

NOTE

Citizens Against Burlington, Inc. v. Busey, THE NARROWING OF THE SCOPE OF NEPA'S ALTERNATIVE ANALYSIS

The city of Toledo, Ohio sought Federal Aviation Administration (FAA) approval of a plan to expand the Toledo Express Airport. The city's objective was to construct a new cargo hub for Burlington Air Express (Burlington) to accommodate the Company's decision to move its base of operations from Fort Wayne, IN, to Toledo. As required by the National Environmental Policy Act of 1969 (NEPA), the FAA published an environmental impact statement (EIS) prior to issuing an order endorsing the city's plan. A group of Toledo residents, organized under the name of Citizens Against Burlington (Citizens), sought judicial review of the FAA order, challenging the adequacy of the impact statement on several grounds. The thrust of Citizens argument was that the FAA's EIS failed to address all reasonable alternatives to the airport expansion and that the FAA violated federal regulations by publishing an impact statement that was prepared by a contractor selected by the city. The United States Court of Appeals for the District of Columbia Circuit *held* that (1) FAA complied with NEPA in publishing an impact statement that discussed in depth only the alternatives of approving the expansion as planned and not approving of it at all, and (2) FAA violated federal regulations by publishing an impact statement that was prepared by a contractor that the agency itself did not select. The court noted, however, that this breach did not invalidate the statement since its objectivity and integrity were not compromised. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

In passing NEPA,¹ Congress intended to declare a national policy which would "encourage productive and enjoyable harmony between man and his environment."² While such a sweeping purpose is characteristic of the environmental legislation of

1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(b) (1988).

2. 42 U.S.C. § 4321.

the period, NEPA is unique in that its mandates are wholly procedural. Rather than focusing on the creation and enforcement of numerical standards, the Act only requires that agencies look hard at the environmental effects of their decisions.³ Whenever federal agencies contemplate undertaking "major Federal actions significantly affecting the quality of the human environment,"⁴ they must prepare an impact statement that outlines such effects on the environment.⁵

The EIS is meant "to serve as an action-forcing device to ensure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal government."⁶ The NEPA provision which is aimed foremost at accomplishing this infusion of policies, the very heart of the EIS,⁷ is the requirement that agencies discuss "alternatives to the proposed action."⁸ However, because the term "alternatives" is not "self-defining,"⁹ agencies themselves face the problem of determining the proper scope of alternatives they are required to consider. In bearing this responsibility, agencies can look first to federal regulations for guidance.

Pursuant to NEPA, the Council on Environmental Quality (CEQ) promulgated regulations to further outline the provisions of the Act.¹⁰ The regulations state that the EIS "shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."¹¹ What the CEQ regulations add to NEPA, then, is a notion of feasibility. However, the *Citizens Against Burlington* court itself noted that "the adjective 'reasonable' is no more self-defining than the noun it modifies."¹² The result has been that the courts have played a significant role in defining the scope of alternatives to be considered.

3. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) (citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)).

4. 42 U.S.C. § 4332(2)(C).

5. *Id.*

6. Environmental Impact Statement, 40 C.F.R. § 1502.1.

7. 40 C.F.R. § 1502.14 (1992).

8. 42 U.S.C. § 4332(2)(C)(iii).

9. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1977).

10. 40 C.F.R. §§ 1502.1-1502.25.

11. 40 C.F.R. § 1502.1. In specifically addressing alternatives to the proposed action, federal regulations require that an impact statement include reasonable alternatives and the alternative of no action. See 40 C.F.R. § 1502.14(c), (d).

12. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

In *Vermont Yankee Nuclear Power Corp. v. NRDC*,¹³ the Supreme Court asserted that "the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative conceivable by the mind of man."¹⁴ The Court upheld the Atomic Energy Commission's decision to exclude energy conservation as an alternative in an EIS prepared in connection with Vermont Yankee's request for a nuclear power plant operating license.¹⁵ The Court quoted the Commission and reasoned that "the phrase 'energy conservation' . . . [t]aken literally . . . suggests a virtually limitless range of possible actions and developments"¹⁶ Thus, with respect to applying the reasonableness concept introduced in the CEQ regulations, the *Vermont Yankee* court set an outer limit to the range of alternatives to be considered by an agency: the objective of a proposed action cannot be so broad as to require a virtually unlimited number of options.

At the opposite end of the spectrum, in *City of New York v. United States Department of Transportation*,¹⁷ the U.S. Court of Appeals for the Second Circuit initially noted that "an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered."¹⁸ The *City of New York* court sanctioned the Department of Transportation (DOT) for rejecting barging as an alternative to transporting nuclear waste from a facility in Long Island, New York.¹⁹ Pursuant to the Hazardous Materials Transportation Act (HMTA),²⁰ DOT developed a rule for the routing of nuclear materials that designated the Interstate Highway System as the preferred route without mentioning barging.²¹ After noting that "[t]he scope of alternatives to be considered is a function of how narrowly or broadly one views the objective of an agency's proposed action,"²² the Second Circuit found that HMTA's requirements constituted a statutorily

13. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

14. *Id.* at 551.

15. *Id.* at 552-53.

