SCENIC HUDSON REVISITED: THE SUBSTANTIAL EVIDENCE TEST AND JUDICIAL REVIEW OF AGENCY ENVIRONMENTAL FINDINGS

The first Scenic Hudson decision by the Second Circuit Court of Appeals in 1965 may be described as the grandfather of most of today's environmental litigation. Its order that all relevant environmental factors must be considered in the Federal Power Commission's licensing proceeding was the direct forerunner of the environmental impact statement requirement of NEPA. The grant of standing to numerous environmental groups to challenge controversial agency action opened the doors of the federal judiciary to the environmental movement. This Note suggests that the Second Circuit recently missed a further opportunity to expand the scope of review of agency action when it affirmed the FPC's new decision to license the Cornwall power plant. Confronting arguments that factual determinations by the FPC should be subject to broadened review in light of the important policy questions involved, the court instead applied the traditional substantial evidence test in upholding agency findings. After discussing the merits of the case, the author examines the arguments for and against expanded review and concludes that the narrow ambit of the substantial evidence test is likely to remain controlling in judicial review of agency decisions involving environmental fact-finding.

The United States Supreme Court's denial of certiorari in Scenic Hudson Preservation Conference v. FPC ended almost a decade of conflict between environmentalists, Consolidated Edison Company of New York (Con Ed), and the Federal Power Commission (FPC) over licensing the

1. 453 F.2d 463, 3 ERC 1232, rehearing denied, 453 F.2d 494 (2d Cir. 1971), cert. denied, 407 U.S. 926, 4 ERC 1750 (1972) [hereinafter Scenic Hudson II]. A state court suit was also filed claiming that the New York Commissioner of Environmental Conservation's certification that the Cornwall project would be in compliance with state water quality standards and would not cause adverse environmental effects was improper as it gave only future rather than present assurances of compliance. This argument was accepted by the trial court but reversed at the appellate level; an appeal has been argued in the New York Court of Appeals. DeRhem v. Diamond, 69 Misc. 2d 1, 330 N.Y.S.2d 71, 3 ERC 1903 (Sup. Ct., Albany County), rev'd, 39 App. Div. 2d 302, 333 N.Y.S.2d 771 (1972). Although no injunction was granted in the case, construction had not yet begun at the Storm King site as of February 1973.

2. The following organizations joined New York City in appealing the FPC's licensing order: Scenic Hudson Preservation Conference, Palisades Interstate Park Commission, the Sierra Club and its Atlantic Chapter, the Wilderness Society, the Izaak Walton League, the National Audubon Society, and the National Parks and Conservation Association.
construction of a pumped storage power plant at the base of Storm King Mountain in the Hudson River Highlands near Cornwall, New York. During this process, the Second Circuit Court of Appeals twice considered the FPC's licensing order. The first case, a landmark decision in environmental law, conferred standing upon numerous environmental groups that had attempted to intervene in the licensing proceeding and remanded the FPC's decision for exploration of all relevant factors, including those related to conservation and aesthetics.

Five years later, the Second Circuit was faced with the FPC's new decision to grant a license. In this case, the court held that Scenic Hudson I had not broadened the scope of judicial review of administrative agency decisions; that the FPC findings on all issues including environmental issues relating to alternative sites, air pollution, and aesthetics were supported by substantial evidence; and that the FPC had not acted arbitrarily or abused its discretion in granting the license to construct the Cornwall plant. The Scenic Hudson II court also ruled that all National Environmental Policy Act (NEPA) requirements had been met. Judge Oakes, in a vigorous dissent recommending reversal without remand, contended that the scope of review as applied by the majority was too narrow. He maintained that the FPC had ignored the Scenic Hudson I mandate, thereby acting arbitrarily and with abuse of discretion, in making contradictory and inconsistent findings on important fact questions. The dissent also argued that the FPC had failed to comply with NEPA and that the Commission's findings on the issue of aesthetics were unacceptable.

