ENVIRONMENTAL LAW

ENABLEMENT THEORY AND THE ENVIRONMENTAL IMPACT STATEMENT REQUIREMENT

The National Environmental Policy Act (NEPA) of 1969 was designed to instill environmental concern into governmental decisionmaking. Perhaps the most significant provision of NEPA is section 102(2)(c) requiring a federal agency to file an environmental impact statement (EIS) for "major [f]ederal actions significantly affecting the quality of the human environment". The EIS requirement forces agencies to consider environmental factors in decision-making.

However, a federal agency can avoid the restrictions of the EIS requirement, for it is the federal agency which initially determines whether to file an EIS. The agency can decide that an EIS is inapplicable by concluding that the proposed activity either fails to be "a major federal action" or fails to significantly affect the environment. After such a negative determination, often based on a superficial environmental assessment, an agency ends its environ-

1. Zabel v. Tabb, 430 F.2d 199, 211 (5th Cir. 1970); 42 U.S.C. § 4321 (1976). The purposes of this [Act] are:
   To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

2. The section reads:
   The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall . . .
   (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
   (i) the environmental impact of the proposed action.


3. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971); 40 C.F.R. 1500.2 (1978). The EIS both discloses information to the public and aids in agency decision making. Under the EIS requirement, a federal agency must discuss in "a detailed statement" the environmental effects of the proposed project and possible alternatives. Initially, the agency makes a draft available to federal, state, and local agencies and the public. Utilizing public and agency comments, the federal agency issues an EIS aimed at minimizing environmental harm of the proposed project. 40 C.F.R. 1500.2 (1978).

mental inquiry.\textsuperscript{5}

Two recent Eighth Circuit decisions, \textit{Winnebago Tribe v. Ray}\textsuperscript{6} and \textit{South Dakota v. Andrus}\textsuperscript{7} dealt with federal agencies' threshold decisions not to file an EIS. Plaintiffs were appealing the lower court decisions rejecting the need for an EIS.\textsuperscript{8} The courts in both cases applied "enablement theory" in deciding that an EIS was unnecessary.\textsuperscript{9} Enablement is used to satisfy the "federal action" requirement in 102(2)(c) when a private party impacts on the environment.\textsuperscript{10} "Federal action" under NEPA exists, not only when a federal agency directly affects the environment, but also, through "enablement" theory, when a governmental decision allows a private party to affect the environment.\textsuperscript{11} For example, the issuance of a federal permit allowing a power company to build a nuclear plant is "enabling control" and the project involves sufficient federal action to demand an EIS be filed.\textsuperscript{12} Enabling control exists if federal approval is discretionary and legally required before a private party can begin the project.\textsuperscript{13}

While enablement satisfies the "federal action" requirement, a second type of federal involvement, "factual control", does not.\textsuperscript{14} Factual control arises when government approval blocks a project, not legally, but as a practical matter.\textsuperscript{15} For example, assume a mining company, already having a right to mine, applies for a federal mineral patent to facilitate finding financial backers. The government approval fails as enabling control because the company could legally mine without the patent. The control is factual, for

\textsuperscript{6} 621 F.2d 269 (8th Cir. 1980).
\textsuperscript{7} 614 F.2d 1190 (8th Cir. 1980).
\textsuperscript{8} 621 F.2d at 270; 614 F.2d at 1191.
\textsuperscript{9} 621 F.2d at 272-73; 614 F.2d at 1194-95.
\textsuperscript{10} 614 F.2d at 1194. In \textit{South Dakota} it is unclear whether enablement satisfies the "federal" or "major" requirement. The court states that an EIS is required under \textsection{} 102(2)(c) if a mineral patent is "an action" within the provision and the alleged federal action is "major" in the same sense that it significantly affects the quality of the human environment." \textit{Id.} at 1193. The enablement discussion then applies to the "major" federal action requirement. \textit{Id.} at 1194. However, under the eighth circuit's unitary test, environmental impact satisfies the "major" question, while enablement answers the "federal" requirement. The court's confusion may result from other circuits' discussing enablement under the dual test where "major" refers to the scope of the federal activity, not its environmental impact. See notes 73-87 and accompanying text \textit{infra}.
\textsuperscript{11} 614 F.2d at 1194.
\textsuperscript{13} NAACP v. Medical Center, Inc., 584 F.2d 619, 633 (3d Cir. 1978).
\textsuperscript{14} 621 F.2d at 272.
without the patent the mining project might financially fail.\textsuperscript{16}

The two Eighth Circuit decisions grapple with the problem of defining enablement control. While \textit{South Dakota v. Andrus} applies enablement correctly, the \textit{Winnebago} decision unjustifiably restricts the enablement principle and conflicts with other Eighth Circuit decisions.

