University of Dayton Law Review

Volume 1 | Number 2 Article 9

May 1976

Environment: Scrap and the Environmental Movement

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ENVIRONMENT: SCRAP AND THE ENVIRONMENTAL MOVEMENT —*Aberdeen and Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975).

In a single year municipal refuse accumulates in an amount which would cover half the area of Connecticut (2,500 square miles) with a layer of refuse one foot thick. The refuse is composed of 12 million tons of iron and steel, 13 million tons of glass, and over a million tons of aluminum, zinc, lead, tin and copper. Nationwide, collecting and disposing of this refuse costs approximately $6 billion annually.[1]

Municipal refuse is ordinarily disposed of by using it for landfill or by putting it through incinerators and burying the residue. Some refuse, however, may be recycled. Recycling favorably affects the environment because (1) the lowered need for incinerators reduces air pollution, (2) the incentive to remove litter increases, and (3) renewable and non-renewable resources are saved.[2]

I. BACKGROUND

In December, 1971, the nation's railroads proposed to the Interstate Commerce Commission (ICC) a temporary, across-the-board increase in freight rates, including the rates on materials to be recycled.[3] This temporary surcharge was to be followed by permanent and larger but more selective increases. Although the ICC subsequently suspended the effectiveness of the larger, permanent increases pending an investigation, it failed to exercise its power to declare the temporary surcharge unlawful.[4] The Students Challenging Regulatory Agency Procedures (SCRAP)[5] became alarmed that collection of the surcharge would adversely affect the environment; it filed suit to enjoin its collection. SCRAP's theory was that the across-the-board increases adversely affected the environment be-

1. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 715 (1973) (Appendix to Opinion of Douglas, J., Dissenting in Part).

2. 412 U.S. at 700.

3. The Interstate Commerce Act reserves to the railroads the initiative for setting rates. 412 U.S. at 672. *See* Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (1959).

4. When the railroads propose new rates, the ICC has the power to investigate and to declare them unlawful if it finds that the proposed rates are unjust, unreasonable, discriminatory, preferential, prejudicial, or otherwise in violation of the Interstate Commerce Act. 49 U.S.C. §§ 13, 15 (1959). The ICC also has the power to suspend a new rate for up to seven months pending determination of its lawfulness. 49 U.S.C. § 15(7) (1959).

The ICC proceeding involved in this case is styled Ex parte 281. The nature of this proceeding is set out in note 22 *infra*.

5. SCRAP is an unincorporated association of law students concerned with enhancing environmental quality.

cause the increased cost of shipping recyclables further aggravated a preexisting disparity in shipping costs between recyclables and the virgin materials with which they competed. As a result, SCRAP alleged, use of recyclables would decrease, refuse would increase, and its members' use of the forests, streams and mountains would be adversely affected.

SCRAP sought relief under the National Environmental Policy Act (NEPA).[6] The Act provides that where any major federal action is contemplated which will significantly affect the quality of the human environment, the responsible federal agency must prepare an "environmental impact statement" to accompany the agency's proposal through the existing agency review processes.[7] SCRAP alleged that the ICC orders permitting the surcharge constituted a "major federal action significantly affecting the quality of the human environment" and therefore required the filing of an environmental impact statement. The ICC had failed to file such a statement.

A three-judge district court[8] considered SCRAP's motion for a

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6. 42 U.S.C. § 4321 *et seq.* (1973).

7. 42 U.S.C. § 4332(2)(C) (1973). That section states:

> 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—
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> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> (iii) alternatives to the proposed action,
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> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

8. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 346 F. Supp. 189 (D.D.C. 1972). The three-judge court was convened pursuant to 28 U.S.C. § 2325 (1965) (originally enacted as Act of Oct. 22, 1913, ch. 32, 38 Stat. 220), now repealed, which states:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, or any order of the Interstate Commerce Commission

preliminary injunction. The court enjoined the railroads from collecting the temporary surcharge on goods being transported for recycling.[9] The Supreme Court reversed and remanded,[10] holding that the district court lacked jurisdiction to enter a preliminary injunction. The Court applied the reasoning it followed in *Arrow Transportation Co. v. Southern Railway Co.*,[11] which held that the ICC had the *exclusive* power under the Interstate Commerce Act to suspend its own rates pending final determination of their lawfulness and denied judicial power to grant such relief.

