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RCRA IMMUNITY FROM NEPA: THE EPA HAS EXCEEDED THE SCOPE OF ITS AUTHORITY

In 1980 the Environmental Protection Agency enacted regulations exempting all Resource Conservation and Recovery Act permits from the Environmental Impact Statement provisions of the National Environmental Policy Act. This Comment argues that the Environmental Protection Agency, in enacting these regulations, exceeded the scope of its authority under the Resource Conservation and Recovery Act.

INTRODUCTION

The Environmental Impact Statement (EIS) provisions of the National Environmental Policy Act (NEPA) require preparation of a statement assessing the environmental impact of all proposed government actions which could have a significant effect on the environment.\(^1\) The Resource Conservation and Recovery Act (RCRA) regulates the generation and disposal of solid waste.\(^2\) This generally involves activity inherently likely to have a significant effect on the environment. The Environmental Protection Agency (EPA), the regulatory agency which administers RCRA, has promulgated regulations governing the permit requirements under that Act. Those regulations categorically exempt all RCRA permits from the NEPA EIS provisions.\(^3\)

Nothing in RCRA's text provides exemptions, categorical or otherwise, from the NEPA provisions.\(^4\) Since most RCRA permits involve activity affecting the environment, it is unlikely that Congress

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intended the kind of across-the-board exemptions enacted by the EPA. If Congress intended to provide categorical exemptions from the NEPA provisions it could have easily stated so in the text of the statute. An examination of other environmental statutes reveals that where Congress has intended such exemptions it has expressly provided for them in the statutory language.  

Regulatory agencies are empowered to enact appropriate regulations to execute and enforce the law, but they cannot disregard Congress' mandate. "[T]he regulations of an agency of the United States must be issued within the powers conferred by Congress (citation omitted). If agency regulations go beyond what Congress has authorized they are void." The EPA's freedom to regulate is limited by congressional intent as expressed in the enabling statutes.

This Comment challenges the EPA's action. First, it examines the applicable administrative law and the legislative history and text of both NEPA and RCRA to determine whether the EPA, in enacting these regulations, exceeded the scope of its enabling statute. The Comment then addresses the public policy considerations against condoning such regulatory overreaching if the EPA indeed exceeded RCRA's scope. It also discusses the constitutional implications of an administrative agency regulation which categorically defeats congressional mandates. Finally, this Comment concludes that Congress, with its corrective powers, should clearly define the RCRA permit requirements and abrogate the agency's regulations.

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Purpose of NEPA

NEPA was enacted in 1969 and became effective on January 1, 1970. Its statement of legislative purpose is very clear and in fact encompasses about one-sixth the length of the Act. NEPA establishes a national policy to "encourage productive and enjoyable harmony between man and his environment," to "promote efforts which will prevent or eliminate damage to the environment," and to "enrich the understanding of the ecological systems and natural re-

6. Federal Maritime Comm'n v. Anglo-Canadian Shipping Co., 335 F.2d 255, 258 (9th Cir. 1964) (citing Kirk v. United States, 270 F.2d 110, 118 (9th Cir. 1959) and Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917)).
7. NEPA was enacted in response to continuing pressure for the creation of a national environmental policy and an agency that would provide an overview of conservation and environmental protection. Extensive congressional hearings had been held over a period of years on various measures relating to national environmental policy. See REPORT OF THE SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, S. 1075, S. REP. NO. 296, 91st Cong., 1st Sess. (1969).
9. Id.
sources important to the Nation."\textsuperscript{10}

NEPA emphasizes congressional concern with "the profound impact of man's activities on the interrelations of all components of the natural environment"\textsuperscript{11} and provides a congressional mandate that, to the fullest extent possible, "the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies [of NEPA]."\textsuperscript{12} The Act's central provision is the EIS section, which requires federal agencies to prepare a report assessing the impact of any federal action that could significantly affect the environment.\textsuperscript{13} The EIS provision was designed to ensure that the government would be required to consider the environmental effects of all proposed actions. Thus, with NEPA's enactment, environmental protection became part of the statutory mandate of all federal agencies.

\begin{itemize}
\item[10.] Id. 42 U.S.C. § 4331(b) also provides:
[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —
(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
\item[11.] 42 U.S.C. § 4331(a).
\item[12.] 42 U.S.C. § 4332(1).
\item[13.] 42 U.S.C. § 4332(2)(C). This section provides:
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,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
\end{itemize}
The provisions of NEPA are underscored by an Executive Order\textsuperscript{14} instructing all federal agencies to initiate measures to ensure that all policies and programs are conducted in a manner consistent with furthering national environmental goals. The Executive Order instructs agencies to review statutory authority and regulations and eliminate any policies or procedures preventing full compliance with the NEPA provisions. It specifically instructs agencies to make necessary preparations to comply with the Act's EIS requirement and directs the Council on Environmental Quality (CEQ)\textsuperscript{16} to issue guidelines regulating the preparation of these statements.\textsuperscript{16} The Act does not exclude any agencies from its requirements.\textsuperscript{17} CEQ regulations provide that all agencies of the federal government must comply with the NEPA regulations.\textsuperscript{18}

In determining what constitutes "major action significantly affect-
ing the environment” for purposes of deciding whether preparation of an EIS is required in a particular case, agencies are advised that individual projects are not to be considered in isolation. Rather, the cumulative effect of multiple projects must be taken into consideration. The CEQ guidelines instruct that “in considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.”

In Conservation Council of North Carolina v. Costanzo, the court stated that issuance of a permit by a federal agency does involve “federal action” within the NEPA provisions. Thus, issuance of RCRA permits falls within the NEPA definition of federal action.

Given these broad guidelines, the NEPA process can be burdensome and time-consuming. The decision whether an EIS should be prepared for a given project may itself take a year or two and may involve preparation of a “small” impact statement to demonstrate that a “large” one is not legally required. The process is extremely expensive. It is not surprising, therefore, that agencies may attempt to circumvent these requirements. One commentator has noted:

Clearly, NEPA has made agencies more conscious of environmental consequences of their activities. Whether it has had the effect of making agencies care about damage to the environment, or whether it has merely made them aware of another obstacle they must overcome before they can get on with

19. CEQ Preparation of Environmental Impact Statements: Guidelines, 38 Fed. Reg. 20,551 (1973) (to be codified at 40 C.F.R. § 1500.6(a)). Grad explains:

This may occur when an agency invests limited resources in small projects which, over a period of time, may collectively involve major resources. So, too, when a decision which involves a limited amount of resources but is a precedent for major action or may involve a decision in principle about a major course of action in the future, the early action may be considered “major.” The same result may occur, too, when several government agencies individually make decisions about partial aspects of a major action. In all of these instances, environmental impact statements should be prepared “if it is reasonable to anticipate a cumulatively significant impact on the environment from the federal action.”