**FACTS**

In \textit{South Dakota v. Andrus}, the Pittsburg Pacific Company applied to the United States Department of Interior for a mineral patent\textsuperscript{17} to mine in Black Hills National Forest. South Dakota argued that the Department of the Interior must file an EIS because granting a mineral patent was a "major federal action" under 102(2)(c).\textsuperscript{18} The court acknowledged that "federal action" did not require direct federal activity, and that where the "federal act enabled another party to significantly affect the environment, a major federal action" exists.\textsuperscript{19} However, the issuance of a mineral patent does not enable a private party to act. The company, by locating, marking, and recording the claim according to statutory procedures, already had an exclusive right to its claim.\textsuperscript{20} The court concluded that granting the patent was not a major federal action. Therefore, with "major federal action" lacking, no EIS was required.\textsuperscript{21}

Also, in dicta, the court, noted that it doubted that "action" under 102(2)(c) included ministerial approval of a mineral patent. The court reasoned that the EIS, which was intended to aid in agency decision-making, would be useless in making a ministerial decision where the agency cannot even consider environmental factors.\textsuperscript{22}

\textsuperscript{16} 462 F. Supp. at 909.

\textsuperscript{17} A mineral patent confirms that a person, having followed the necessary legal requirements, has an exclusive right to a mining claim. While the patent does not add to the mining right, it does provide conclusive evidence of title in a claim dispute. \textit{2 American Law of Mining} § 9.28 at 357 (1980).

\textsuperscript{18} 614 F.2d at 1192.

\textsuperscript{19} Id. at 1194.


\textsuperscript{21} However, the court warned that an EIS might be necessary when government approval was requested for activities such as roads and water pipelines.

The court in *Winnebago v. Ray* also concluded that an EIS was not required. In *Winnebago*, Iowa and Nebraska power companies planned to build a 67 mile transmission line across the Missouri River and through the Winnebago Indian Reservation. Because the power line was to cross navigable waters, the power company had to apply to the Corps of Engineers for a section 10 permit. The Corps issued the permit after concluding that the project would cause no significant environmental impact requiring an EIS. The Winnebago tribe attacked this decision.

In *Winnebago* the Eighth Circuit applied its reasonableness standard to decide if it should upset the agency's decision not to file an EIS. Under this standard, the plaintiff has the burden to show that a project could significantly affect the environment. Once that requirement is met, the burden shifts to the government to support its negative determination. The plaintiff's burden is satisfied by alleging that facts are absent from the environmental assessment, "which, if true, would constitute a 'substantial' impact upon the environment."

The plaintiffs alleged three deficiencies in the environmental assessment. They argued that the Corps should consider other alternatives; that the line would harm the bald eagles; and that the Corps should consider the impact of the entire power line rather than just the river crossing portion. The court dismissed all three arguments, focusing mainly on the project-wide analysis argument.

--

23. *621 F.2d at 274.*
24. *Id. at 270.* A party must apply for a section 10 permit from the Corps of Engineers for structures in or affecting navigable water of the United States. 33 C.F.R. 322.1 (1980). The Corps can deny a permit based on both navigational and environmental factors. *Zabel v. Tabb, 430 F.2d 199, 214 (5th Cir. 1970).*
25. *261 F.2d at 270.*
26. *Id. at 271.* See also *Monarch Chemical Works, Inc. v. Thone, 604 F.2d 1083, 1086-87 (8th Cir. 1979); Minnesota Pub. Int. Res. Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466-67 (5th Cir. 1973).* *But see, Hanly v. Kleindienst, 471 F.2d 823, 829-30 (2d Cir. 1972) (court employed arbitrary and capricious standard).*
27. *621 F.2d at 271.* See, e.g., *Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973).*
29. *Id. at 271.*
30. *Id. at 273-74.* The court refused to consider the Corps' failure to consider alternatives because the issue was not raised at trial. *Id. at 274.*

