Another environmental issue that the Fifth Circuit did not consider during this survey period involves the question of whether the EPA can force a state to implement federal requirements under the Clean Air Act. This issue is currently creating considerable controversy in other circuits. In *Texas v. EPA*,[11] a case arising during the preceding survey year, the EPA maintained that a number of transportation control measures were necessary to attain and maintain the national standard for photochemical oxidants. When Texas refused to implement the measures, the EPA disapproved the state plan and promulgated the disputed federal requirements. Texas filed a petition for review in the Fifth Circuit.[12] One of the 25 appellants in the case argued that although the EPA could implement the contested controls itself, it could not constitutionally force a state to enact and enforce the federal measures.[13]

The court did not address this argument. Its stated reasons for failing to do so were that the argument was not made below and that the State of Texas itself raised no such objection.[14] Recently, however, in cases involving transportation control plans very similar to the plan challenged in *Texas v. EPA*, two other circuits[15] have held that the EPA cannot impose sanctions against a state that fails to implement federally mandated measures. These cases will probably be appealed by the EPA to the United States Supreme Court. In light of these and other issues yet to be resolved, there is little doubt that the forthcoming year will be of great interest to environmental courtwatchers.

Survey

I. National Environmental Policy Act

A. *Necessity of Environmental Impact Statement*

Pursuant to the mandate of the National Environmental Policy

11. 499 F.2d 289 (5th Cir. 1974).

12. *Id.* at 293-94.

13. *Id.* at 320.

14. The real explanation is probably that the record in the case comprised over 20,000 pages. Any point, if not emphasized more strongly than was this particular argument, could easily be overlooked in such a voluminous record. Furthermore, Judge Bell in his 28-page opinion evidenced some of his frustration with the complexity of the case when he wrote, "Lest we make of this case a career . . . ." Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974).

15. Maryland v. EPA, No. 74-1007 (4th Cir., Sept. 19, 1975); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975).

Act of 1969 (NEPA),[1] all federal agencies must file an environmental impact statement (EIS) before engaging in activities that will significantly affect the quality of the human environment.[2] When an impact statement is required, it must disclose to the fullest extent possible the environmental impact of proposed federal action.[3] The fact that the dictates of NEPA are supplementary to the mandates in existing statutory authorization for federal agencies does not obviate the requirement that all federal agencies conduct their activities in accordance with NEPA.[4] If compliance by an agency would clearly violate its statutory authorization, however, compliance with NEPA is excused.[5] In *Louisiana v. FPC*[6] the Fifth Circuit was called upon to determine whether section 102(c) of NEPA required the Federal Power Commission (FPC) to compile an EIS before instituting permanent natural gas curtailment plans.[7]

Plaintiffs in *Louisiana v. FPC* were large industrial consumers threatened by gas curtailment under a new distribution plan approved by the FPC.[8] The objective of the suit was to delay the effective date of the new plan so that plaintiffs would continue to receive gas pursuant to an existing supply contract with United Gas Pipe Line Company.[9] Under the permanent curtailment plan devised by the FPC, plaintiffs would be forced to burn fuels that created more air pollution than the fuel they were using—natural gas. Therefore, plaintiffs argued that the action by the FPC would significantly affect the quality of the environment and that the FPC was required to file an EIS.[10] The FPC argued that it did not have to comply with section 102 because the statutory duty of the FPC required it to construct curtailment plans and section 102 directly conflicted with this duty.[11] Although the Fifth Circuit recognized that NEPA does not require the FPC to file impact statements for mere interim curtailment plans, it rejected the FPC argument con-

1. 42 U.S.C. §§ 4321 *et seq.* (1970).
2. National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970).
3. *Id.*
4. Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971), *citing* 115 CONG. REC. 39703 (1969).
5. *Id.*
6. 503 F.2d 844 (5th Cir. Dec. 1974).
7. *Id.* at 873-74.
8. *Id.* at 876.
9. *Id.*
10. *Id.*
11. *Id.*

cerning permanent curtailment plans and held that the latter are subject to the requirements of section 102.[12]

The court noted that noncompliance with the provisions of NEPA is permitted only when a federal agency can demonstrate that its statutory duty expressly prohibits full compliance with one of the directives of the Act or makes such compliance impossible.[13] Absent these considerations, the court concluded that the language of section 102 requiring compliance "to the fullest extent possible" was not intended by Congress to provide federal agencies with a means to avoid compliance with NEPA.[14] Because the FPC could not show that compliance with section 102 conflicted with the duty and ability of the agency to devise permanent curtailment plans, the Fifth Circuit required that an EIS be compiled.[15]