2 F. GRAD. TREATISE ON ENVIRONMENTAL LAW 9-50 (1986).


22. 2 F. GRAD, supra note 19, at 9-287.

23. Id. “In the northwestern part of the United States, for example, an informal survey. . . conducted by EPA’s Region X produced an estimate that more than 300 man-years were being devoted to preparing and commenting on impact statements by Federal, state and local agencies.” Id. at n.13 (quoting COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY — FOURTH ANNUAL REPORT 246 (1973)).
their project is a different matter.\textsuperscript{24}

\textbf{THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976}

\textit{Purpose of RCRA and its Application to NEPA}

RCRA\textsuperscript{25} was designed to confront the problem of generation and disposal of solid waste. RCRA establishes what has been called a "cradle to grave"\textsuperscript{26} regulatory program for the management of solid and hazardous waste. Solid waste in the RCRA context refers to garbage, sludge or any other discarded material, whether it is solid, liquid, semi-solid or gaseous.\textsuperscript{27} Hazardous waste is any solid that can kill or make a person ill, or that can present a health risk when not properly managed.\textsuperscript{28}

The legislative history of RCRA reflects Congress’ concern for environmental effects of improper waste disposal.\textsuperscript{29} RCRA’s text does not provide exemptions from the NEPA requirements; neither does the legislative history indicate congressional intent to shortcut existing statutory environmental provisions. Rather, the legislative history clearly reveals the intent that RCRA function “in a coordinated and effective way” with other environmental laws.\textsuperscript{30}

A factor supporting the assertion that action under RCRA is “major activity significantly affecting the environment” is that RCRA

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24. 2 F. Grad, \textit{supra} note 19, at 9-288.
29. \textit{House Report, supra} note 26, at 6238-6354. The discussion states that the most effective way to illustrate the dangers of improper hazardous waste disposal is to cite actual instances of damage caused by current hazardous waste disposal practices. Approximately 60 examples of such instances throughout the United States are listed. Id. at 6255-61. “[M]ost important, [this Bill] is a needed step toward protecting the purity of the land itself, and [the] health of our people and the vitality of our environment.” Id. at 6249.
30. \textit{House Report, supra} note 26, at 6241. The Report stated: The committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes . . . . At present the federal government is spending billions of dollars to remove pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.
\end{flushleft}
facilities generally handle fairly large volumes of waste. Facilities generating only small amounts of waste are not subject to the RCRA requirements.\textsuperscript{31} The inevitable local opposition which occurs in communities targeted as sites of hazardous waste facilities further reinforces the claim that the disposal of such waste poses an inherent danger to the environment.\textsuperscript{32}

\textit{EPA Regulations Exempting RCRA from NEPA}

Because the disposal of hazardous waste under RCRA appears to involve a great likelihood of potential environmental damage, this activity should fall squarely within the NEPA designation of an "action significantly affecting the quality of the human environment." Waste disposal should be subject to almost per se inclusion in the NEPA EIS provisions. The language of both the text and legislative history of RCRA support this argument.\textsuperscript{33} Yet, in November 1980 the EPA promulgated regulations governing the permit requirements under RCRA, which provide that "all RCRA . . . permits are not subject to the environmental impact statement provisions . . . of the National Environmental Policy Act . . . ."\textsuperscript{34}

These regulations directly conflict with 40 C.F.R. sections 6.100-6.1007, which govern the EPA's application of the NEPA EIS provisions and include an entire subsection explicitly describing NEPA's application to RCRA solid waste demonstration projects and im-

\textsuperscript{31} 40 C.F.R. § 261.5 (1986).

\textsuperscript{32} For an example of judicial acknowledgement of the nuisance posed by hazardous waste, see Village of Wilsonville v. SCA Servs., Inc., 86 Ill. 2d 1, 426 N.E.2d 824 (1981), in which the community brought a common law nuisance action to require the removal of a hazardous waste landfill. The Illinois Supreme Court, affirming a decision granting an injunction, stated: [W]e think it is sufficiently clear that it is highly probable that the instant site will constitute a public nuisance if, through either an explosive interaction, migration, subsidence, or the "bathtub effect," the highly toxic chemical wastes deposited at the site escape and contaminate the air, water, or ground around the site. That such an event will occur was positively attested to by several expert witnesses.

\textit{Id.} at 27, 426 N.E.2d at 837.

\textsuperscript{33} 42 U.S.C. §§ 6901-87; \textit{House Report, supra} note 26, at 6238-6354.

\textsuperscript{34} 40 C.F.R. § 124.9(6)(1986). These regulations also exempt from the NEPA provisions all permits under the Prevention of Significant Deterioration program authorized by the Clean Air Act (PSD permits); permits issued under the Underground Injection Control program authorized by the Safe Drinking Water Act (UIC permits); and all permits other than permits to new sources issued under the National Pollutant Discharge Elimination System authorized by the Clean Water Act (NPDES permits). This Comment does not attempt to assess the propriety of these regulations except as applied to RCRA.

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proved solid waste disposal facilities. Sections 6.100-6.1007 require that the responsible official assure preparation of an EIS when any of a number of enumerated conditions exist. The conditions listed are extensive and probably would require an EIS in the majority of cases.

Categorical exclusions from the NEPA EIS provisions are approached with extreme caution. The CEQ regulations state that categorical exclusions are to be defined as a “category of actions which do not individually or cumulatively have a significant effect on the


Section 6.801 Applicability. The requirements of this subpart apply to solid waste demonstration projects for resource recovery systems and improved solid waste disposal facilities undertaken pursuant to section 8006 of the Resource Conservation and Recovery Act of 1976.

Section 6.802 Criteria for Preparing EISs. The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions in § 6.108 exist.