This Note will consider the merits and deficiencies of the Scenic Hudson II majority and dissenting opinions. Consideration will be given to authorities which support the traditional substantial evidence test and to those backing an expanded scope of judicial review. From this examination, it will be shown that both Scenic Hudson I and II have firmly established the propriety of the traditional scope of review and the concomitant application of the substantial evidence test to administrative agency environmental findings. The Note will also offer a brief suggestion for changing the judicial review procedure without broadening the scope of review.

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3. Hereinafter, the power plant will be referred to as the Cornwall plant, or Cornwall project. It has often been referred to by others as the Storm King plant, or Storm King project.


5. FPC Op. No. 584, 44 FPC 350 (1970). The FPC is empowered to grant licenses to construct, operate, and maintain pumped storage hydroelectric plants under section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1970). The numbered Findings and Further Findings cited in the Scenic Hudson II opinion refer to the paragraph numbers in the FPC slip opinion. Although the FPC Reports include the FPC opinion in language identical to that found in the slip opinion, the Reports do not use the paragraph numbering found in the slip opinion. Since reference is made to those numbered findings in the Scenic Hudson II opinion, the numbered findings as well as the FPC Reports page number will hereinafter be cited.

In both Scenic Hudson I and II, the court was reviewing FPC decisions to grant a license to Con Ed "to construct, operate, and maintain a pumped storage project along the western shore of the Hudson River at Cornwall, New York." The project, which is designed primarily to supply New York City with electricity during the peak load and emergency periods, will have an immediate generating capacity of two million kilowatts. The three principal elements of the proposed Cornwall power plant—a reservoir, an underground powerhouse, and overhead and underground transmission lines—will require large-scale construction work. At its closest point the plant's powerhouse will be 140 feet from the Moodna Pressure Tunnel, a link in the Catskill Aqueduct System which, along with two other systems, supplies New York City with all of its water. Con Ed maintained that the construction of the plant was necessary to prevent continued electrical brownouts and blackouts in the New York City metropolitan area, and to reduce the severity of the "daily load swing" in its New York City plants between high daily and low nightly output.


The reservoir will be constructed one mile south of Storm King Mountain, 1,000 feet above the Hudson River in a natural mountain basin. It will occupy 240 acres and will be enclosed by five dams. The water in the reservoir can be considered the equivalent of stored electrical energy. The underground powerhouse will contain eight pump-generators. At the Storm King site, the northern slope of the mountain will be cut away a length of 560 feet along the shoreline and a depth of 200 to 260 feet back from the shore to make room for the tailrace where water will be drawn in and discharged. When pumping to the reservoir, the powerhouse will draw approximately 1,080,000 cubic feet of water per minute from the Hudson River; when generating, it will discharge 1,620,000 cubic feet of water per minute from the reservoir into the river. Transmission lines will run under the Hudson River to the east bank and then underground for 1.6 miles. From this point the lines will be carried on overhead towers 100 to 150 feet tall for nine miles to an interconnection with Con Ed's existing north-south lines to New York City. The overhead lines will occupy a swath 125 feet wide, and the cut will be greater where the topography requires a larger right-of-way. The project, which will be the world's largest pumped storage plant, will be capable of enlargement to a generating capacity of 3 million kilowatts. The estimated project cost is 300 million dollars. Brief for Scenic Hudson Preservation Conference at 2-5, Scenic Hudson II [hereinafter cited as Preservation Conference Brief].

New York City intervened in the proceeding subsequent to the Scenic Hudson I remand when it became apparent that the powerhouse construction posed a threat to the city's water supply.

Con Ed has argued that the project's "peaking generation" is necessary to meet emergency power needs. It has contended that the pumped storage operation can deliver its capacity from a cold start to the synchronized system from 2½ to 3½ minutes faster than can gas turbines, one of the primary alternative power sources considered. According to Con Ed, this start-up time differential is crucial in avoiding the cascading system failures that caused the 1965 Northeast blackout. While Scenic Hudson Preservation Conference and other inter-
The project site at Storm King Mountain was strongly opposed by the Scenic Hudson Preservation Conference and other environmental groups as a threat to an area of beauty and historical significance as well as to Hudson River fisheries. The plaintiffs were particularly concerned with the project's impact on Storm King Mountain, the base of which will be a portion of the project site. In the Cornwall area, the Appalachian Mountains are cut to sea level by the Hudson River, forming hills that appear to rise almost directly from the river's edge. Storm King Mountain, at a height of 1343 feet, is one of the largest and most scenic hills in this formation.