B. Direct Participation by Interested Party in Underlying Environmental Studies

Controversy also arose in the Fifth Circuit regarding the source of material utilized by a federal agency in compiling its EIS. In *Sierra Club v. Lynn*[16] Judge Clark, writing for the court, held that an EIS was not fatally defective because a person interested in a favorable EIS had directly participated in the underlying environmental studies for the project.[17] The court found that the provisions of NEPA did not prohibit an interested party from providing a federal agency with data, groundwork environmental studies, or other materials used in the preparation of an EIS.[18]

Judge Clark did caution, however, that the EIS should not be a "rubber stamp" of the work product of the interested party.[19] He further concluded that the federal agency must independently perform its reviewing, analytical, and judgmental functions and that

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12. *Id.*

13. *Id; accord*, Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

14. *Id.*

15. *Id.*

16. 502 F.2d 43 (5th Cir. Oct. 1974).

17. *Id.* at 59.

18. *Id.* "To assist the proposed action, applicants for a grant or contract may be required to submit with their original application an environmental assessment . . . . The Agency may also request additional environmental data or analysis to supplement the assessment." 40 C.F.R. § 6.21(c) (1973), *as amended*, 40 C.F.R. § 6.202 (1975).

19. 502 F.2d at 59. The court found no such rubber stamping in *Lynn* because HUD had engaged its own team to compose the EIS and had utilized the independent research and analyssis of its own experts.

it must participate actively and significantly in the preparation and drafting of the final EIS.[20]

C. *Adequacy of the Environmental Impact Statement*

The Fifth Circuit in *Sierra Club v. Morton*[21] chose to follow the analysis of the First Circuit[22] concerning the functions to be performed by the "detailed statement" required by section 102(d) of NEPA. The court in *Morton* concluded that an EIS serves at least three functions.[23] Judge Clark, writing for the court, emphasized that an impact statement permits a court to ascertain whether any agency has made a good faith effort to take into account the values NEPA seeks to safeguard;[24] that it serves as an environmental full disclosure law containing the information Congress thought the public should have concerning the particular environmental costs involved in proposed federal projects;[25] and that it helps to insure the integrity of the decision-making process by preventing stubborn environmental problems and serious criticism from being swept under the rug.[26]

In *Morton*[27] the Fifth Circuit found that the Interior Department had fulfilled these requirements in connection with proposed oil leases off the coasts of Mississippi, Alabama, and Florida even though the "pre-EIS research was either inadequate or nonexistent in some specific areas."[28] Because the significant effects of the proposed action were recognized and presented in the final EIS and because the EIS contained an evaluation of the long-term environmental hazards and detriments of the project, the EIS met the rule of reason test utilized by the court in testing the adequacy of an EIS. Therefore, the decision to proceed with the project was not arbitrary

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20. *Id; accord*, Citizens Environmental Council v. Volpe, 484 F.2d 870, 873 (10th Cir. 1973).

21. 510 F.2d 813, 819 (5th Cir. Mar. 1975).

22. *See* Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir. 1973).

23. Sierra Club v. Morton, 510 F.2d 813, 819-20 (5th Cir. Mar. 1975).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 820-26. Four specific omissions from the EIS were asserted by plaintiffs. First, the statement did not include sufficient analysis of present air and water quality in the area affected. Second, the statement failed to assess each ecosystem as to its unique character, productivity, and manner in which it operates. Third, the statement did not describe the operation of the Eastern Gulf ecosystem as a unit. Fourth, detailed geological data was absent from the statement. *Id.* at 820-21.

or capricious.[29]

This finding by the *Morton* court is consonant with the finding of EIS sufficiency in *Sierra Club v. Lynn*,[30] an earlier current decision. In *Lynn*, although the court found the preliminary and "final" EIS's inadequate, it held that an addendum to the "final" EIS had corrected the deficiencies.[31] Judge Clark, writing for the court, indicated that post-submission efforts to rehabilitate an inadequate EIS so that it comports with the provisions of NEPA should not be barred by initial inadequacies of the statement.[32]

The court in *Morton*, however, despite its literal "detailed statement" requirement, allowed the Department of the Interior to conduct certain tests after the filing of the EIS. The final impact statement disclosed that the tests were scheduled to be run after the proposed action was instituted. The EIS also provided, however, that prior to the approval of drilling permits, the lessees were required to submit a drilling operation plan to the Department of the Interior. These plans were to contain suitable safety procedures necessary to control hazards anticipated by the EIS.[33] In finding the EIS sufficient, the court rejected plaintiff's argument, on these facts, that the EIS "must stand the test alone—i.e., in and of itself it must either meet the requirements of NEPA or fail."[34]