36. Id. § 6.108. The criteria for initiating environmental impact statements are as follows:

The responsible official shall assure that an EIS will be prepared and issued for actions under Subparts E, G, H, and I when it is determined that any of the following conditions exist:

(a) The Federal action may significantly affect the pattern and type of land use (industrial, commercial, agricultural, recreational, residential) or growth and distribution of the population;
(b) The effects resulting from any structure or facility constructed or operated under the proposed action may conflict with local, regional or State land use plans or policies;
(c) The proposed action may have significant adverse effects on wetlands, including direct and cumulative effects, or any major part of a structure or facility constructed or operated under the proposed action may be located in wetlands;
(d) The proposed action may significantly affect a habitat identified on the Department of the Interior's or a State's threatened and endangered species list, or a structure or facility constructed or operated under the proposed action may be located in the habitat;
(e) Implementation of the proposed action or plan may directly cause or induce changes that significantly:
   (1) Displace population;
   (2) Alter the character of existing residential areas;
   (3) Adversely affect a floodplain; or
   (4) Adversely affect significant amounts of important farmlands as defined in requirements in § 6.302(c), or agricultural operations on this land.
(f) The proposed action may, directly, indirectly or cumulatively have significant adverse effect on parklands, preserves, other public lands or areas of recognized scenic, recreational, archaeological, or historic value; or
(g) The Federal action may directly or through induced development have a significant adverse effect upon local ambient air quality, local ambient noise levels, surface water or groundwater quality or quantity, water supply, fish, shellfish, wildlife, and their natural habitats.

human environment,” and that agencies must have special procedures for such categorical exclusions. The regulations require that any such procedures adopted under their provisions must provide for “extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” Section 6.107 of the Code of Federal Regulations also discusses categorical exclusions, and again such exemptions are confined narrowly to “[c]ategories of actions which do not individually, cumulatively over time, or in conjunction with other Federal, State, local, or private actions have a significant effect on the quality of the human environment.”

**EPA’s Failure to Carry Out Congressional Intent**

The EPA RCRA exemption provisions certainly fail to follow the CEQ guidelines. It would be unrealistic to characterize the entire field of solid and hazardous waste disposal as a “category of actions which do not individually or cumulatively have a significant effect on the human environment.” Solid and hazardous waste disposal is not the type of activity intended to be summarily dismissed in a categorical exclusion. It does not seem that categorical exclusions, in any case, were intended to be applied to such a broad category of activity. Furthermore, the EPA exemption regulations establish no provisions for circumstances in which normally excluded action does have a significant environmental impact.

In enacting these regulations, the EPA has acted beyond the scope of congressional intent. Indeed, evidence indicates that Congress has become impatient with the EPA’s failure to effectively implement environment protection statutes — RCRA in particular. Although RCRA was enacted in 1976, the EPA did not promulgate any regulations allowing the Act to be implemented until 1980. A set of rules was not completed until mid-1982, six years after the statute’s enactment.

Congress indicated its impatience with the EPA by refusing to wait for the agency to promulgate implementing regulations before the 1984 RCRA amendments took effect. Those amendments, in many instances, were self-effectuating. The extensive detail and comprehensiveness of the amendments bear a closer resemblance to reg-

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37. 40 C.F.R. § 1508.4 (1986).
38. Id.
ulation than legislation. One commentator has observed:

One can conclude from the form and substance of [the 1984 RCRA Amendments] only that Congress was unwilling to trust EPA with the traditional task of the regulatory executive agency — the interpretation and specification of comparatively vague congressional intentions expressed in statutes. Historically, Congress has left the nitty-gritty work of writing regulations to the technical expertise of its creature agencies; here Congress declined to do that. There are a number of possible explanations for this unusual departure. ... The most obvious, and probably correct conclusion is that between 1980 and 1983, Congress came to perceive EPA as an agency unwilling or unable to fulfill its mandate of environmental protection. Almost every section of the RCRA Amendments might be read as expressing a sense of frustration over the pace and scope of EPA action. For these reasons Congress elected to act, in effect, as its own regulatory agency.

A more specific example of Congress' dissatisfaction with the EPA concerned the agency's designation of small quantity generators under RCRA. Under the original EPA regulations, any facility generating hazardous waste in quantities of less than 1,000 kilograms per month was excluded from RCRA regulation. Although the EPA estimated that these exclusions allowed only one percent of the total hazardous waste to escape coverage, the Office of Technology Assessment found that a much higher amount, up to ten percent of hazardous waste, could be escaping proper control under the EPA provisions. Congress, concluding that the 1,000 kilogram per month limit set by the EPA allowed too great a volume of hazardous waste to escape regulation, amended RCRA to lower the limit for unregulated activity to 100 kilograms per month.

EXAMINATION OF OTHER ENVIRONMENTAL STATUTES

If Congress had intended to provide exemptions from the NEPA provisions it easily could have stated so in RCRA's text. An examination of other environmental statutes reveals that where Congress has intended large scale categorical exemptions it has expressly provided for them in the statutory language. The Clean Water Act provides:

[N]o action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]. ... Nothing in

43. Mugdan & Adler, supra note 42, at 215, 217 (footnote omitted).
44. 40 C.F.R. § 261.5 (amended 1984).
46. 42 U.S.C. § 6921(d) (Supp. III 1987). Congress' uncharacteristic refusal to defer to administrative discretion reveals a lack of confidence in the EPA's ability to properly carry out its duties. Ordinarily Congress would not be expected to intrude into the activity of setting standards, which is essentially a regulatory function.
[NEPA] shall be deemed to . . . authorize any [Federal] agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.\textsuperscript{47}

The Clean Air Act contains virtually identical language.\textsuperscript{48} Such language is notably absent from RCRA's text.

The obvious congressional intent to exempt the Clean Water Act and Clean Air Act from NEPA provisions is also found in NEPA's legislative history. In 1969, while S. 1075,\textsuperscript{49} the bill that would become NEPA, was before Congress, Senator Edmund Muskie, who headed the subcommittee on Air and Water Pollution, opposed any effect the Act might have on the standards set by his committee. Senator Henry Jackson assured Muskie that NEPA would not adversely affect those standards.\textsuperscript{50} This was not an indication of environmental policy, but a political compromise made in an attempt to pass S. 1075 in the House.\textsuperscript{51}

EPA's Rationale for the Regulations

In enacting these regulations, the EPA relied on the assertion that RCRA permit requirements are the functional equivalent of an EIS.\textsuperscript{52} In fact, RCRA requirements vary widely depending on the type of project.\textsuperscript{53} In many respects the requirements of the two statutes do overlap, particularly in the necessity for public information and involvement. However, even a superficial comparison of the two statutes reveals a major flaw in the EPA's argument. One of the central provisions of the EIS requirement is the mandate that all applicants consider alternatives to the proposed action,\textsuperscript{54} as well as the environmental effects of each proposed alternative.\textsuperscript{55} The NEPA regulations implementing this section are considerably detailed and

