       added).

48. Section 101(b)(1) makes reference to the nation as "trustee of the environment
   for succeeding generations." This, in conjunction with the public trust doctrine, might
   be used as an independent argument in favor of substantive environmental rights
   under NEPA. See text accompanying note 28-31.

49. Section 101(c), 42 U.S.C. § 4331(c), declares: "The Congress recognizes that
   each person should enjoy a healthful environment . . . .".
been intended to create substantive rights, the explicit language in the original bill would have survived.\textsuperscript{52} However, it should be noted that the reason for the language change by the Conference Committee is not clear. The explanation given is as follows:

The language of the conference substitute reflects a compromise by the conferees with respect to a provision in the Senate bill (but which was not in the House amendment) which stated that the Congress recognizes that "each person has a fundamental and inalienable right to a healthful environment . . . ." The compromise language was adopted because of doubt on the part of the House conferees with respect to the legal scope of the original Senate provision.\textsuperscript{53}

If the Conference Committee members were certain as to the legal ramifications of the language they actually adopted in §101(c), they gave no indication what those ramifications were. This, of course, leaves open the possibility that §101(c) might be construed as affording substantive rights. \textit{despite} the fact that the original, discarded version employed more sweeping language. The point is this: the fact that doubt on the part of legislators prompted a change from strong to less forceful language does not render §101(c) of NEPA meaningless nor does it \textit{ipso facto} negate the possibility that the provision might be interpreted as a source of substantive environmental rights.\textsuperscript{54}

Litigation under NEPA has evidenced a general refusal by courts to accept the statutory construction that the Act has substantive as well as procedural innovations. Numerous district court decisions held that NEPA was primarily a procedural statute and that agency obligations were generally limited only to compliance with the §102 requirements — the courts reasoned that §101 was merely a statement of policy and therefore did not authorize substantive judicial review of agency decisions.\textsuperscript{55} When plaintiffs urged that NEPA afforded statutory rights in connection with the substantive policies of the Act, the courts responded by saying that NEPA did not permit reviewing courts to substitute their own judgment for that of the

\textsuperscript{52} \textit{See} Tanner v. Armco Steel Corp, 340 F. Supp. 532 (S.D. Tex. 1972), where the court employed such an argument to hold that §101(c) of NEPA creates no substantive right to a healthy environment.


\textsuperscript{54} Hanks & Hanks, \textit{An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969}, 24 Rutgers L. Rev. 230, 249-51 (1970), urges that §101(c) of NEPA not only should serve as the basis for substantive rights, but also should be read "exactly as had been intended in the Senate version." \textit{Id.} at 251.

agency's and hence did not create substantive rights.\(^5\) The various circuit courts followed this reasoning\(^6\) and eventually the accepted rule was that NEPA afforded procedural remedies but not substantive rights. This meant that a citizen's only recourse under NEPA was a cause of action alleging inadequate performance of the §102 duties.

Judicial construction which places near-total emphasis upon the procedural aspect of NEPA without recognizing substantive rights leaves the Act far short of achieving its potential as an environment-protecting statute. To require only that federal agencies carry out the procedural directives of NEPA might well assure that consideration will be given to environmental values, but it does not assure that that consideration will play an important role in the agency's decisions.\(^\#\) Nevertheless, this is the interpretation which represents the current majority view. A significant exception to that view was announced in EDF.\(^\#\)

---

56. Environmentalists often argued that NEPA created substantive rights by affording citizens a cause of action to challenge the actions of federal agencies on the grounds that they did not comply with the policies established in §101. The typical reaction to such an argument was voiced in Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916, 925 (N.D. Miss. 1972):

"Courts do not sit to decide the substantive merits or demerits of a federal undertaking under NEPA, but only to make certain that the responsible federal agency, in this case the Corps of Engineers, makes full disclosure of environmental consequences to the decisionmakers. While the exact scope of §101 has not been defined by the Supreme Court, the prevailing view of the federal courts is that neither this section nor other provisions of NEPA create substantive rights that are enforceable in the courts . . . . The reasoning of the decided cases is that §101 vests in federal agencies broad discretion "to use all practicable means" consistent with other national policy to enhance the quality of man's environment, and leaves with the decisionmakers, and not the courts, the question of whether a given project shall proceed."

Other district court decisions drawing the same conclusions are:

- Tanner v. Arnco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972);
- Environmental Defense Fund, Inc. v. TVA, 4 BNA Environment Rptr.—Decisions 1892 (E.D. Tenn. 1972);
- Pizitz v. Volpe, 4 BNA Environment Rptr.—Decisions 1195 (M.D. Ala. 1972);

57. See, e.g., Pizitz v. Volpe, 4 BNA Environment Rptr.—Decisions 1401 (5th Cir. 1972); Bradford v. Highway Authority, 4 BNA Environment Rptr.—Decisions 1301 (7th Cir. 1972); Conservation Council v. Froehlke, 4 BNA Environment Rptr.—Decisions 1044 (4th Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Scaborg, 463 F.2d 783 (D.C. Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971); Upper Pecos Ass’n v. Stans, 452 F.2d 1233 (10th Cir. 1971).