On the issue of harm to bald eagles, the court found the Tribe failed to satisfy its burden of proof. The plaintiff needed to allege facts showing a "substantial impact" on the environment to justify shifting the burden of proof. *Id. at 271.*
ment. In rejecting project-wide analysis of the power line, the court suggested it would review the impact of the entire line if the permit qualified as an "enablement." However, for a permit to fit into the enablement category, the court said government approval must be a legal precondition for the entire project. Here, government approval extended only to the section over the river.\textsuperscript{31}

The permit thus involved only factual, rather than enabling control over the project. The court considered three factors to decide whether such factual control should result in project-wide analysis. Those factors were the agency's degree of discretion over the federal portion, whether the federal government has given financial aid, and whether overall federal involvement is sufficient to make the private action federal.\textsuperscript{32}

Applying the "degree of discretion" test, the court found that the Corps' discretion over the project was limited to the portion over the river. Under a section 10 permit, the Corps jurisdiction extends only to "areas in and affecting navigable waters." Since the Corps' jurisdiction applied only to the area over the river, the discretion test did not demand project-wide analysis.\textsuperscript{33} The permit also failed the other two requirements for project-wide analysis.\textsuperscript{34}

\textbf{BACKGROUND AND ANALYSIS}

This article will compare these two cases and attempt to show why the \textit{Winnebago} court erred in failing to consider the environmental impact of the entire power line. The discussion will focus on the court's restrictive application of the enablement theory, its misapplication of the factual control test, and its narrow view of the Corps' jurisdiction.

\textit{Restriction of Enablement Control}

\textit{South Dakota v. Andrus} follows other Eighth Circuit decisions

\begin{itemize}
\item \textsuperscript{31} 621 F.2d at 270, 272.
\item \textsuperscript{32} 621 F.2d at 272.
\item \textsuperscript{33} \textit{Id.} at 272-73.
\item \textsuperscript{34} \textit{Id.} at 273. In the second test, the direct financing requirement was unsatisfied because the federal government was not financially involved in the project. Applying the third test, the court found inadequate federal involvement to mark the private activity with federal action. Condemnation of reservation land for the power line did not increase federal involvement. The court found that under 25 U.S.C. § 357 (1976) a state can condemn Indian lands "in the same manner as land owned in fee." \textit{Id.}
\end{itemize}

The Tribe also argued that the rest of the line should be considered as a secondary or indirect impact. \textit{Id.} at 273. \textit{See} 40 C.F.R. 1500.6(b) (1978). The Tribe argued the Corps' granting of a permit resulted in the secondary effect of the rest of the line being built. The court, after closely reading 40 C.F.R. 1500.6(a)(3)(ii) (1978), dismissed this argument. 621 F.2d at 273.
in applying the enablement concept. The decision states that enablement arises when the government makes a discretionary decision which is a precondition to a private party's action affecting the environment. Thus, when the federal government makes a discretionary decision to grant a lease, permit, license or approve or fund state highways, enablement occurs and the “federal action” requirement is satisfied. As discussed, the mineral patent in South Dakota failed as an enablement because it was neither a precondition to mining nor a discretionary decision.

The Winnebago decision restricts the enablement category presented in South Dakota by adding two requirements to the principle. First, the approval must be not only a precondition to the project, but a legal precondition. Approval as a precondition covers activities which a party could not legally or practically begin without governmental approval. In contrast, approval as a legal precondition extends only to projects which a party could not legally start without the government's agreement. The Winnebago court stated as a second requirement that the approval must be a precondition for the entire project. While the legal precondition requirement follows the weight of authority, the requirement for project-wide approval does not.

Although the cases generally support the legal precondition requirement, some minor problems arise in adopting this requirement. The broad language in Scientists' Institute for Public Information v. Atomic Energy Commission, an often quoted source of enabling theory, presents the main roadblock. Scientists' states that “there is 'Federal action' within the meaning of the statute... whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.” A decision permitting action encompasses more than decisions legally authorizing a project. For example, under this broad language, federal development of nuclear technology is viewed as enabling control over the building of nuclear power plants, even though technology is not a legal precondition to building nuclear plants.