\textsuperscript{51} See Comment, supra note 50; see also 115 CONG. REC. 40,425 (1969).
\textsuperscript{52} 45 Fed. Reg. 33,173 (1980).
\textsuperscript{53} 40 C.F.R. §§ 264, 270 (1986).
\textsuperscript{54} 42 U.S.C. § 4332(C)(ii); 40 C.F.R. § 6.203(b)(1986).
\textsuperscript{55} 40 C.F.R. § 6.203(c) (1986).
even require that applicants consider the effects of a "no action" alternative.\textsuperscript{56}

The seven basic types of RCRA waste permits are tank storage, container storage, surface impoundment, waste pile, land treatment, landfill and incinerator facility permits. Other types of facilities are being tested under the RCRA Research, Development, Demonstration and Information, (R,D&D) permit program.\textsuperscript{57} An EIS would require a determination of the environmental impact of the facility proposed, of alternate types of facilities, and of the consequences of a "no action" alternative. RCRA permit provisions require no consideration of alternatives whatever.\textsuperscript{58} The EIS cannot be considered the functional equivalent of a regulation which lacks one of the EIS regulations' central provisions.

Perhaps the most troublesome of the RCRA provisions are the R,D&D permit procedures.\textsuperscript{59} While most RCRA permit requirements take one to two years to satisfy,\textsuperscript{60} R,D&D permits can be obtained in four to eight months. The requirements for these permits are much more lenient and many RCRA requirements can be modified or even waived at the EPA's discretion.\textsuperscript{61} Experimental and unproven methods of waste disposal involve a degree of unpredictability which poses potentially the greatest danger to the environment. Yet, these permits are subject to the most lenient requirements and their potential danger is circumscribed by minimal safeguards.\textsuperscript{62}

\textsuperscript{56} Id. § 6.203(b)(1).
\textsuperscript{57} Telephone interview with Kristen Anderson, EPA RCRA representative, Washington, D.C. (Jan. 28, 1987) (confirming that consideration of alternatives is not part of the RCRA permit process). See also 40 C.F.R. §§ 264, 270 (1986).
\textsuperscript{58} Telephone interview with Kristen Anderson, supra note 57.
\textsuperscript{59} 40 C.F.R. § 270.65 (1986).
\textsuperscript{60} Telephone interview with Robin Neville, EPA RCRA representative, Washington, D.C. (Jan. 20, 1987).
\textsuperscript{62} As of January 1987, experimental facilities were in operation under R,D&D permits in Alexandria, Virginia (Atlantic Research Corp.); Monica, Pennsylvania (Saint Joe Mineral Corp.); Gulfport, Mississippi (Naval Construction Battalion Center); and Johnston, Texas (Johnston Atoll United States Air Force Facility). Telephone interview with Nester Avilles, supra note 61.

On March 30, 1987 the EPA granted a fifth permit to G.A. Technologies to allow a toxic waste incinerator to be built in La Jolla, California. This permit was granted despite broad public opposition as well as scientific evidence that the incinerator poses potential adverse environmental and public health dangers. The incinerator will be located in a densely populated area directly across the street from the University of California, San Diego, a campus of over 25,000 students, faculty and staff. Two hundred and fifteen thousand people live and work within three miles of where the facility will be located and three acute care hospitals are within two miles. The area, one of the most scenic in California, also contains two very sensitive environmental preserves, one of which contains one of the last groves of Torrey Pine trees in the world. Yet the permit for this toxic waste plant was granted, pursuant to EPA standards, with no consideration of the environmental threat posed. The plant will handle highly toxic materials containing cancer-causing chemicals such as PCBs, dioxin, asbestos and arsenic. It may also handle organic
That such a wide variance exists in the spectrum of RCRA permit requirements reinforces the inappropriateness of the across-the-board immunity from NEPA that the EPA would claim. Even if there were individual instances where EIS exemption would be appropriate (such as where investigation of alternatives had been independently undertaken), this would properly be decided, as all other agency actions subject to NEPA are decided, on a case-by-case basis.

In enacting these regulations, the EPA relied heavily on ten lower court decisions which it cites as supporting the assertion that the agency itself should be exempt from NEPA. Although the court in each instance did exempt the EPA from the EIS provisions, seven of the ten cases involved the Clean Air Act. In the remaining three cases the courts had carefully established that functional equivalency had been satisfied and alternatives considered in each instance. The EPA's reliance on these cases is misplaced at best. The agency's

solvents and mercury that can cause miscarriages, birth defects, and neurologic, kidney and liver disease. The permit places no limitations on the types of waste that can be incinerated. Air emissions will be required to be sampled once every test day but with no requirement that sampling be done when burns are actually taking place. No plans have been considered concerning a response in case of a disaster, such as an earthquake, fire, explosion or other accident, resulting in the release of toxic material. Heifetz, *Toxic Waste For Torrey Pines?*, San Diego Union, Apr. 24, 1987, at B11, col. 1.


64. Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). See also supra footnotes 47-51 and accompanying text. *Portland Cement Ass'n*, on which the EPA relies as supporting its exemption, in fact, expressly refused to make such a determination. The court stated: "[The EPA's] broad exemption claim . . . should not be decided in the present case." The court noted that the "policies against a NEPA exemption embrace the endemic question of 'Who shall police the police?' As Senator Jackson stated 'It cannot be assumed that the EPA will always be the good guy.'" 486 F.2d at 384. The court concluded: "[W]e add, finally, a word of clarification: we establish a narrow exemption from NEPA [under the] Clean Air Act." Id. at 387 (emphasis added).


66. The EPA, at 45 Fed. Reg. 33,173 (1980), cites Maryland v. Train, 415 F. Supp. 116, 122-23 (D. Md. 1976): "Where federal regulatory action is circumscribed by extensive procedures, including public participation, for evaluating the environmental issues and is taken by an agency with recognized environmental expertise, formal adherence to the NEPA requirements is not required unless Congress has specifically so directed." The EPA ignores the fact that this language was used in the context of a case where the court found that alternatives had been extensively considered, and the "[functional] equivalence necessary to obviate the need for an [EIS]" had been satisfied. 415 F. Supp. at 122-23. Outside of this context, the court's language is mere dicta.
unfounded assertion that it can claim complete exemption from
NEPA, based on the narrow holdings of these lower court decisions,
is an unfortunate example of unrestrained agency overreaching.