58. It is all too possible that the §102 duties are mechanically performed without any real intention of altering the proposed course of action. See Sandler, The National Environmental Policy Act: A Sheep in Wolf’s Clothing?, 37 Brooklyn L. Rev. 139 (1970). This article concludes that much of NEPA's effectiveness is lost because the §102 duties are often half-heartedly performed by agencies and inconsistently applied by courts. The Wall Street Journal, Oct. 16, 1972, at 14, col. 2, contains an article which discusses the failure of certain federal agencies to obey NEPA, particularly in connection with filing impact statements.

59. 470 F.2d 289 (8th Cir. 1972).
The Arkansas federal district court in the EDF case followed the established rule in other decisions by: (1) declaring that NEPA did not allow courts to review substantive agency decisions,6 and (2) holding that NEPA created no substantive right to a decent environment,6 but rather afforded only procedural remedies.6 The Eighth Circuit reversed as to the reviewability of agency decisions on the merits:

The trial court's opinion is in error insofar as it holds that the courts are precluded from reviewing the agencies' decisions to determine if they are in accord with the substantive requirements of NEPA.6

The EDF case was unquestionably a departure from the rulings in other circuits and represented the first significant recognition of the substantive importance of NEPA. The court said that mere compliance with the § 102 procedures would not satisfy the requirements of the Act. The ultimate purpose of NEPA, the court pointed out, is not only that agencies must consider ecological factors when making decisions, but that the decisions themselves in fact reflect environmental considerations:

The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set

60. 342 F. Supp. at 1216:
If this Court is correct in its interpretation of the NEPA, the plaintiffs here cannot look to the judiciary to reverse or modify any decision with respect to the building of the embankment across the Cossatot.

61. 325 F. Supp. at 755:
It is true that the Act required the government “to improve and coordinate Federal plans, functions, programs, and resources,” but it does not purport to vest in the plaintiffs, or anyone else, a “right” to the type of environment envisioned therein.

62. Id.:
In view of this interpretation of NEPA by the Court, the plaintiffs are relegated to the “procedural” requirements of the Act.

63. 470 F.2d at 300.

64. The only case prior to EDF that gave any suggestion of enforcing the substantive section of NEPA was Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972). Decided just eight months before EDF, that case ruled that the FPC would not be enjoined from completing construction on certain power lines which were already 80% completed, despite the retroactive application generally given to NEPA. The court said, however, that it “might arrive at a different conclusion if there were significant potential for subversion of the substantive policies expressed in NEPA . . . .” Id. at 425.

65. 470 F.2d at 298:
The procedures included in § 102 of NEPA are not ends in themselves. They are intended to be “action forcing.”
forth in the Act, not just to file detailed impact studies which will fill governmental archives. (Emphasis added)."

EDF stands for the proposition that, in order to comply with NEPA, federal agencies must act in accordance with the substantive directives of § 101 as well as perform the procedural requirements of § 102." This is vital because it means that agency decisions must reflect the policies and goals set forth in § 101. This insures that agency decisions will in fact reflect environmental considerations, thereby enhancing the chances that the policy set forth in the Act will be realized. The line of decisions requiring compliance with § 102 alone does not accomplish that goal. NEPA is an effort to set forth and effectuate a national environmental policy — this can be accomplished more effectively by requiring compliance with the substantive as well as the procedural sections of the Act.

The question that immediately arises is whether the EDF decision is such a total reversal of the majority view that it represents a judicial recognition of substantive statutory rights. Although the opinion does not expressly state that NEPA creates substantive rights," it would not be unreasonable to interpret the case as saying exactly that by implication.

Since the courts (in the Eighth Circuit, at least) have an "obligation" to review the merits of an agency decision to determine compliance or non-compliance with § 101, it appears that a cause of action might be made out challenging an agency decision on substantive grounds. That is, a private citizen might have a cause of action against federal agencies based on § 101 of NEPA, enabling him to institute a suit in district court alleging agency non-compliance with § 101. Moreover, such a cause of action would exist in spite of total performance of the procedural requirements. Thus, even though an agency has met its § 102 obligations satisfactorily, its decision

---

66. 470 F.2d at 298. Also, the court mentioned that NEPA "is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking." Id. at 297.

67. The court went on to apply an "arbitrary or capricious" standard for reviewing agency decisions under NEPA. In all previous NEPA decisions, courts exercised unlimited discretion to determine whether a particular decision or action was arbitrary or capricious. But here, the court's discretion was confined to determining whether or not an agency decision was in accord with § 101. This would appear to be much more restrictive than the previously-applied "arbitrary-capricious" standard, because presumably any decision which did not comply with § 101 of the Act would automatically be an arbitrary decision.