The court found that the Interior Department tests did not have to be run prior to the negotiation of the leases so that their results could be included in the EIS.[35] In finding that the results of the tests could be omitted from the EIS, the court emphasized that the leasing regulations of the Interior Department should be consid-

29. *Id.* at 819, 829. NEPA does not specify the standard of review that courts are to use in reviewing agency action pursuant thereto. Therefore, there is no uniformity between the circuits as to what test is to be applied. The Eighth Circuit, in Environmental Defense Fund, Inc. v. Frohlke, 473 F.2d 346 (8th Cir. 1972), has held that the review is a limited one for the purpose of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in the Act and whether the actual balance of costs and benefits struck by the agency according to these standards was arbitrary or clearly gave weight to environmental factors. *Id.* at 353. In National Helium Corp. v. Morton, 486 F.2d 955 (10th Cir. 1973), however, the Tenth Circuit required only that the federal agency involved exercise an objective good faith effort to comply with the mandate of NEPA. *Id.* at 1001.

30. 502 F.2d 43 (5th Cir. Oct. 1975).

31. *Id.* at 60.

32. *Id.*

33. Sierra Club v. Morton, 510 F.2d 813 (5th Cir. Mar. 1975).

34. *Id.* at 827.

35. *Id.* at 828.

ered in concert with the EIS.[36] These leasing regulations, which contain environmental safeguards, were required to have been complied with by the lessee throughout the term of the lease. Noncompliance by the lessee with the regulations, the court noted, could result in forfeiture of the rights of the lessee under the lease and could thus foreclose any further activity pursuant to the lease.[37] Because the leasing regulations permitted the Interior Department to make adjustments in operating procedures as they became necessary, the court concluded that this factor should be considered in determining the sufficiency of the EIS and the material contained therein.[38]

Although they appear to be very pragmatic, the decisions of the Fifth Circuit in *Morton*[39] and *Lynn*[40] may tear at the very underpinnings of NEPA. Because an EIS serves as the basis for the comparison of benefits of a proposed project with its environmental risks, the EIS becomes the central component for decisionmaking under NEPA. To serve its purpose, an EIS must be prepared and circulated for comment prior to the first decision to engage in major federal action.[41] Only then can the danger that environmental factors will be given merely pro forma consideration be abated. To allow any type of major decision to be based on less than a full and complete EIS at the early decision-making stage is to invite predisposition and post hoc rationalization into the decision-making process.[42] It is logical to assume that once a decision has been made, even if it is a tentative decision, later review personnel within an agency may review subsequent data with less than detached objectivity. Furthermore, practices such as those sanctioned by the court in *Morton* and *Lynn* may result in significant decisions being made when public debate and awareness have already subsided. Therefore, one of the most basic purposes and functions served by an EIS may be thwarted.[43]

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36. *Id.*

37. *Id.* However, if the Department of Interior is required to compile an EIS before exercising such controls, the court's analysis loses much of its vitality. See *supra* note 6 and accompanying text. *See also* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

38. *Id.*

39. 510 F.2d 813 (5th Cir. Mar. 1975).

40. 502 F.2d 43 (5th Cir. Oct. 1974).

41. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1129-30 (5th Cir. 1974).

42. Sierra Club v. Froehlke, 486 F.2d 949, 950-51 (7th Cir. 1973); Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115-18 (D.C. Cir. 1971).

43. *See* National Environmental Policy Act of 1969 § 10k, 42 U.S.C. § 4331 (1970);

D. Cost/Benefit—Judicial Review

Cost/benefit analysis is used by government agencies to determine whether a proposed public investment will result in an efficient allocation of resources. Although NEPA does not expressly require that a cost/benefit analysis be included in an EIS, it is generally held that NEPA does mandate a rigorous balancing of costs and benefits so that optimally beneficial action may be taken by a federal agency.[44] Additionally, many agencies are statutorily required to compile a cost/benefit analysis before instituting a project.[45] The issue that has troubled the courts is whether environmental factors should be quantified and included as part of the costs of a project which are to be compared to that project's estimated benefits. The effect of such inclusion may be that the costs exceed the benefits and, therefore, that the project cannot proceed.[46] In its analysis of section 102 of NEPA, the Fifth Circuit has never really come to grips with the problem.