35. South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980).
36. Id. at 1194.
38. 614 F.2d at 1193-94.
39. 621 F.2d at 272.
40. NAACP v. Medical Center, Inc., 584 F.2d 619, 632 (3d Cir. 1978).
41. 621 F.2d at 272.
43. Id. at 1088-89.
44. Id. at 1089.
However, despite the language in *Scientists*', enablement theory has been consistently applied to cases where government action was legally required before the private party could act. Even in *Scientists*' where the Atomic Energy Commission’s nuclear technology was considered enabling, the A.E.C. also had legal control. For a power company needed not only nuclear technology, but also the A.E.C. permit to build a nuclear plant.

In addition, the legal requirement conforms with the policy behind enablement. Enablement is based on the government’s taking “sufficient control and responsibility” over private action to justify the agency’s assuming the burden of considering environmental factors. The legal precondition requirement insures that adequate federal control and responsibility exists, for under the legal requirement the government has taken the responsibility of legally sanctioning the activity. In contrast, the requirement will exclude cases where the government does not legally control the project, but merely affects the private party’s own decision whether to start a project.

**Project-Wide Analysis**

While the legal precondition requirement makes sense, the requirement that approval must cover the entire project causes problems. This requirement conflicts with other enablement cases, NEPA legislative history, and the Eighth Circuit unitary test.

i) **Enablement Cases**

Enablement cases often involve governmental approval over the total project. However, no case speaks of project-wide approval as a factor in determining enablement control. The cases

---

45. See **NAACP v. Medical Center, Inc.**, 584 F.2d 619, 632 (3d Cir. 1978); Minnesota Pub. Int. Res. Group v. Butz, 489 F.2d 1314, 1322-23 (9th Cir. 1974) (government modification of contracts and administrative duties a legal precondition to logging); Nat’l Forest Pres. Group v. Butz, 485 F.2d 408, 410-12 (9th Cir. 1973) (exchange of private lands for national forest legally required for railroad to affect national forest); Davis v. Morton, 469 F.2d 593, 596 (10th Cir. 1972) (government legally required to approve private developer’s lease on an Indian reservation); Lathan v. Volpe, 455 F.2d 1111, 1114-15 (9th Cir. 1971) (federal approval of highway plan legally required to qualify for federal funds).

46. 481 F.2d at 1085.

47. 584 F.2d at 634. See 40 C.F.R. 1500.6(c) (1978).

48. 584 F.2d at 634.

49. See note 94 and accompanying text infra.

50. 621 F.2d at 272. See, e.g., Cady v. Morton, 527 F.2d 786, 795 (9th Cir. 1975) (lease for entire strip mining project); Davis v. Morton, 469 F.2d 593, 594 (10th Cir. 1972) (lease for entire land development); Greene County Planning Bd. v. FPC, 455
emphasize not the scope of the approval, but that the government's decision permitted another to act. For example, the court in *N.A.A.C.P. v. Medical Center, Inc.*, the basis of the Winnebago enablement discussion, considered not the extent of federal approval, but only that the approval is a discretionary legal precondition to the project.

In *Medical Center*, a hospital submitted building expansion plans to the Secretary of HEW for approval. Under a social security statute, if the Secretary approved the plan, the hospital would not lose medicare and medicaid funds due to unnecessary capital expenditures. The plaintiff argued the federal approval was enabling because the hospital, heavily dependent on medicare funds, could not expand without federal approval.

The court found that the government approval failed as enabling control for two reasons. First, approval was not a legal precondition to hospital construction and, unlike highway funding cases, the hospital was not legally required to obtain approval before construction to insure funding. Second, the Secretary's decision was ministerial. Once a state agency had approved the plan, the Secretary was required to accept the plan, with no discretionary authority to reject it.

*Medical Center* states that enabling control exists when governmental approval is discretionary and a legal precondition to the project. Once these two requirements are satisfied, enablement occurs. *Medical Center* does not further inquire into the scope of the approval. It asks neither if agency discretion extends to the entire project nor if approval is legally required for the entire project. The case only questions whether a

---

51. *See Scientists' Inst. for Pub. Info. Inc. v. AEC*, 481 F.2d 1079, 1089 (D.C. Cir. 1973) (federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party to take action affecting the environment); *Nat'l Forest Pres. Group v. Butz*, 485 F.2d 208, 411 (9th Cir. 1973) (land exchange analogous to the licensing of or granting of federal funds to a nonfederal entity to enable it to act).