In Scenic Hudson II, the Preservation Conference asserted that Scenic Hudson I mandated an expansion of the scope of judicial review of administrative decisions. The majority rejected this claim, relying on language in Scenic Hudson I which they interpreted only to require administrative consideration of all relevant factors, including those related to environmental impact. The majority found any expansion of the scope of review improper and applied the traditional substantial evidence test to the agency findings. The dissent rejected this position and asserted that both Scenic Hudson I and subsequent cases mandated a broader scope of judicial review of administrative findings. While Judge Oakes did not explicitly reject the substantial evidence test, he asserted that it could properly be expanded to permit judicial reconsideration of the environmental data without deference to the administrative findings. Judge Oakes did not choose to call this de novo review, although the language of his dissent indicates that de novo consideration was in fact intended. The majority and dissent also differed on the issue of the FPC's fulfillment of NEPA requirements in licensing the project—particularly the duty to explore all alternatives to the project.

venors have maintained that only "base-load" power plants are necessary, Con Ed has claimed that the peak-load capability will allow the Cornwall plant to use energy generated by otherwise idle generating plants in New York City during non-peak hours. This energy will enable the Cornwall plant to pump water up the mountain and into the reservoir. By allowing other New York City plants to generate power on a continuous basis, these plants will develop a more even load and thus eliminate the costly and inefficient "daily load swing" from high daily to low nightly output. Brief for Consolidated Edison Co. at 30-34, Scenic Hudson II [hereinafter cited as Con Ed Brief].

11. In Scenic Hudson II, the Commission findings [Findings 224-51, 44 FPC 397-404] that Con Ed had made adequate protective provisions for Hudson River fish and fish eggs were upheld. 453 F.2d at 476-77, 3 ERC at 1241-42.

12. For discussion of the aesthetic impact of the project on the mountain, see part I, C infra.

13. This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the "licensing of the project would be in the overall public interest." The Commission has an affirmative duty to inquire into and consider all relevant factors. Id. at 468-69, 3 ERC at 1235-36, citing 354 F.2d at 620, 1 ERC at 1093.

14. See text accompanying notes 89-92 infra.

15. See text accompanying notes 93-95 infra.


17. See part I, D infra.
A. Threat to the Catskill Aqueduct

The first conflict between majority and dissent regarding issues of fact involved possible danger to the Catskill Aqueduct's Moodna Pressure Tunnel during excavation for the Cornwall powerhouse. The issue before the FPC was whether or not the drilling and excavation for the powerhouse would put enough additional stress on the tunnel to affect its structural integrity and thereby endanger a large portion of the New York City water supply. The majority adhered to the FPC's ultimate finding that the excavation would pose no danger to the Moodna Tunnel, and accepted the Commission's conclusion that the rock at the project site was "capable of sustaining great loads." In doing so, it rejected New York City's contention that rock stability contributed to the tunnel's failure in 1913 and could cause the same result during the powerhouse excavation. The majority recognized that there was disagreement among the experts on the potential danger to the tunnel during blasting and excavation, but concluded that the findings favorable to the construction were supported by substantial evidence. In reaching this conclusion the majority stated that the court should defer to administrative expertise on "highly complex technological issues such as these."

The dissent emphasized the conflicting testimony on the tunnel question, noting that some experts had stated that only a small increase in rock stress was likely, while others indicated that a significant increase was possible. In Judge Oakes' opinion, the evidence relied upon by the FPC was thus both insufficient and inconsistent and could be rejected on either ground.

1. Inconsistency of Administrative Findings

Judge Oakes asserted that in failing to consider adequately the potential danger to the Catskill Aqueduct, the Commission ignored the Scenic Hudson I mandate to consider all factors relevant to the construction and operation of the Cornwall plant. Although the FPC had adduced testimony and made findings on this issue, in Judge Oakes' view "[t]he mere recitation of testimony of the Federal Power Commission does not amount to the making of findings" and such conclusions cannot be sustained where they

18. Further Finding 33, 44 FPC at 429, stated: "The construction of Applicant's proposed project at the Cornwall site will not constitute a hazard to the Catskill Aqueduct, and the site does not constitute a hazard to the Aqueduct." The term "Further Finding" is used in the FPC's slip opinion to describe the Commission's ultimate findings. The FPC Reports do not employ the term Further Finding, but include those findings in the closing paragraphs of the opinion.