On October 4, 1972, prior to the *SCRAP I* decision, the ICC issued its final report and order in Ex parte 281.[12] The report approved, with some exceptions, the proposed permanent selective rate increases. Although the statute requires that the impact statement accompany a proposal through the agency review process, no such statement accompanied the report and order here because in the opinion of the ICC the rate increases would not significantly affect the environment. Following protests by SCRAP, the Environmental Protection Agency, and the Council on Environmental Quality, the ICC ordered the new rates as to recyclables suspended until June 10, 1973, and reopened Ex parte 281 for the limited purpose of considering the environmental effects of increased freight rates on goods transported for recycling.[13] The ICC filed a final environmental impact statement on May 7, 1973, some eight months after its final report and order in Ex parte 281. On May 30, SCRAP went back to court seeking to enjoin preliminarily the implementation of the increased rates on recyclables scheduled to go into effect on June 10. The district court granted the injunction, but, upon appeal by the ICC, the Supreme Court vacated and remanded for reconsidera-

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shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

9. The district court also held that plaintiff had standing because it had sufficiently alleged "injury in fact." Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). Plaintiff's allegation was that its members used the State of Washington's forests, streams, mountains, and other resources for camping, hiking, fishing, and sightseeing. Nonuse of recyclables would disturb their use of these natural areas. 346 F. Supp. at 194.

10. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (hereinafter cited as *"SCRAP I"*). The Court first considered plaintiff's standing and affirmed the lower court finding that plaintiff had sufficiently alleged standing. 412 U.S. at 683-90.

11. 372 U.S. 658 (1963).

12. See note 4 *supra*.

13. Following this ICC action, the three-judge district court refused to grant SCRAP's request that the ICC be preliminarily enjoined from collecting the rate increases. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 353 F. Supp. 317 (D.D.C. 1973).

tion in light of *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade.*[14]

On remand[15] the district court declined to enjoin collection of the increased rates on recyclables. However, the court considered in detail[16] the ICC's preparation and use of its final environmental impact statement and concluded that the impact statement did not meet the requirements of 42 U.S.C. §4332(2)(C).[17] The district court ordered, therefore, that the ICC prepare a new environmental impact statement which would comply with the statute and that further oral hearings be conducted by the ICC regarding the impact of the increased rates.[18] The ICC and the railroads appealed to the Supreme Court.

II. The Supreme Court's Second SCRAP Decision

The *SCRAP II* decision[19] is the first instance of substantive consideration by the Supreme Court of the impact of NEPA upon federal agencies.[20]

The first NEPA-related issue to be determined by the Court[21] was whether a federal district court has jurisdiction to hear an appeal when the ICC decides, as part of a general revenue proceeding,[22] not to declare proposed rate increases unlawful. The Court

14. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 414 U.S. 1035 (1973). In Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973), the Supreme Court reversed a district court decision to vacate an ICC order approving increased charges because the reasons for approval were, in the opinion of the district court, inadequate.

15. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) v. United States, 371 F. Supp. 1291 (D.D.C. 1972).

16. 371 F. Supp. at 1298-1306.

17. See note 7 *supra*.

18. 371 F. Supp. at 1306-07.

19. Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP), 422 U.S. 289 (1975) (hereinafter cited as "*SCRAP II*").

20. In the first portion of its opinion, the Court considered a challenge to its jurisdiction raised under 28 U.S.C. § 1253 (1966) which vests the Supreme Court with appellate jurisdiction over orders granting or denying an injunction in a civil action. The question was whether the district court order appealed from was an injunction as used in § 1253. The Supreme Court held that the district court order was "cast in injunctive terms" and interfered with an ICC order. Therefore, the district court order was an injunction within the meaning of § 1253 and the Supreme Court had jurisdiction.

21. 422 U.S. at 311-19.

22. A general revenue proceeding is an ICC procedure which is held when the railroads have requested across-the-board increases in all or nearly all of their rates. This sort of across-the-board increase presents enormous practical problems of investigation to determine lawfulness which do not exist where rates on only one commodity are involved. The Supreme Court recognized these practical problems and as a result permitted the ICC to find the proposed new rates lawful after taking proof as to the reasonableness of the rates in general. New England Divisions Case, 261 U.S. 184, 196-98 (1923). In United States v. Louisiana, 290

held that even though a general revenue proceeding is an interim one in the rate-making process, the ICC, when it terminated Ex parte 281, had finally decided to give no further consideration to environmental factors in that proceeding. Since no further relief could be obtained from the agency, the Court held that the district court properly had jurisdiction to review the adequacy of the ICC's consideration of environmental factors.

A second issue presented by *SCRAP II* was whether the district court was correct in finding that the environmental impact statement finally prepared by the ICC was deficient in light of the statute.[23] The Court overturned the district court's holding that the ICC's impact statement failed to meet specific statutory standards. Instead, the Court found that environmental considerations "pervaded" the proceeding and that "environmental issues far outweighed the financial issues usually thought controlling at a general revenue proceeding."[24] The impact statement was therefore deemed sufficient. The district court's analysis of the impact statement, which applied the strict compliance standard adopted by federal courts in other cases,[25] makes clear that the Supreme Court's deci-

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U.S. 70, 76-78 (1933), the Court approved an ICC procedure permitting an across-the-board rate increase to become effective after investigation without a finding that each new rate was reasonable. The ICC simply declined to declare the increase unlawful.