68. On the other hand, the opinion also does not expressly deny that NEPA creates substantive rights. Conceding the hazards involved in drawing conclusions from things that are not said, it is nevertheless true that the possibility is left open by the court.

69. 470 F.2d at 298.
whether and how to proceed with a project would still be subject to attack under § 101. Since EDF now allows courts the authority to review agency decisions to determine if they are in accord with NEPA's substantive policy, there seems to be no logical reason why a citizen cannot file an independent action asking the court to exercise that authority.

If it is conceded that an individual has a cause of action against a federal agency for failure to comply with § 101, it must also be conceded that in doing so he is, in effect, asserting his rights under that section, i.e., his right to live in "safe, healthful, productive, and aesthetically and culturally pleasing surroundings;" to attain "the widest range of beneficial uses of the environment without degradation, risk to health or safety;" to enjoy the preservation of "important historic, cultural, and natural aspects of our national heritage." 70

In other words, asserting a cause of action under the substantive section of NEPA is synonymous with asserting the right to a decent environment. So by recognizing a private cause of action based on substantive grounds under § 101, the EDF case would appear to recognize, if not expressly then by implication, substantive statutory rights.

Although it is hoped that the decision in EDF will be interpreted as recognizing substantive environmental rights, it must be noted again that the opinion is silent as to that issue and so remains undecided. 71 Be that as it may, the crucial importance of the case is that it represents a major departure from a course of static judicial construction which had all but negated the effectiveness of NEPA. It is the first case to give substantive meaning to the Act by requiring federal agencies to comply with the spirit, as well as with the letter, of the law. 72 As the EDF court said:

71. In a subsequent case, Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972), the Eighth Circuit reaffirmed its position that agency decisions should be subject to judicial review according to § 101 standards. In that decision, the court specifically cautioned that "the ultimate standard of review is a narrow one" and that a court of law would not be allowed "to substitute its judgment for that of the agency." 473 F.2d at 353. This should not be read as a limitation upon the EDF holding because EDF issued exactly the same caution. 470 F.2d at 300. Furthermore, the Froehlke decision stated that the purpose of the review was to determine "whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§ 101 and 102 of NEPA." 473 F.2d at 353.
72. The EDF case has been cited as authority for similar reversals by other courts. For example, the Fourth Circuit, in Conservation Council v. Froehlke, 473 F.2d 664 (4th Cir. 1973), expressed agreement with the EDF court with respect to reviewing substantive agency decisions, thereby overruling the well-known Conservation Council v. Froehlke, 340 F. Supp. 222 (M.D.N.C. 1972). Also, a few district courts have now aligned themselves with the Eighth Circuit. See Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973); Conservation Society v. Secretary of Transportation, 5 BNA ENVIRONMENT Rptr.—DECISIONS 1683 (D. Vt.
(T)he prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.73

If NEPA is to achieve its full potential as an environment-protecting statute, it must be viewed as the source of substantive environmental rights. And if NEPA is to be viewed as a source of substantive rights, it will require an active and innovative role on the part of the judiciary. EDF, if nothing else, is certainly a step in the right direction.

CONCLUSION

As a result of insistent and unwarranted destruction of the environment which has occurred over the years, this nation has experienced a rapidly increasing concern for ecological values. Out of that concern there has developed the notion that citizens have a right to live in a decent environment. But no solid legal basis existed for asserting such a right until the enactment of NEPA in 1969. One of a myriad of recent legislative enactments designed to curb environmental abuse, this is the first statute with the substantive foundation necessary for a source of environmental rights. Indeed, the substantive section of the Act, §101(a)-(c), goes much further than declaring policy and setting goals. It establishes and enumerates certain governmental responsibilities which are directed toward protecting the environment. The substantive potential of NEPA was initially stymied by courts who insisted that the purpose of the Act was to compel federal agencies to consider ecological consequences when making decisions, and that NEPA was primarily procedural and created no substantive rights. But the ultimate objective of NEPA is not merely that agencies consider the environment when making decisions, but rather that the decisions which are actually made do in fact reflect ecological considerations. Procedural compliance alone cannot accomplish that. It is one thing to require a federal agency to assess environmental consequences by asking it to comply with various statutory provisions; it is quite another thing to require that the agency decisions themselves reflect that assessment. A significant breakthrough was announced by the Eighth Circuit in EDF. In holding that courts may review federal agency decisions to insure compliance with the substantive standards in §101, the EDF decision finally give NEPA the substantive meaning it deserves. Although

73. 470 F.2d at 299.
no decisive answer is yet available, it is quite probable that the EDF case itself represents a judicial recognition of substantive rights. But irrespective of that, it can be said with certainty that EDF has set the stage for courts to take the final plunge and recognize NEPA for what it is — a statutory source of the right to live in a decent environment.

Steven D. Ruse — '75