19. 453 F.2d at 479, 3 ERC at 1243, citing Finding 259, 44 FPC at 405.
20. 453 F.2d at 480, 3 ERC at 1244.
21. Id. at 484, 488, 3 ERC at 1247, 1250.
22. Id. at 487, 3 ERC at 1249. This language echoes the court's statement in Scenic Hudson I that the Commission's role is not to act "as an umpire, blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative action at the hands of the Commission." 354 F.2d at 620, 1 ERC at 1093. It should be noted that there were no specific Scenic Hudson I directions to the FPC on the tunnel issue since it was not disputed until after the remand.
are inconsistent and insufficiently explored.\textsuperscript{23}

The record indeed reveals a lack of certainty as to the degree of risk involved in the powerhouse excavation. Finding 270 acknowledged that there was “some risk” of endangering the tunnel, but did not specify or quantify that risk.\textsuperscript{24} Finding 272 asserted that 50 years of trouble-free tunnel operation indicated that it could withstand all the hydrostatic pressures involved in the powerhouse construction; but how such previous trouble-free operation supports this assertion is not documented.\textsuperscript{25} Similarly, Finding 284 referred to the remote possibility of danger to the Aqueduct from blasting for the powerhouse excavation, although the Commission's own footnote to Finding 287 indicated that the structural integrity of the Aqueduct was unknown.\textsuperscript{26} Furthermore, Finding 295 referred to the absence of danger to the Aqueduct,\textsuperscript{27} while Finding 290 mentioned a “remote” danger.\textsuperscript{28} As Judge Oakes wrote, “there is a world of difference between no danger and a ‘remote danger.’”\textsuperscript{29} But, Further Finding 33 stated: “The construction of Applicant's proposed project at the Cornwall site will not constitute a hazard to the Catskill Aqueduct, and the site does not constitute a hazard to the Aqueduct.”\textsuperscript{30} This unequivocal language arguably renders meaningless the semantic differences in the earlier findings.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{23} 453 F.2d at 484, 3 ERC at 1247.
\item \textsuperscript{24} Construction of the powerhouse would [require] removal of approximately 254,000 cubic yards of rock. The City [stated] this would disturb the equilibrium of forces within the rock formation. City's witness Fluhr testified that, while the risks may be small, there is certainly some risk, though he admitted that his conclusions on geologic risk were largely qualitative and that he might be overly cautious.
\item Finding 270, 44 FPC at 407.
\item The finding simply stated:
\begin{quote}
Operation of the Aqueduct for a period of over 50 years has established that the immediate rock formation can successfully withstand all of the hydrostatic pressures and stresses involved herein. In essence, this is the conclusion of the Berkey report on the Aqueduct's geology.
\end{quote}
Finding 272, 44 FPC at 407. Furthermore, as Judge Oakes noted, Finding 271 revealed that in 1913 there was a leak in the Catskill Aqueduct which required a temporary shutdown, thus belies the assertion of complete trouble-free operation. 453 F.2d at 486, 3 ERC at 1249.
\item “There is no evidence concerning the condition of the Aqueduct's lining. Its structural integrity is unknown to the City or any of its witnesses.” Finding 287 n.25, 44 FPC at 409 n.25.
\item “The arguments regarding Section 27 primarily relate to the by-pass and are largely moot, since we do not require a by-pass, based on our findings that construction of the powerhouse will not endanger the Aqueduct.” Finding 295, 44 FPC at 411.
\item “We conclude that the evidence in the record indicates that the probability of damage to the Aqueduct is remote and that a by-pass is not required.” Finding 290, 44 FPC at 410.
\item 453 F.2d at 487, 3 ERC at 1250.
\item Further Finding 33, 44 FPC at 429.
\item However, simply because the FPC makes an ultimate finding that apparently resolves previous inconsistent findings on the same issue, a court should not be precluded from examining those inconsistent findings. Here the Further Finding clarifies the Commission's state of mind on the aqueduct issue and tends to reconcile the previous inconsistencies, showing that by “remote danger” the FPC really meant a
The dissent argued that "if any agency findings are internally inconsistent, the court is not bound to accept them." However, the cases relied upon in support of this assertion are not precisely on point. In *Gallick v. Baltimore & Ohio R.R.*, the Supreme Court indicated that the inconsistent jury findings would cancel each other out. However, the Court also stated that such conflicting findings should be harmonized whenever possible. Similarly, the dissent cited *Telex v. Balch* and *Freightways, Inc. v. Stafford*, in which the Eighth Circuit rejected inconsistent findings in support of judgments where the trials were to courts without juries. Thus, the dissent relied on cases which refer to inconsistent findings made by triers of fact at trial, and not by administrative agencies. To be sure, the administrative scenario seems analogous to that at trial and, indeed, the *Freightways* court stated that where the facts warrant a judgment for either side "dependent upon which [finding] is accepted as controlling, then the findings are in irreconcilable conflict." Such language, while addressed to trial situations, seems applicable to administrative hearings, as Judge Oakes indicated.