52. 584 F.2d at 633.
53. 584 F.2d at 619.
54. *Id.* at 631.
55. *Id.* at 630-31, 631 n.16; *NAACP v. Wilmington Medical Center, Inc.*, 463 F. Supp. 1194, 1200-01 (D. Del. 1977).
56. *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 634 (3d Cir. 1978); *NAACP v. Wilmington Medical Center, Inc.*, 436 F. Supp. 1194, 1200-01 (D. Del. 1977). Even if the hospital did not seek federal approval, it could still receive medicare funds if HEW later found expansion reasonable. Also, unlike highway cases, the government did not directly fund the project, but merely paid for patients' hospital care. *Id.* at 1201.
57. 584 F.2d at 628, 630; 436 F. Supp. at 1201.
58. 584 F.2d at 633.
party needs the government's discretionary approval to legally act.\textsuperscript{59}

The Corps' permit, despite its limited scope, appears to satisfy the requirements of enabling outlined in \textit{Medical Center}.\textsuperscript{60} First, the Corps has discretion to consider environmental factors.\textsuperscript{61} Second, the Corps' permit is a legal precondition to building the power line across the Missouri River.\textsuperscript{62}

Case law further suggests that the issuance of a Corps' section 10 permit to the power company is an enabling act constituting a "major federal action."\textsuperscript{63} This conclusion finds support in \textit{Sierra Club v. Morton} which considered whether a section 10 permit is a "major federal action" requiring an EIS. The case states:

The issuance of either a Section 9 or 10 permit . . . always constitutes major federal action and unless the Corps of Engineers . . . makes the negative determination that the issuance has no significant effect on the environment, an EIS is required. . . . The key factor is that without federal approval . . . the project could not commence. . . .\textsuperscript{64}

The \textit{Winnebago} decision cites no case suggesting that the permit must cover the entire project to be enabling.\textsuperscript{65}

\textit{ii) NEPA Legislative History}

The requirement of project wide approval also clashes with the Congressional mandate to vigorously enforce NEPA. Section 102 states that agencies should follow NEPA, including its EIS requirement, "to the fullest extent possible."\textsuperscript{66} A review of the legislative history on section 102 shows Congress intended section 102

\begin{itemize}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} 621 F.2d at 272. \textit{See} Zabel v. Tabb, 430 F.2d 199, 214 (5th Cir. 1970).
\item \textsuperscript{62} 621 F.2d at 270. \textit{See} 33 U.S.C. \textsuperscript{63} § 403 (1976).
\item \textsuperscript{63} \textsuperscript{64} See notes 51-64 and accompanying text \textit{supra}. \textit{See} Scientists' Inst. for Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1089 (D.C. Cir. 1973) (EIS required where federal agency grants permits); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (where federal permit involved federal approval constitutes major federal action); Comment, \textit{The Developing Common Law of "Major Federal Action" Under the National Environmental Policy Act}, 31 Ark. L. Rev. 254, 259 (1977), \textit{see also} 40 C.F.R. 1500.5 (1978) (an action under \$ 102(2) (c) includes projects involving a federal permit).
\item \textsuperscript{64} Sierra Club v. Morton, 400 F. Supp. 610, 644 (N.D. Cal. 1975).
\item \textsuperscript{65} The cases discussed the fact that approval allowed the private party to act, but failed to discuss the scope of the approval. Atlanta Coal. on the Transp. Crises v. Atlanta Reg. Comm'n, 599 F.2d 1333, 1345 n.16 (5th Cir. 1979); NAACP v. Medical Center, Inc., 584 F.2d 619, 633 (3d Cir. 1978); Cady v. Morton, 527 F.2d 786, 793 (9th Cir. 1975); Davis v. Morton, 469 F.2d 593, 596-97 (10th Cir. 1972). \textit{Cf.} Greene County Planning Bd. v. FPC, 455 F.2d 412, 418 (2d Cir. 1972) (permit as federal action was not an issue).
\item \textsuperscript{66} 42 U.S.C. 4332(c) (1976 Ed.). \textit{See} note 2 \textit{supra}.
\end{itemize}
duties to be strictly enforced. The Senate and House conference reports state that the language "fullest extent possible" means agencies should comply with section 102 duties unless "existing law applicable to such agency's operations expressly prohibits or makes full compliance . . . impossible." The conference warns against agency's utilizing "an excessively narrow construction of its existing statutory authorizations to avoid compliance."67 Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, referring to the reports, states that "fullest extent possible" should not be used as "an escape hatch for footdragging agencies."68