NEPA, by statute as well as by Executive Order, expressly applies
to all agencies of the federal government.67 Numerous federal regu-
lations and cases describe NEPA's application to the EPA.68 Even
the Clean Water Act, which Congress has largely exempted from
NEPA by statute, is not entirely immune. All National Pollutant
Discharge Elimination System (NPDES) permits to new sources is-
ued by the EPA under the Clean Water Act expressly require an
EIS.69

In declaring itself exempt from NEPA, the EPA implies that, be-
cause of its expertise in environmental protection, it can be trusted to
act in the best interest of the environment. Therefore, any statutory
measures ensuring this would be superfluous. It is ironic that the
central case the agency relies on in making this assertion70 is Mary-
land v. Train,71 in which the court reprimanded the EPA for grant-
ing a permit to dump sewage sludge in the Delaware Bay without
considering alternatives or holding a public hearing as required by
statute.72

Agency activity, by its very nature, is largely implemented
through the machinery of vast bureaucracies. The purpose of requir-
ing that such operations be conducted within statutory confines is to
ensure uniformity of application and results. This is particularly im-
portant in the area of environmental protection. The agency's ration-
ale for its claim of RCRA and EPA immunity from NEPA and the
"superagency" overtones it suggests are not persuasive.

ADMINISTRATIVE AGENCY REGULATORY POWER

Since it is reasonable to conclude that Congress did not intend
that RCRA permits be categorically exempt from NEPA, it appears
that the EPA, in enacting these regulations, has exceeded the scope

67. See supra note 17 and accompanying text.  
68. See 40 C.F.R. §§ 6.801-6.802 (1986); 40 C.F.R. § 124.9(6) (1986). See also
Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d
1109 (D.C. Cir. 1971), where the court stated that "NEPA . . . makes environmental
protection a part of the mandate of every federal agency and department." 449 F.2d at
1112 (emphasis added).
provides for exemption from NEPA "except for the provision of Federal financial assis-
tance for . . . assisting the construction of publically owned works . . . and the issuance
of a permit . . . for the discharge of any pollutant by a new source") (emphasis added).
72. Id. at 122. "[T]here was no consideration given . . . either to possible alter-
atives on land or elsewhere in the ocean available . . . for sludge disposal . . . . [T]he
administrator was without discretion to skip this essential step in the process."
of its legitimate administrative power. The rule-making power of an administrative agency is a delegated legislative power. As such, it must be exercised within the limits of the power granted by the enabling statute. An administrative agency may not enact regulations which are inconsistent with the statute it is administering. An agency “may not, under the guise of a regulation, substitute its judgment for that of the legislature in administering a legislative act.”

The first step in determining the legitimacy of an administrative action is to establish the applicable standard of review. The Administrative Procedure Act (APA) governs the EPA’s regulatory power. The standard of review established by the APA is that an agency’s promulgated rule must be set aside if found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” “Arbitrary and capricious” may be defined as any action which is unreasonable under the particular circumstances. “Abuse of discretion” in judicial usage is the antithesis of reasonable action or sound discretion.

Professor Kenneth Culp Davis asserts that certain agency actions are, in limited instances, immune from judicial review. However,

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74. The scope of review provisions, 5 U.S.C. § 706 (1982), read as follows: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
   (1) compel agency action unlawfully withheld or unreasonably delayed; and
   (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
       (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
       (B) contrary to constitutional right, power, privilege, or immunity;
       (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
       (D) without observance of procedure required by law;
       (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
       (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

76. 5 K. Davis, Administrative Law Treatise 253-330 (2d ed. 1984) [hereinafter 5 K. Davis]. Professor Davis bases his unreviewability argument on the language of 5 U.S.C. 701(a)(1) & (2), (concerning judicial review, which states: “This chapter ap-
the prevalent view seems to be that there are few, if any, situations in which absolute immunity would be appropriate. This is particularly true where arbitrary agency action is involved. Raoul Berger, who for years engaged in a public debate with Professor Davis on the issue, states:

For more than 125 years before the passage of the APA the Supreme Court declared again and again that there is no room for arbitrary action in our system, that power to act arbitrarily is not delegated. Together with almost all of the circuits it is stated without equivocation across a wide spectrum of administrative activity that arbitrary action is reviewable.

Even Professor Davis agrees that a strong presumption exists in favor of the reviewability of administrative agency action.

plies . . . except to the extent that —

(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

Other discretion is reviewable. 5 K. Davis at 292. Moreover, Professor Davis asserts that despite language in several Supreme Court holdings indicating a requirement of “clear and convincing” legislative intent to cut off review, the “courts often hold, in the absence of any indication of congressional intent, that action is reviewable.” K. Davis, Administrative Law 59 (1977) (emphasis in original).

Professor Davis notes: “Action probably is never totally reviewable, for the most reviewable action may usually be set aside for fraud, for complete absence of all jurisdiction, or for clear unconstitutionality that deprives a challenger of a protected interest.” 5 K. Davis, supra note 76, at 257. Davis challenges the notion that actions always are reviewable for arbitrariness, however, citing APA-based cases supporting his position. 5 K. Davis, supra note 76, at 277-78 (citing Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); Schilling v. Rogers, 363 U.S. 666 (1960); Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (1963)).

Berger, supra note 75, at 966. Mr. Berger notes sardonically that, in view of the fact that the presumption for review “is buttressed by the clear Section 10(e) directive that courts ‘shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,’ it is a wondrous feat to emerge with ‘agency immunity from review.’” Id. He goes on to argue:

Both “discretion” and “abuse of discretion” were terms of settled meaning at the time the APA was drafted. Courts had long said that discretion “means . . . a discretion exercised not arbitrarily . . . .” An arbitrary finding “is outside the administrative discretion conferred by the statute.” . . . Discretion simply “does not extend to arbitrary and unreasonable action.”

Id. at 968-69.

Professor Davis writes: “[T]he Supreme Court for the first time explicitly established a presumption of reviewability in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) . . . . The court said that ‘judicial review of a final agency action . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . .’ Early cases in which this type of review was entertained . . . have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review . . . . The words just quoted from the Abbott opinion are the law . . . . That [they] will continue to be the law seems unquestionable, for the need for review of regulations is greater now than it was in 1967.” 5 K. Davis, supra note 76, at 255. The essence of Davis’ view of the presumption of reviewability is this:

When significant private interests are at stake, the presumption of reviewability controls unless it is rebutted by affirmative indication of legislative intent in favor of unreviewability or by some special reason for unreviewability growing out of the subject matter or the circumstances; the presumption is usually given full effect.