Questions on increases for individual commodities may be reviewed under a separate, appellate-type procedure provided for in 49 U.S.C. §§ 13, 15 (1959). The availability of § 13 and § 15 appeals imbues the general revenue proceeding with the characteristics of an interim procedure in the rate increase process where across-the-board increases are at issue.

The railroads are generally acutely in need of revenues when they request across-the-board increases. Therefore, it has been the custom of the ICC in general revenue proceedings to expedite the effective date of the increase by limiting its investigation to substantiating the financial need of the railroads for revenues.

The parties agreed here that a general revenue proceeding is a "major federal action" within the meaning of NEPA, and the Court does not discuss that point. The lower federal courts, however, have spent some time discussing that issue. The question of whether an action is "federal" has been broadly construed, and only a few cases have been dismissed because the proposed action was not sufficiently federal. In that regard, *see* Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972); Julis v. Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972).

23. The courts have also liberally construed what a "major" action is and have found actions not to be major in only a few cases. For attempts to define "major action," *see* Citizens Organized to Defend the Environment v. Volpe, 353 F. Supp. 520 (S.D. Ohio 1972); Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972). Cases where federal action has been found not to be major are Kisner v. Butz, 350 F. Supp. 310 (N.D. W.Va. 1972); Julis v. Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972).

24. 422 U.S. at 327.

25. On its face the statute appears to exact a strict standard by requiring compliance "to the fullest extent possible." 42 U.S.C. § 4332 (1973). The courts have reinforced that appearance by holding that strict compliance is called for: Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) was the first major case to so hold, and it has been followed in Environmental Defense Fund v. Corps of Eng'rs, 342

sion on this point is a regrettable one.

The district court noted at the outset that the ICC had prepared an impact statement only after an "avalanche" of criticism greeted its October 4 order,[26] and also found that the ICC failed to comply with the statutory requirement that the impact statement accompany the proposal through existing agency review processes.[27] It criticized the failure of the ICC to prepare an impact statement for the hearing prior to its October 4, 1971 order and its failure to permit a hearing after the draft impact statement had been filed in March, 1972. Although the impact statement met the requirements of the statute as to form, it was found that pro forma compliance was insufficient.[28] The specific findings of the district court included the following:

(1) The statute requires compliance "to the fullest extent possible."[29] The ICC had failed to make a full and good faith consideration of the environmental issues as required by the statute. The impact statement was inappropriate in language and style; the ICC's posture in the impact statement was defensive and advocatory.

(2) Further, the ICC had failed to alter its draft impact statement in light of critical comments received from the Department of Commerce, the Environmental Protection Agency, and the Council on Environmental Quality.[30]

(3) Most important, the impact statement failed to analyze whether the underlying rate structure significantly affected the en-

F. Supp. 1211 (E.D. Ark.), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972); Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972); Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971).

26. 371 F. Supp. at 1299.

27. *Id.* at 1299-1300.

28. *Id.* at 1301-07.

29. 42 U.S.C. § 4322 (1970).

30. The comments were as follows:

(1) The Department of Commerce and the Environmental Protection Agency suggested that the ICC study the responsiveness of demand for secondary materials to changes in transportation costs. The ICC had criticized in its impact statement a private study dealing with this issue, but had not made its own study. 371 F. Supp. at 1302-03.

(2) The Environmental Protection Agency made reference in its comments to a Department of Transportation study dealing with secondary materials which were producing more revenue over costs than virgin materials. The ICC made no alternative analysis of the relative cost contribution of secondary and primary materials. *Id.* at 1303.

(3) The Environmental Protection Agency and the Council on Environmental Quality criticized the ICC's failure to consider the impact of the rate increases on investment in facilities which make better use of recyclable materials. The ICC did not modify its impact statement as a result of this criticism; it made no analysis of whether holding rates down might encourage investment. *Id.*

vironment. If the existing rate structure adversely affected the environment, a presumption would arise that increasing the rates aggravated that impact. The ICC's separate investigation into the underlying rate structure (Ex parte 270—which had been in progress for two years) was not a substitute for a detailed impact statement prepared before federal action was taken. Ex parte 270 would provide only reconsideration of action already taken.