16. *Id.* at 552.

17. *City of N. Y. v. United States Dept. of Transp.*, 715 F.2d 732 (2d Cir. 1983).

18. *Id.* at 743. See also 40 C.F.R. § 1502.2(g) (An "EIS shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made").

19. *City of N. Y.*, 715 F.2d at 744.

20. 49 U.S.C. §§ 1801-1812 (1976 & Supp. V 1981).

21. *City of N. Y.*, 715 F.2d at 737.

22. *Id.* at 743.

imposed objective that did not envision a comparison of modes of transportation.²³ The Act itself limited the agency's inquiry to highway transportation.

In the absence of a statutory mandate limiting the goals of a proposal, the extent to which an agency may narrow the objectives of a proposed action in order to narrow the scope of alternatives it must consider is unclear. This was precisely the question the circuit courts addressed in *Van Abbema v. Fornell*,²⁴ as well as in the noted case. In *Van Abbema*, a private businessman, Mr. Fornell, applied to the Army Corps of Engineers for a permit to construct and operate a facility that would transload coal from trucks to barges on the Mississippi River.²⁵ The Seventh Circuit noted at the outset "that the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of the alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals."²⁶ Thus, the *Van Abbema* court understood that the applicant's general goal was to deliver coal from the mine to the utility rather than merely to construct a facility at the site the applicant favored.²⁷ The court viewed the Corps' acceptance of Fornell's discussion of alternatives and its failure to conduct a substantial investigation on its own as "blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents."²⁸

While the task of determining the proper scope of alternatives leaves a good deal of room for advocacy, the issue of exactly who must prepare the EIS appears to be more straightforward. CEQ regulations require that an EIS "be prepared directly by [the agency] or by a contractor selected by the lead agency."²⁹ If an agency decides to contract out the work on the EIS, the agency itself must choose the contractor "to avoid a conflict of interest," and the contractor must "execute a disclosure statement prepared by the lead agency . . . specifying that [the contractor has] no financial or other interest in the outcome

23. *Id.* at 744.

24. *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

25. *Id.* at 635.

26. *Id.* at 638.

27. *Id.*

28. *Id.* at 642.

29. 40 C.F.R. § 1506.5(c).

of the project."³⁰

In *Citizens Against Burlington*, Judge Clarence Thomas, writing for the panel majority, reached the opposite result of the *Van Abbema* opinion. After noting that it was the court's obligation "[to] review an agency's compliance with NEPA's requirements deferentially"³¹ and highlighting Congressional policy in favor of the construction of airport cargo hubs,³² the court found that the FAA permissibly narrowed its discussion of alternatives by defining its goal "as helping to launch a new cargo hub in Toledo and thereby helping to fuel the Toledo economy."³³ The D.C. Circuit reached this conclusion not by distinguishing *Van Abbema* on a factual basis, but by attacking the Seventh Circuit's legal analysis on two grounds.

Judge Thomas first asserted that the *Van Abbema* court misconstrued the language of NEPA.³⁴ He reasoned that NEPA, in requiring a discussion of alternatives to "major Federal actions," creates a distinction between an agency's goals and the goals of the applicant's proposal.³⁵ The D.C. Circuit envisioned the agency's duty as evaluating its own objectives in the EIS, shaped by the application at issue. The *Van Abbema* court's failure to recognize this distinction meant that the Seventh Circuit was mistakenly redefining the goals of the proposal that aroused the call for action under NEPA.³⁶ The court noted that "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."³⁷ The court next stated that "the second problem with *Van Abbema* lies in the court's assertion that an agency must evaluate 'alternative means to accomplish the general goal of an action.'"³⁸ Since there is much ambiguity involved in determining why and how to distinguish between general and specific goals, it is implicit in *Van Abbema* that it is the reviewing court's responsibility to make those determinations.³⁹ Citing *Vermont*

30. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) (citing 40 C.F.R. § 1506.5(c)).

31. *Id.* at 196.

32. *Id.* at 197 (citing the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2202(a)(7) (1988)).

33. *Id.* at 198.

34. *Id.* at 199.

35. *Citizens Against Burlington*, 938 F.2d at 199.

36. *Id.*

37. *Id.*

38. *Id.* (citing *Van Abbema v. Fornell*, 807 F.2d at 633, 638 (7th Cir. 1986)).

39. *Id.*

Yankee, the D.C. Circuit noted that this clearly conflicts with a court's duty to deferentially review an agency's compliance with NEPA.⁴⁰

The EIS, prepared in connection with the City of Toledo's proposal, clearly stated that the city, not the FAA, chose the contractor, Coffman Associates, to work on the statement. In accepting Citizens' argument that this amounted to a breach of federal regulations, the Court stated that "[o]nce the FAA decided not to prepare the environmental impact statement directly, it was obliged to pick a contractor itself and not to delegate the responsibility."⁴¹ The court declined, however, to accept Citizens' argument that the appropriate remedy for this breach was to invalidate the EIS. The D.C. Circuit asserted that "[t]his particular error did not compromise the 'objectivity and integrity of the [NEPA] process' "⁴² and found that the breach was not sufficient itself to reject the impact statement. Nevertheless, the court did order the FAA to have Coffman execute an appropriate disclosure statement to ensure that no conflicts of interest existed.⁴³