5 K. Davis, supra note 76, at 254 (emphasis added).
The Supreme Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe*,\textsuperscript{80} gave a narrow reading to the APA provision precluding judicial review where “agency action is committed to agency discretion by law.” The Court held that unreviewable administrative action occurs only where there is “no law to apply.”\textsuperscript{81} According to one commentator, this means for “all practical purposes that the issue is almost non-existent.”\textsuperscript{82} The issue of the reviewability of agency decisions under NEPA was addressed in *McDowell v. Schlesinger*.\textsuperscript{83} The court in *McDowell* concluded that “[a]gency determinations concerning the procedural requirements of NEPA are not committed to agency discretion by law within the meaning of [APA] and are therefore reviewable.”\textsuperscript{84}

The Supreme Court in *Overton Park* emphasized that courts must be aggressive overseers when reviewing administrative actions which affect the environment. The opinion states that courts reviewing agency actions affecting the environment must engage in a “substantial inquiry” and a “thorough, probing, in depth review.”\textsuperscript{85} This “substantial inquiry” language has been called the *Overton Park* “hard look doctrine.”\textsuperscript{86} Professor Davis points out that the “hard

It cannot convincingly be argued that the EPA’s action was committed to agency discretion by law, since neither RCRA’s text nor its legislative history indicate such a congressional intent or directive. Moreover, no special reason for unreviewability grows out of the subject matter; the EPA harbors no congressional exemption from review. Thus, Professor Davis would agree that the presumption of reviewability would govern review of the EPA action at issue.

A recent Supreme Court case threatens to upset the presumption of reviewability. *Heckler v. Chaney*, 470 U.S. 821 (1985) held unreviewable an agency determination not to enforce certain regulations. The Court stated that a general presumption of unreviewability of decisions not to enforce existed. 470 U.S. at 834. The *Chaney* decision marks a reversal in the Court’s approach to review of administrative action.

81. *Id.* at 410. Professor Davis argues that the entire “no law to apply” approach is a misinterpretation of congressional intent. He argues that the presence or absence of law to apply is irrelevant as to the reviewability of agency action. 5 K. DAVIS, supra note 76, at 290-91. While Davis’ criticisms appear to have much merit analytically, his suggestions have not been followed in subsequent Supreme Court cases. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).
84. 404 F. Supp. at 241 (citing Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1384 (8th Cir. 1974)).
86. The “substantial inquiry” or hard look doctrine of *Overton Park* is a tenet of modern administrative law and a catechism of environmental law. It means that courts will accept nothing less than fairly conceived, fully explained, and rationally based administrative discretionary judgments. Judge Harold Leventhal, a respected analyst of the administrative process, says the courts

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look doctrine" can have two different meanings. It can mean that the court is required to take a hard look at the agency actions, but it can also mean that the agency is required to take a hard look at its actions.87

The Overton Park opinion further states that a court should undertake a three-part review of agency action. First, the court must determine whether the administrator “acted within the scope of his authority.”88 A reviewing court will show little deference for the judgment of the administrator in this step of review, since such a determination will be based on statutory construction, and the judiciary is the final arbiter on questions of law. Second, if the court finds the administrator acted within the scope of his authority, the court will determine whether the agency's decision was based on consideration of relevant factors and "whether there has been a clear error of judgment."89 Third, the reviewing court will determine whether the agency followed the necessary procedural requirements.90

The EPA regulations cannot withstand judicial scrutiny under these standards. The creation of random categorical immunity exempting the entire spectrum of RCRA activity from the provisions of a congressional mandate cannot reasonably be characterized as anything but "arbitrary and capricious." Such broad-sweeping and apparently careless provisions would seem to be a classic example of an "abuse of discretion." If "arbitrary and capricious" is to be defined as action which is unreasonable under the circumstances, these regulations may be characterized as the antithesis of reasonable action and sound discretion.

Neither would the regulations withstand scrutiny under the Overton Park "hard look" standard of review. The EPA has clearly failed to take a "hard look" at the environmental consequences of RCRA procedures, (2) give good faith consideration to matters assigned to them, and (3) produce results that are defensible in reason. W. Rogers, supra note 82, at 19 (citing Leventhal, Environmental Decision-Making and the Role of the Courts, 122 U. Pa. L. Rev. 509, 511 (1974)). 87. 5 K. Davis, supra note 76, at 335. 88. Overton Park, 401 U.S. at 415-16. 89. Id. at 416. The APA instructs courts to use the "arbitrary and capricious" standard if the case involves informal agency action and the "substantial evidence" standard if the case involves an agency decision made on the record after a hearing. 5 K. Davis, supra note 76, at 335. Professor Davis asserts that, in fact, courts do not know the difference between the "substantial evidence" scope of review and the "arbitrary and capricious" scope of review. He says the two tests are sometimes the same and sometimes different and whether they are the same or different is usually unpredictable. Id. at 357. He indicates that, in any case, labels are superfluous because, regardless of what courts call it, they proceed to undertake review ranging all the way from zero to 100%. K. Davis, Administrative Law Text 530 (3d Ed. 1972). 90. Overton Park, 401 U.S. at 417. Here the court will show less deference to the agency's decision if necessary procedural requirements were not followed.
activity under the NEPA requirements. Moreover, it appears that
the agency neither “acted within the scope of its authority” nor
made a decision that was “reasonable under the circumstances.”

Cases are numerous where administrative regulations have been
overturned because they conflict with a statute or exceed the scope
of administrative authority granted. In *Calvert Cliffs’ Coordinating
Committee v. United States Atomic Energy Commission,* the court
examined an agency rule providing categorical exemptions from
NEPA EIS provisions. The Commission had promulgated regula-
tions providing that no EIS was required if other agencies had al-
ready certified that their own environmental standards were satisfied
by the proposed action. The court, finding that one of the agencies
charged with administration of NEPA had “failed to live up to its
congressional mandate,” declared the regulations invalid. “Our duty
. . . is to see that important legislative purposes, heralded in the
halls of Congress, are not lost or misdirected in the vast hallways of
the federal bureaucracy.”

In *Natural Resources Defense Council v. Herrington,* the court
found that rules promulgated by the Department of Energy under
the Energy Policy and Conservation Act violated congressional in-
tent. The court stated that “when an agency does not reasonably
accommodate the policies of a statute or reaches a decision that is
‘not one that Congress would have sanctioned,’ (citations omitted) a
reviewing court must intervene to enforce the policy decisions made
by Congress.” The court also noted that “an agency may not ig-
gnore the decisionmaking procedure Congress specifically mandated
because the agency thinks it can design a better procedure.” Further,
the court found that the Department’s decision not to prepare
an EIS was arbitrary and capricious.