NEPA regulations also order strong enforcement of Section 102.69

Following the congressional mandate to strictly adhere to 102(2)(c), an agency should not narrowly interpret "major federal action" to escape filing an EIS.70 Likewise, the court should also avoid overrestricting major federal action.71 Yet the Winnebago court, by adding project-wide approval to the enablement requirements is indeed narrowly interpreting major federal actions to provide an escape hatch for filing an EIS. Such an interpretation, weak in case support, circumvents the Congressional order that EIS duties be enforced "to the fullest extent possible."72

iii) Unitary Test

The project-wide approval requirement also conflicts with the Eighth Circuit unitary test for determining if a federal action is "major". Courts apply two standards for judging "major" action, the majority dual test and the minority unitary test.73 Under the unitary test, the court, after finding federal action, determines if it is major by viewing its impact on the environment.74 In contrast, under the dual test, the court determines major action by viewing not the environmental impact, but the scope of federal activity.75

---

70. See notes 69-70 and accompanying text supra.
71. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (fullest extent possible, a standard which must be rigorously enforced by the reviewing courts).
72. See note 67 and accompanying text supra.
Only if the court finds the federal activity major in scope will it then inquire into its environmental impact.\textsuperscript{76}

The Eighth Circuit adopted the unitary test in \textit{Minnesota Public Interest Research Group v. Butz}.\textsuperscript{77} In that case, the court found that the Forest Service’s modification and extension of logging contracts in a national forest and supervisory activities under the contracts triggered the EIS requirement.\textsuperscript{78} The court viewed the Forest Service activities as enabling, even though their approval activities did not extend to the entire logging project.\textsuperscript{79} The court found the action major because it significantly affected the environment.\textsuperscript{80} Partial government approval, considered enabling, triggered an EIS encompassing the entire logging project.\textsuperscript{81}

\textit{Minnesota Public} criticizes the dual standard for allowing minor federal actions significantly affecting the environment to escape the EIS requirement.\textsuperscript{82} The court stated:

To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purpose of the Act, i.e., to “attain” the widest range of beneficial uses of the environment without degradation, risk to health and safety, or other undesirable and unintended consequences. By bifurcating the statutory language, it would be possible to speak of a “minor federal action significantly affecting the quality of the human environment,” and to hold NEPA inapplicable to such an action. Yet if the action has a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA; the activities of federal agencies cannot be isolated from their impact upon the environment.\textsuperscript{83}

Under the unitary test, even an enabling activity minor is scope, if

\textsuperscript{76} See Hanley v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972). “‘[M]ajor Federal action’ refers to the cost of the project, the amount of planning . . . and the time required to complete it, but does not refer to the impact of the project on the environment.” \textit{Id.}

\textsuperscript{77} See 498 F.2d 1314, 1321-22 (8th Cir. 1974).

\textsuperscript{78} 498 F.2d at 1318. The Forest Service made eleven contracts before the enactment of NEPA. Consequently, for § 102(2) (c) to apply, additional federal action was necessary. \textit{Id.} at 1318.

\textsuperscript{79} \textit{Id.} Approval did not apply entirely to all eleven logging areas. The Forest Service only modified eight of the eleven contracts; the approval applied to only limited areas such as road and camp locations. \textit{Id.}

\textsuperscript{80} \textit{Id.} at 1321.

\textsuperscript{81} \textit{Id.} at 1323 n.29.

\textsuperscript{82} \textit{Id.} at 1321-22.