As argued in the dissent, a court's rejection of inconsistent agency findings should result in more careful administrative consideration and presentation of the evidence. However, in rejecting the findings, the dissent also precluded the possibility of harmonizing them, as suggested in *Gallick*. Thus, the series of findings on the tunnel issue could be interpreted to reveal a possibility of danger to the tunnel during powerhouse excavation, but one which is so remote as to be worth taking. Furthermore, while there was a conflict between the testimony of the experts on the possible risks to the Moodna Tunnel, the FPC findings appear to embody only minor semantic inconsistencies. For example, while Judge Oakes maintained "no danger" and "remote danger" were sufficiently inconsistent terms to permit rejection of the findings which included them, these terms are not diametrically opposed and may reveal only a slight difference in risk. For this reason, Judge Oakes' reliance on the inconsistency doctrine seems mis-

virtually non-existent and insignificant hazard. See text accompanying notes 39-41 infra.

32. 453 F.2d at 484, 3 ERC at 1247.
34. Id. at 119.
35. 382 F.2d 211 (8th Cir. 1967).
36. 217 F.2d 831 (8th Cir. 1955). In *Freightways*, where the findings of fact irreconcilably conflicted, the court held the findings cancelled each other out and could not support a judgment for the plaintiff. 217 F.2d at 835. However, the FPC findings attacked by Judge Oakes do not reflect the irreconcilable conflict found in *Freightways*.
37. 217 F.2d at 835.
38. In fact the rejection of conflicting findings doctrine might be more important in review of agency than judicial fact-finding since administrative agencies are often strongly mission-oriented and unable to maintain the neutrality of a judge or jury. See Roberts, *Federal Power Commission, Sierra Club Bull.*, Aug. 1970, at 9-10.
39. 372 U.S. at 119.
40. 453 F.2d at 487, 3 ERC at 1250.
placed, since it permits rejection of findings which may be harmonized and which, in any event, are potentially more vulnerable to attack on other grounds.\textsuperscript{41}

2. Deference to Administrative Expertise

On the Catskill Aqueduct issue, the dissent departed from the concept of deference to administrative expertise and argued that since the FPC had no expertise in geology or rock stress analysis, its findings were not acceptable as an adequate technical assessment of the problem.\textsuperscript{42} Furthermore, Judge Oakes maintained that the Commission's refusal to follow the recommendation of its own staff that "an appropriate precautionary measure should be undertaken to safeguard the Moodna Tunnel" underscored the Commission's inability to assess the geological data competently.\textsuperscript{43}