102(2)(c)(iv) of NEPA states that an EIS must analyze the "relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."[47] The primary goal of the section is to assure that the economic and technical benefits of planned action are assessed and weighed against the environmental costs of a proposed federal project.[48] Although the Fifth Circuit recognizes that an EIS must reflect environmental as well as other costs and benefits,[49] in *Sierra Club v. Morton*[50] it rejected the contention that this cost/benefit ratio be determined by the use of a specific mathematical equation.[51]

In *Morton* the court concluded that NEPA requires only that federal agencies search out, develop, and follow procedures reasona-

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Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 294-98 (8th Cir. 1972).

44. Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1123-28 (D.C. Cir. 1971).

45. *E.g.*, 37 Fed. Reg. 15015, 15018 (1972).

46. For an excellent discussion of the cost/benefit problem, see Note, *Cost-Benefit Analysis in the Courts: Judicial Review Under NEPA*, 9 GA. L. REV. 417 (1975).

47. National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1970).

48. Clavert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1113, 1123 (D.C. Cir. 1971).

49. Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. Mar. 1975). *See* Skillern, *Introduction to Environmental Law, Fifth Circuit Survey*, 6 TEX. TECH. L. REV. 621, 625 (1975).

50. 510 F.2d 813 (5th Cir. Mar. 1975).

51. *Id.* at 827.

bly calculated to equate environmental factors with economic and technological factors before engaging in a program that will significantly affect the environment.[52] The court indicated, however, that this does not require a federal agency to total up dollars and cents in a sort of profit-loss ledger.[53]

E. Award of Attorneys' Fees

In the last year one of the most controversial issues litigated in connection with environmental suits was whether attorneys' fees are recoverable by plaintiffs who successfully advance environmental litigation.

In *Sierra Club v. Lynn*[54] the district court awarded plaintiffs attorneys' fees on the theory that they had acted as private attorneys general and had advanced the public interest by ensuring that adequate precautions would be taken to protect the environment.[55] On appeal the Fifth Circuit reversed the district court's judgment in *Lynn* and expressly refused to follow *Wilderness Society v. Morton*[56] in which the District of Columbia Circuit had previously allowed recovery of such attorneys' fees.

The resultant conflict between the Courts of Appeals for the Fifth and District of Columbia Circuits was later resolved by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.[57] Justice White, writing for the majority in that case, disallowed the recovery of attorneys' fees granted by the District of Columbia Circuit.[58] Although the Supreme Court recognized that the encouragement of private action to implement public policy is desirable, it refused to allow such fees in *Alyeska* because there was no statutory authority authorizing the award of attorneys' fees in envi-

52. *Id.*

53. *Id.* Although 42 U.S.C. § 4332(2)(B) (1970) requires that all agencies of the federal government shall "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical consideration," the court dismissed Sierra Club's argument on the point and held that the section is satisfied merely by the good faith attempt of an agency to balance the ecological and economic factors. 510 F.2d at 827.

54. 502 F.2d 43 (5th Cir. Oct. 1974).

55. *Id.* at 65.

56. 495 F.2d 1026 (D.C. Cir. 1974), *rev'd*, 421 U.S. 240 (1975).

57. 421 U.S. 240 (1975).

58. *Id.*

ronmental litigation.[59] The Fifth Circuit decision in *Lynn* thus comported with the result reached by the Supreme Court in *Alyeska*.

F. Laches in Instituting Environmental Suits

In *Ecology Center of Louisiana, Inc. v. Coleman*[60] the Fifth Circuit reiterated that the doctrine of laches is applicable to suits brought under NEPA.[61] In this case plaintiffs attacked the sufficiency of an EIS prepared in connection with a proposed highway bypass around the city of New Orleans. Because 2 years had elapsed between the filing of the final EIS and plaintiffs' suit and because over $1 million had already been spent for property acquisitions for the project, the district court held that the suit was barred by laches.[62]

Judge Godbold, writing for the Fifth Circuit, indicated that a defendant must demonstrate the presence of three elements before laches is applicable:[63] (1) delay by plaintiff in the assertion of a claim, (2) that the delay was not excusable, and (3) that defendant was unduly prejudiced by the delayed assertion of the claim.[64]

To determine whether the last factor existed in *Coleman*, Judge Godbold looked to the actual Federal Highway Authority expenditures and then to the congressionally determined public interest fulfilled by the Highway Authority. He concluded that the Highway Authority was charged by Congress with "affirmatively considering both the transportational needs and the environmental needs of the people in the area."[65] Judge Godbold noted that the money already spent by the Highway Department was slight in comparison with the total expected expenditure. Because of this and the fact that the department had failed to show that special prejudice would result if construction was halted pending the suit, the Fifth Circuit held that the suit was not barred by laches.[66]

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59. *Id.* For a more complete discussion of this topic, see Note, *Awards of Attorneys' Fees Are Not Permissible Under a Non-Statutory Private Attorney General Doctrine*, 7 TEX. TECH L. REV. 122 (1975).