In *Motor Vehicle Manufacturers Association v. State Farm Mu-
tual Insurance Company,* the court, finding agency regulations ar-
bitrary and capricious and therefore void, held that an agency rule
would normally be found arbitrary and capricious if the agency had
"relied on factors which Congress ha[d] not intended it to consider
or] entirely failed to consider an important aspect of the prob-

91. 449 F.2d 1109 (D.C. Cir. 1971).
92. Id. at 1111.
93. 768 F.2d 1355 (D.C. Cir. 1985).
94. Id. at 1383.
95. Id. at 1396.
96. Id. at 1429-33.
lem." 108 The court noted an absence of any apparent basis on which the agency had exercised its discretion and concluded that the APA would not permit it to accept such practice. "Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." 109

**The Regulations' Effect On Judicial Review Under RCRA**

In light of the fact that most sources agree there are very few situations in which agency action is absolutely unreviewable, 10 one of the most disturbing aspects of the EPA exemption regulations is that they may effectively render any particular case immune from judicial review on the issue of an EIS. Since any party failing to prepare an EIS under a RCRA permit acts clearly within the scope of agency regulations, no challenge on that issue is possible without a successful attack on the regulation itself. The cost and time expense imposed by this additional burden could effectively deter potential challenges.

At least on the narrow issue of whether an EIS should be prepared in a given instance, courts have aggressively reviewed agency action

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98. Id. at 43.
99. Id. at 48 (quoting New York v. United States, 342 U.S. 882, 884 (1951)).
See also Usery v. Kennebec Copper Corp., 557 F.2d 1113, 1118 (10th Cir. 1977) ("Administrative regulations are not absolute rules of law and should not be followed when they conflict with the design of the statute or exceed the administrative authority granted."). In United States v. Silva, 272 F. Supp. 46 (S.D. Cal. 1967), the court held that Coast Guard-promulgated regulations constituted an unauthorized assumption of power. "In determining whether a regulation promulgated by a federal agency is valid, it must first be determined whether the regulation conforms with the statutory grant of power extended the appropriate agency," 272 F. Supp. at 49.

In Federal Maritime Comm'n v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964), the court held that the Commission did not have statutory authority to promulgate the challenged regulations. "[T]he regulations of an agency of the United States must be issued within the powers conferred by Congress [citation omitted]. If agency regulations go beyond what Congress has authorized, they are void." 335 F.2d at 258.

See also Kirk v. United States, 270 F.2d 110, 118 (9th Cir. 1959); Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917); Hawke v. Comm'r of Internal Revenue, 109 F.2d 946, 949 (9th Cir. 1940).

In Porter v. Prudential Ins. Co. of America, 470 F. Supp. 203 (W.D. Tex. 1979), the court held that defendant's reading of a federal regulation could not be sustained because it would subvert the obvious intent of the statute. "It is well settled that 'if the rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' [citation omitted] . . . In order to be valid, regulations must 'be consistent with the statute under which they are promulgated.'" 470 F. Supp. at 206. See also Pacific Gas & Elec. Co. v. United States, 664 F.2d 1133, 1136 (9th Cir. 1981), in which the court used virtually identical language in regard to an improper IRS interpretation of a federal regulation which was inconsistent with the intent of the enabling statute.

100. See supra notes 76-79 and accompanying text.
on a case-by-case basis. Since the actual provisions of NEPA are skeletal, the Act has been the focus of considerable litigation and interpretation. Judicial review has become extremely important and the courts have played a substantial role in implementing NEPA. The NEPA EIS provisions generated more cases than any other environmental statute in the 1970s. This has resulted in the

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101. Most NEPA cases involve challenges for failure to prepare an EIS in a particular situation rather than challenges against an agency's implementation of NEPA on a large scale through rule-making. In 1976 the Council on Environmental Quality Report on the first six years of NEPA noted that 654 cases had been filed, 363 of which asserted that no EIS had been filed where required. The number of cases filed claiming NEPA violations has remained steady in recent years. See Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), which involved an action to enforce compliance with NEPA with respect to the erection of a jail facility. The court held that the function of a court in reviewing an agency determination whether agency action requires an environmental impact statement "is to determine de novo "all relevant questions of law," [citations omitted] and, with respect to [an agency's] factual determinations . . . to determine[e] whether [the agency's] findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."" 471 F.2d at 828.


103. L. Wenner, The Environmental Decade in the Court 11 (1982).
development of a "common law" of NEPA.\textsuperscript{104}

Because of the important role judicial review has come to play in implementing the NEPA EIS provisions, the EPA regulations' effect of shielding any given case from review is particularly troublesome. The United States Court of Appeals for the District of Columbia Circuit has stated that "NEPA mandates a case-by-case balancing judgment on the part of federal agencies."\textsuperscript{106} The Supreme Court, deciding \textit{Baltimore Gas & Electric Company v. Natural Resources Defense Council Inc.},\textsuperscript{108} concluded that the courts should perform both a substantive and a procedural review under NEPA.\textsuperscript{109} The Court held that review on the merits under NEPA should be undertaken using the "arbitrary and capricious" standard.\textsuperscript{108}

But, under RCRA regulations, even instances of arbitrary and capricious disregard of the environmental results of a particular action can escape review. Allowing such a large category of agency activity to be carved out and rendered immune from the careful case-by-case review which has become the common law of NEPA will certainly have serious consequences.

\textbf{CONSTITUTIONALITY OF THE REGULATIONS}

The effect of categorically shielding cases from judicial review under the guise of regulations enacted by a public agency not subject to political restraints also raises constitutional issues. Congress has enacted a statute requiring an EIS for all government actions falling within a particular category.\textsuperscript{109} The Supreme Court has indicated that substantive review should be undertaken under this statute to assure its proper application.\textsuperscript{110} An executive agency, operating through unelected public employees, has promulgated regulations; not pursuant to any apparent delegation of legislative authority, categorically defeating the mandates of both the legislative and judicial branches of government. This violates the constitutional doctrine of separation of powers.\textsuperscript{111}

\footnotesize
\begin{itemize}
\item \textsuperscript{104} See Kleppe v. Sierra Club, 427 U.S. 390, 421 (1976) (Marshall, J., dissenting in part).
\item \textsuperscript{105} \textit{Calvert Cliffs}, 449 F.2d at 1123.
\item \textsuperscript{106} 462 U.S. 87 (1983). See Weinstein, supra note 102, at 839.
\item \textsuperscript{107} Id. at 87.
\item \textsuperscript{108} Id. at 98. See Weinstein, supra note 102, at 839.
\item \textsuperscript{109} 42 U.S.C. § 4332(2)(C)(i).
\item \textsuperscript{110} See Weinstein, supra note 102, at 839.
\item \textsuperscript{111} In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring), Justice Jackson discussed the balance of power between the executive and legislative branches and distinguished three separate categories of activity. 343 U.S. at 635-38. This situation would appear to fall within Jackson's third category, thus subject to the most careful scrutiny: When the executive branch "takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb." 343 U.S. at 637. Such activity "must be scrutinized with caution, for what is at
One commentator recently noted that it was not until 1946 that the APA provided a non-constitutional source of authority for the courts to control administrative agencies and that "[t]here has been a renewed emphasis on fundamental separation of powers analysis in examining the relationship of the agencies to the Constitutional branches." Since 1946, courts have, for the most part, relied on the statutory provisions of the APA, rather than on constitutional principles, in evaluating agency actions. However, it is important not to lose sight of the underlying constitutional principles which restrict administrative agency activity.