Of the three-member panel of the D.C. Circuit, Judge Buckley filed a dissenting opinion. Buckley stressed that Burlington's own requirements and desires had shaped the project from the start, and expressed his concern that, by narrowly defining the objective of the proposed action, the FAA had accepted Burlington's consideration and rejection of sixteen other sites at face value.⁴⁴ Buckley stated, "I do not suggest that Burlington is untrustworthy, only that the FAA had the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."⁴⁵ By allowing the FAA to abandon the determination of which alternatives are reasonably available, the majority established "a precedent that will permit an applicant and a third

40. *Citizens Against Burlington*, 938 F.2d at 199 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1977)). "Congress enacted NEPA 'to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency.'").

41. *Id.* at 202.

42. *Id.* (citing Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,031 (1981)).

43. *Id.*

44. *Id.* at 208-09 (Buckley, J., dissenting).

45. *Citizens Against Burlington*, 938 F.2d at 209 (Buckley, J., dissenting).

party beneficiary of federal action to define the limits of the EIS inquiry and thus frustrate one of the principle safeguards of the NEPA process, the mandatory consideration of reasonable alternatives."⁴⁶ Judge Buckley went so far as to characterize the majority's treatment of the discussion of alternatives as reducing the requirement to a "vermiform appendix."⁴⁷

While the court's decision in *Citizens Against Burlington* may lead to an increase in procedural efficiency among agencies by allowing them to narrowly define the scope of the alternatives they must consider, this lessening of procedural burdens is not justified in light of the negative aspects of the decision. The D.C. Circuit's sanctioning of the FAA's decision to discuss only the alternatives that encompass the specific goal of expanding the airport comes dangerously close to turning the EIS inquiry into a "foreordained formality."⁴⁸ By accepting Burlington's decision to reject alternative sites to Toledo Express without further inquiry, the FAA's EIS appears to resemble more of a justification of a decision already made than an assessment of the environmental impacts of a proposed action.⁴⁹ The result is that one must ask whether the court's decision is consistent with the purposes of NEPA.

In declaring a national policy that encourages "productive and enjoyable harmony between man and his environment,"⁵⁰ NEPA recognizes the need for economic growth and that such growth may adversely effect the environment. The Act merely seeks a full discussion of options so that the alternative that has the least detrimental effect on the environment might be selected. In accepting the FAA's approach, "the majority . . . allows a non-federal party to sort out alternatives based entirely on economic considerations."⁵¹ Burlington's previous rejection of other sites undoubtedly excluded a consideration of adverse environmental impacts. Thus, the D.C. Circuit's decision is inconsistent with the purposes of NEPA because it "will undermine the . . . aim of 'inject[ing] environmental considerations

46. *Id.* (Buckley, J., dissenting).

47. *Id.* at 207 (Buckley, J., dissenting).

48. *Id.* at 196 (warning that the scope of alternatives cannot be too narrow) (citing *City of N. Y. v. United States Dep't. of Transp.*, 715 F.2d 742, 743 (2d Cir. 1983)).

49. See 40 C.F.R. § 1502.2(g).

50. 42 U.S.C. § 4321.

51. *Citizens Against Burlington*, 938 F.2d at 210 (Buckley, J., dissenting).

into the federal agency's decisionmaking process.'"⁵²

The D.C. Circuits decision to uphold the validity of the EIS in light of a clear violation of federal regulations regarding selection of contractors further undermines the validity of the EIS. Because the Act relies solely on procedural requirements in achieving its goals, these processes should be strictly construed. By holding, on the one hand, that the FAA's EIS had not suffered any loss of integrity by using the applicant's own contractor and by requiring, on the other hand, that the FAA have Coffman prepare a disclosure statement, the Court's decision gives the appearance of inconsistency. Until a court is certain that no conflicts of interest exist, it cannot determine whether an EIS is objective with regard to any aspect of compliance with federal regulations.

In order for NEPA's environmental goals and policies to be properly infused into federal programs, the Act requires that agencies prepare impact statements that contain a thorough discussion of alternatives to the proposed action.⁵³ At one extreme this discussion of alternatives need only include reasonable options to the proposed action.⁵⁴ At the other extreme the discussion cannot be so narrow as to simply justify the decision already made.⁵⁵ By allowing the FAA to discuss only the alternatives relevant to the goal that embodies Burlington's specific objective to move to Toledo, the D.C. Circuit in *Citizens Against Burlington* allowed for a discussion of alternatives that was so narrow as to only justify the decision Burlington already made. Ultimately, in striving to uphold the FAA's EIS, Judge Thomas appears to place greater weight on congressional policy in favor of the construction of cargo hubs than on the environmental goals of NEPA.

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52. *Id.* (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981)).

53. See 42 U.S.C. § 4332(2)(c)(iii); 40 C.F.R. § 1502.1.

54. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1977); 40 C.F.R. § 1502.1.

55. See *City of N. Y. v. United States Dep't. of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983); 40 C.F.R. § 1502.2(g).