60. 515 F.2d 860 (5th Cir. July 1975).

61. *Id.*

62. *Id.* at 864.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

II. CLEAN AIR AMENDMENTS

The Clean Air Act represents congressional response to findings that rapid urbanization and increasing use of motor vehciles present mounting dangers to the public health and welfare.[67] Pursuant to the Act, states are required to develop plans for implementation, maintenance, and enforcement of clean air standards prescribed by the Administrator of the Environmental Protection Agency (EPA).[68] Unless exempted by presidential order, the Act requires that federal agencies comply with state implementation plans.[69] A question has arisen, however, over the degree of compliance required by federal agencies, with the Sixth[70] and Fifth Circuits taking opposing positions. The Fifth Circuit recently determined that full compliance with the Act by federal agencies is required.[71]

In *Alabama v. Seeber*[72] the State of Alabama and the Alabama Air Pollution Control Commission brought an action for declaratory and injunctive relief to require the Tennessee Valley Authority (TVA) to obtain a state permit for the operation of equipment that caused air pollution. The Alabama permit requirement was a part of the implementation plan formulated by Alabama and approved by the Administrator of the EPA in accordance with section 110 of the Clean Air Act.[73] TVA had supplied information concerning emissions and took steps to abate them, but had refused to apply for the operating permit required by Alabama law.[74] TVA contended that the Act did not subject it to the Alabama permit requirement.[75] TVA argued that the Act required it to comply with the "substantive" standards and limitations of Alabama law but that it was exempted from compliance with "mechanisms" of enforcement such as Alabama's permit requirement.[76]

Writing for the Fifth Circuit, Judge Godbold concluded that adherence to the Act required TVA compliance with state enforce-

67. 42 U.S.C. § 1857(a) (1970).
68. 42 U.S.C. § 1857c-5 (1970), *as amended*, 42 U.S.C.A. § 1857c-5 (Supp. 1975).
69. 42 U.S.C. § 1857f (1970).
70. Kentucky v. Ruckelshaus, 497 F.2d 1172 (6th Cir. 1974).
71. Alabama v. Seeber, 502 F.2d 1238 (5th Cir. Oct. 1974). *Seeber* is also discussed by Environmental Introduction author Pamela Giblin. See Survey, p. 459, *supra*.
72. 502 F.2d 1238 (5th Cir. Oct. 1974).
73. *Id.* *See* 42 U.S.C. §§ 1857c-5(a)(2)(F)(iii) to (iv) (1970).
74. 502 F.2d 1238.
75. *Id.* at 1242.
76. *Id.* at 1245.

ment mechanisms guaranteed by section 116 of the Act.[77] He noted also that although sections 111,[78] 112,[79] and 114[80] of the Act provide explicit exemptions for some federal facilities regarding certain classes of air pollution, section 110[81] contains no exemption for federal facilities. Therefore, implementation plans adopted pursuant to section 110, including permit systems, were found to apply to federal facilities.[82]

As additional support for its decision in *Seeber*, the Fifth Circuit relied on the legislative history and background of section 118 of the Clean Air Amendments of 1970.[83] The court found that Congress was displeased with the policy of voluntary compliance by federal facilities that had existed under the Air Quality Act of 1967 and therefore enacted section 118 to strengthen that Act.[84] The court thus found that to uphold the contention of the TVA that it was exempted from the Alabama permit requirement "would be tantamount to a return to the Congressionally rejected policy of voluntary compliance by federal facilities."[85]

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77. *Id.* at 1243.
78. 42 U.S.C. § 1857c-6 (1970).
79. 42 U.S.C. § 1857c-7 (1970).
80. 42 U.S.C. § 1857c-9 (1970).
81. 42 U.S.C.A. § 1857c-5 (1970), *as amended*, 42 U.S.C.A. § 1857c-5 (Supp. 1975).
82. 502 F.2d 1238.
83. *Id. See* 42 U.S.C. § 1857f (1970).
84. *Id.*
85. *Id.* at 1245.