\textsuperscript{83} \textit{Id.}
it substantially affects the environment, requires an EIS.\textsuperscript{84} \textit{South Dakota v. Andrus} reinforces this notion, stating NEPA has applied where federal actions "are relatively minor but form the basis for enabling the private parties to act."\textsuperscript{85}

Thus, under the Eighth Circuit unitary test, once a federal nexus is shown, the inquiry goes not to the scope of federal activity, but to the environmental repercussions.\textsuperscript{86} Consequently, in \textit{Winnebago}, once a federal nexus resulted from the permit, one need not look at the scope of the federal activity. Hence, there is no reason to require that the permit encompass the entire power line.\textsuperscript{87}

A review of enablement cases, Congressional history of NEPA, and the Eighth Circuit unitary test suggests that these authorities conflict with the idea that enablement must involve approval for the "entire non-federal project." When one rejects this requirement, the section 10 permit is clearly an enablement action.\textsuperscript{88} With enablement marking the entire project as "federal action," the Corps should have reviewed the environmental impact of the entire power line.\textsuperscript{89} Therefore, the plaintiff was correct in alleging as a deficiency in the record, the Corps' failure to consider the entire line.

\textbf{Misapplication of Factual Control}

When \textit{Winnebago} straitjacketed enablement, it also distorted the "factual control" concept. It did so in two ways; first, by applying that concept without following the fact pattern for factual control,\textsuperscript{90} and secondly, by applying a "degree of discretion" test, without recognizing it as a rewording of the enablement concept.\textsuperscript{91}

According to Medical Center, factual control occurs when government approval is less than a discretionary legal precondition to another's activity, but the government's failure to approve could ground the project.\textsuperscript{92} In Medical Center the government lacked

\begin{thebibliography}{99}
\bibitem{87} See notes 74-87 and accompanying text \textit{supra}.
\bibitem{88} See notes 51-63 and accompanying text \textit{supra}.
\bibitem{89} South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980).
\bibitem{90} See notes 94-98 and accompanying text \textit{infra}.
\bibitem{91} See notes 97-99 and accompanying text \textit{infra}.
\bibitem{92} See NAACP v. Medical Center, Inc., 584 F.2d 619, 632-634 (3d Cir. 1978); see also note 16 and accompanying text \textit{supra}; Atlanta Coal. on the Transp. Crises v. Atlanta Reg. Comm'n, 599 F.2d 1333 (5th Cir. 1979). In \textit{Atlanta Coalition}, the federal
discretionary legal control over the hospital expansion plans, yet it had factual control, as the Secretary's failure to approve the plan would halt hospital expansion. The hospital, while legally able to expand, feared building without the government's assurance of continued medicare payments. The Winnebago court held that the Corps had factual, not enabling, control over the project. However, the Corps approval in Winnebago is factually opposite to Medical Center, for the section 10 permit is both discretionary and a legal precondition to the project. The Corps can stop the project, not simply factually, but legally.

Winnebago considers three factors in deciding whether factual control requires project-wide analysis. The court correctly applied the second and third factors, but misapplied the first factor, the "degree of discretion exercised by the agency over the federal portion of the project." This factor is merely a rewording of the enablement principle. The trial court in Medical Center addressed this factor in discussing when a government permit requires an EIS. That court stated that "[t]he typical permit case involve[s] a private activity which cannot be carried on without federal permission. . . . Furthermore, in the typical permit case, the federal agency has discretionary powers." The case then discussed how HEW's approval was not equal to a permit situation and that the decision was ministerial. Thus, we see the Winnebago Court making a circle, applying a "degree of discretion test" to factual control when the test is actually one for enablement.

Winnebago clashes with Medical Center's description of factual control because it enlarges the factual control concept and government had factual control. Under federal law, the Secretary of Transportation was required to approve state and local highway projects in order for the projects to preserve a right for future federal funds. The approval failed as enablement because the approval was neither discretionary nor a legal precondition to building the highway. Id. at 1345 n.16.

Atlanta Coalition presents a more restrictive view of a legal precondition than does Medical Center. Medical Center discussed a third case, Lathan v. Volpe, where a state was legally required to get federal approval before highway construction to insure funding. Even though the approval did not result in a commitment of government funds, it satisfied the legal precondition requirement. NAACP v. Medical Center, Inc., 594 F.2d 619, 633 (3d Cir. 1978); see also Lathan v. Volpe, 455 F.2d 1111, 1115 (9th Cir. 1971). However, in Atlanta Coalition, because approval resulted in no governmental commitment, the legal precondition requirement was not satisfied, 599 F.2d at 1347.