Without disclosing why the standards of compliance applied by the lower court here and by other federal courts were inapplicable, the Supreme Court apparently accepted a loose approximation of the required statutory performance by federal agencies. The Court justified its decision by characterizing the "federal action" as limited and non-final and by finding that environmental issues "pervaded" the proceedings.[31] Strict compliance with the statute under these circumstances was apparently deemed not necessary.

The third issue which the Supreme Court discussed was whether the hearing held prior to the October 4 order was an "existing agency review process" at which a final draft impact statement should have been available and whether the ICC should have recommenced its hearing after deciding to prepare an impact statement.[32] The Court held that the ICC need not prepare a new impact statement and reinstitute its hearing in light of the new impact as the district court had required. The Court also found that a final impact statement need not be available until the ICC issued its order effectuating the increased rates. The ICC's order approving the general rate increases becomes, under the Court's reasoning, the agency's "proposal" for rate increases within the meaning of NEPA, even though the proposal is issued after opportunity to be heard has passed. While granting the assumption that the ICC was tardy in its preparation and presentation of its impact statement, the Court nevertheless found that the ICC need not start its proceedings from the beginning. Instead, the Court held that the agency had acted correctly in limiting its reopened hearing, which had merely considered the general increase in light of a final impact statement filed some eight months after official approval of the rate increases.

To summarize, the Supreme Court has affirmed the jurisdiction of a district court to review the ICC compliance with NEPA in general revenue proceedings, holding that such a decision is a major federal action for which an environmental impact statement is required. However, in reviewing the adequacy of the ICC's impact

31. 422 U.S. at 322-28.
32. *Id.* at 319-22.

statement prepared for a general revenue proceeding, a district court under *SCRAP II* may abandon a strict statutory compliance approach and rather may look to the *overall* nature of the proceeding to determine whether the environmental impact statement is sufficient. Moreover, the ICC is not required to have available a final impact statement at the time the railroads submit their proposal for generally increased rates. Instead, it may be made available *after* the general revenue hearing has concluded (and therefore after opportunity for cross-examination has vanished) and at the time the ICC issues its order as to the lawfulness of the increases.

III. Conclusion

It is unfortunate that the first NEPA case to reach the Supreme Court involved the rate-making procedure of an independent agency, a procedure common to only a few federal agencies.[33] Because the rate-making procedure is so specialized, this case should be limited closely to its facts. It should not be considered controlling except to rate-making agencies whose procedures closely parallel the ICC's general revenue proceeding.[34]

The Supreme Court, understandably, has opted for the practical approach rather than an approach which might follow more closely the strictly technical and philosophically satisfying statutory requirements. In this regard, it must be understood that a general revenue proceeding is permitted because the railroads' proposed increases are generated by an immediate need for revenues. It is therefore necessary that the ICC act quickly. If the ICC were to become entangled in complicated environmental issues, the effectiveness of the revenue proceeding would be lost and the nation's rail system presumably endangered. Mindful of the need for speed, the Court reasoned that where environmental issues were pervasive, the requirements of NEPA would be satisified even though the impact statement was inadequate by statutory standards. The Court was also influenced by Ex parte 270, the ongoing investigation into the underlying rate structure as it applied to specific commodities, including recyclables. In view of the limited nature of the general revenue proceeding and separate inquiry into the underlying rate structure as applied, the Court apparently was comfortable with its

33. Other rate-making agencies and the statutes dealing with rate-making procedures are: Civil Aeronautics Board, 49 U.S.C. § 1482(d), (e), and (g) (1963); Federal Communications Commission, 47 U.S.C. § 204 (1970); Federal Maritime Commission, 46 U.S.C. § 817 (1975); Federal Power Commission, 16 U.S.C. § 824d(d) and (e) (1970).

34. The Civil Aeronautics Board has a procedure known as a general passenger fare investigation which appears to be similar to the ICC's general revenue proceeding.

finding that there was sufficient consideration of the environmental issues in the general revenue proceeding.

It is submitted that the Court in *SCRAP II* has dealt the Environmental Policy Act a setback. First, the lower federal courts, as noted, have consistently insisted that agencies preparing impact statements maintain strict compliance with the letter and the spirit of the Act. A reading of the district court opinion in this case shows that the impact statement was indeed deficient according to the requirements of the Act. The fact that environmental issues pervaded the *proceeding* should not suffice under NEPA where the *impact statement* itself is insufficient.

Second, the Act and the legislative history are clear that Congress intended that agencies must become accustomed to considering environmental issues along with economic and technical issues when major federal action is still in the policy stage. The Court, when it does not require an agency impact statement to be filed before a final order with respect to rates, deprives the affected parties of a fair hearing on environmental issues and allows an agency to impose minimal or no environmental safeguards rather than requiring the impact statement to form an important, well-considered *basis* of its decision.

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