The Framers of the Constitution provided that all federal legislative action was to be undertaken by Congress subject to the bicameralism and presentment requirements carefully delineated in the text of the Constitution. These explicit and unambiguous provisions are integral parts of the constitutional doctrine of separation of powers. The bicameralism provisions require that no law can take effect without concurrence of the prescribed majority of members of both Houses. The purpose of this requirement was to enforce the Framers' belief that legislation should not be enacted until it had been carefully and fully considered by the country's elected officials. Dividing Congress into two separate bodies was to ensure that lawmaking power "would be exercised only after opportunity for full study and debate in separate settings." The purpose of the presentment clauses and the presidential veto power was to ensure that the law-

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113. Id. at 211.
114. Article I provides:
All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.
Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President.
U.S. CONST. art. I, § 7, cl. 2.
Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .
U.S. CONST. art. I, § 7, cl. 3.
116. Id. at 951.
making power of Congress would be “carefully circumscribed.””

The framers employed these detailed balancing provisions to guarantee that laws enacted under the authority of the United States would never be “oppressive, improvident or ill-considered.”

The court in United States v. Goldsmith pointed out that administrative details could be left to agency discretion but that “purely legislative powers of the federal government reside solely in Congress under the Constitution and that [Congress] has no power to renounce them in favor of any other branch of the government.” In Willapoint Oysters v. Ewing, the court stated that “[r]ulemaking is legislation on the administrative level . . . within the confines . . . of the granting statute as required by the Constitution and its doctrines of non-delegability and separability of powers.” In Devoe v. Atlanta Paper Company, the court held that the delegation of power to the administrator was constitutional, but that such power is constitutionally exercised only “where the definition is within the limits laid down by Congress.”

Administrative agency representatives are not monitored by the political checks and restraints which influence congressional decisionmaking. Agency regulatory power must be exercised within the confines of the power delegated by Congress. The safeguards carefully prescribed by the Framers would be rendered meaningless if

117. Id. at 947.
118. Id. at 947-48.
119. 91 F.2d 983 (2d Cir. 1937).
120. Id. at 985.
121. 174 F.2d 676 (9th Cir. 1949).
122. Id. at 693.
124. Id. at 286.
unelected agency employees could casually promulgate rules defeating the clear intention of the federal legislature. When viewed in this light, the EPA regulations at issue appear fatally flawed. Because they were not promulgated within the confines of any apparent delegation of power by Congress, they should be found unconstitutional.125

**PUBLIC POLICY CONSIDERATIONS**

Aside from the possible constitutional issues, strong public policy considerations oppose condoning this type of regulatory overreaching. If other agencies begin to follow suit in providing categorical exemptions from NEPA, Congress' intent in establishing a national environmental policy could be defeated on a large scale. Moreover, if this type of activity were condoned, it would inevitably spread to other areas of federal regulation, to be invoked whenever categorical immunity would provide a convenient shelter from a potentially burdensome federal statutory provision.

The court in *Calvert Cliffs* was emphatic in pointing out that "considerations of administrative difficulty, delay or economic cost" should not be allowed to defeat the NEPA provisions.126 To condone manipulative agency rulemaking aimed at circumventing congressional mandates could issue an open invitation to already overburdened agencies, which might, in the long run, defeat not only NEPA but many other statutes as well.

If NEPA has the effect of increasing the administrative workload or making it inconvenient for agencies to proceed with their projects, this is a price which the American people have asserted, through their elected officials, that they are willing to pay. NEPA was enacted in response to many years of public demand for environmental legislation.127 The taxpayers apparently felt that the importance of maintaining the environment for future generations was well worth the cost that would be required. Such a decision should not be subject to overriding agency impulses. Until Congress instructs other-

125. Obviously, our system is one in which lawmaking roles are often blurred. Courts make law, sometimes with detail similar to legislative acts; rulemaking agencies make law — indeed, one has only to look at the Code of Federal Regulations to realize that agency-made law is much more voluminous than Congress-made law. Yet, an executive administrative agency that promulgates regulations contrary to the mandate given it by Congress acts *ultra vires*, and unconstitutionally crosses the somewhat fuzzy line separating government branches.
126. *Calvert Cliffs*, 449 F.2d at 1115.
127. See supra note 7.
wise, the EPA should be required to proceed according to the standards dictated by the voters.

CONCLUSION

NEPA requires preparation of an EIS to determine the environmental impact of all proposed government actions which could have a significant effect on the environment. The EPA has promulgated regulations categorically exempting RCRA permits from NEPA requirements. Since RCRA does not authorize the EPA to create such exemptions, the agency has exceeded the scope of its administrative authority. Such activity violates constitutional principles and, from a public policy standpoint, sets an undesirable precedent for other administrative agencies.

The environmental consequences that will inevitably result from the RCRA exemption provisions are a high price to pay for the administrative convenience the EPA seeks in avoiding preparation of environmental impact statements. Simplifying the administrative tasks of the EPA does not justify compromising the environment in contravention of Congress' desires. When weighed against the long-term environmental effects certain to result from RCRA immunity from the NEPA provisions, the relatively small burden that would be involved in continuing to evaluate EIS applicability on a careful case-by-case basis is warranted.

Congress should address this issue and clearly define the requirements of the RCRA permit process. If categorical exemptions are intended they should be codified as they are in the Clean Air Act and Clean Water Act. If the political climate of the country favors more lenient enforcement of environmental protection statutes, Congress may determine this and act on it. Otherwise the EPA regulations categorically exempting RCRA permits from NEPA requirements should be abrogated.

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128. See supra note 13 and accompanying text.
129. See supra note 34 and accompanying text.
130. See supra notes 73-74 and accompanying text.