93. NAACP v. Medical Center, Inc., 584 F.2d 619, 634 (3d Cir. 1978).
94. Id. at 630-31.
95. See notes 51-66 and accompanying text supra.
96. 621 F.2d at 272.
97. Id.
thereby diminishes the reach of enablement control. In *Winnebago*, even when federal approval is a discretionary legal precondition, factual control exists unless approval encompasses the entire project. Consequently, the court in deciding factual control asks not only if approval is ministerial or discretionary, but also if the discretion applies to the entire project. However, once one rejects the requirement of "project-wide approval", *Winnebago* will conform to other cases' description of factual control.

**Narrow View of Corps Jurisdiction**

Even assuming enablement requires project-wide approval, the Corps permit can be arguably viewed as approval extending to the entire power line. *Winnebago* states that NEPA does not enlarge the jurisdiction of the Corps of Engineers. However, in *Winnebago*, the Corps' jurisdiction is unclear.

The Corps' section 10 jurisdiction arises from the Rivers and Harbors Act which requires a section 10 permit if one tries to "alter or modify the course, location, condition . . . of any navigable waters." Case law has defined this jurisdiction as activities "in and affecting navigable waters." *Winnebago* narrowly interprets "affecting navigable waters" to mean that the activity requiring the section 10 permit must eventually flow into navigable waters. Thus, while 1.6 miles of the power line is "in navigable waters," the land portion, failing to flow into the Missouri, does not "affect navigable waters." However, the cases cited in *Winnebago* do not clearly support this narrow interpretation. *Winnebago* interprets these cases as requiring jurisdiction when the contested activity affects the streamflow. However, it may be that these cases were limited to this conclusion because they all involved canals or lagoons flowing into navigable waters. These cases, then, do not necessarily

99. 621 F.2d at 272-73.
100. Id. at 272.
103. 621 F.2d at 272 n.3.
105. See United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976) (Corps has jurisdiction because canal flowing into bay ecologically damaged bay); United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1298 (5th Cir. 1976) (canals connected to sound under Corps' jurisdiction because they changed sound's shoreline; no jurisdiction over landlocked canals not affecting sound);
support the proposition that to establish Corps jurisdiction through "effect", the court must look only at activities directly affecting waterflow. In addition, these cases do not consider the Winnebago situation where the power line is partially "in navigable waters" and partially on the land.

United States v. Sexton Cove Estates, Inc., the basis of Winnebago, considers the scope of the section 10 permit. The case states that the Corps has jurisdiction when "alteration or modification of the . . . condition . . . of a navigable water" occurs. United States v. Joseph G. Moretti, Inc., another case cited in Winnebago as defining section 10 jurisdiction, urges a liberal interpretation of the phrase "alteration or modification" of navigable waters. The court says, "[t]hese statutory terms are broad and undefined. So long as activities fall within this generous scope, those activities are subject to the jurisdiction of the Corps." By broadly interpreting the statutory language, one could view the whole power line as altering the fact of the Missouri, for without the entire line no alteration would exist. These cases do not mandate that the land portion must flow into the river to alter its condition

Once the entire powerline is viewed as altering the condition of a navigable stream, the Corps would have project-wide approval over it. Then, even under the restrictive Winnebago test, enabling control would be present requiring the Corps to consider the environmental impact of the entire transmission line.

CONCLUSION

Winnebago refines the enablement concept in the Eighth Circuit. Enablement becomes discretionary governmental approval which is a legal precondition to the entire nonfederal project. While the legal requirement benefits the concept, the project-wide approval requirement unjustifiably restricts enablement theory. Cases, legislative history, and the Eighth Circuit unitary test support vigorous protection of the environment through an EIS.


107. 621 F.2d at 270.
108. 526 F.2d 1293 at 1298.
109. 526 F.2d 1306 at 1309.
110. See notes 106-07 and accompanying text supra.
111. 621 F.2d at 272-73.
Fortunately, *Winnebago* dampens that environmental fervor by adding the word “entire” to the enablement requirements.

*Margaret Schneider—’82*