There is authority to support a refusal to defer to administrative expertise, although none was cited in the dissent. Professor Jaffe has stated that courts "must evaluate the relevance and weight of expertness," and "must be wary of expert opinion which really only seeks to advance the expert's conception of policy, cloaking it in the concept of expertise."\textsuperscript{44} Likewise, when a court considers itself as qualified as an agency to assess particular information, the concept of deference is properly abandoned.\textsuperscript{45} As Justice Frankfurter noted in his dissent in \textit{RCA v. United States},\textsuperscript{46} courts on numerous occasions have dealt with complex scientific problems.\textsuperscript{47} Frankfurter argued that where the judgment of the agency is applied to a situation which profoundly affects the public interest, traditional notions of judicial deference can be ignored.\textsuperscript{48} Although these authorities were not relied upon, it is clear from the language of the \textit{Scenic Hudson II} dissent that Judge Oakes assumed the court to be as competent as the FPC to assess the Moodna

\textsuperscript{41} For example, aesthetic degradation and increased air pollution in New York City. See parts I, B & C infra.

\textsuperscript{42} 453 F.2d at 484, 486, 3 ERC at 1247, 1249.

\textsuperscript{43} \textit{Id.} at 486, 3 ERC at 1249, \textit{citing} FPC Staff Brief on Exceptions to Initial Supplemental Decision, Feb. 12, 1970, at 11.

\textsuperscript{44} L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 579-80 (1965).

\textsuperscript{45} See \textit{SEC v. Cogan}, 201 F.2d 78 (1951), \textit{rev'd in part on rehearing}, 201 F.2d 82 (9th Cir. 1952). In \textit{Cogan}, the court was reviewing an SEC decision relating to the breach of a fiduciary duty sufficient to cause the forfeiture of an attorney's fee where the attorney was involved in a railway reorganization matter before the Commission. On rehearing, the Ninth Circuit held that issue to be a question of law on which a court could properly substitute its judgment for that of the agency. 201 F.2d at 84-87. See \textit{also} Justice Jackson's dissent in \textit{SEC v. Chenery Corp.}, 332 U.S. 194, 209-18 (1947), for a heated attack on deference to administrative expertise.

\textsuperscript{46} 341 U.S. 412, 421 (1951).


\textsuperscript{48} 341 U.S. at 423.
Tunnel data, thus permitting the court to reject particular findings which would otherwise fulfill the substantial evidence test.

**B. New York City Air Pollution**

Air pollution was an issue in *Scenic Hudson II* because the Cornwall plant will require external power generation for pumping water from the Hudson River to the Cornwall reservoir. The plan accepted by the FPC will permit Con Ed to employ its relatively inefficient New York City fossil fuel plants for this purpose.\(^9\) Thus, although the Cornwall plant will eventually assume a significant portion of the generating load for New York City in emergency and peak load periods, the city plants will assume the entire generating load for Cornwall pumping power. Furthermore, the fossil fuel plants will produce this energy at night, thereby increasing their power output during a normally idle period and releasing additional nitrogen oxide emissions into the readily polluted still night air.\(^0\)

The majority accepted all of the Commission's findings concerning the Cornwall plant's impact on New York City air pollution.\(^1\) The findings stated, *inter alia*, that the Cornwall project would ultimately reduce the number of fossil fuel plants in New York City by giving Con Ed additional time to construct "clean" nuclear powered generating plants\(^2\) and that after

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\(^9\) See notes 9 & 10 *supra*.


\(^1\) Findings 75-92, 44 FPC 369-73.

\(^2\) Findings 81, 83, 44 FPC at 370-71. Thus, the Commission stated:

Pumped storage is also a source of anti-pollution generation in that peaking energy is supplied pollution free and pumping energy requirements provide a demand which permits nuclear and fossil fuel generation units to operate during night hours more effectively. This in turn provides the economic and ecological incentive for construction of such units thereby eliminating the need to continue operating the less efficient and more polluting fossil fuel installations.

Finding 81, 44 FPC at 370. The Commission continued:

That water for Cornwall will normally be pumped by the use of electric energy from nonpolluting sources is based on economic realities. Most of Con Ed's present generating facilities are relatively inefficient and burn relatively expensive fossil fuel. It is obvious that the oldest and most inefficient of these steam-electric plants must be replaced as soon as possible. The evidence is that the Cornwall project will permit a more rapid replacement of these plants by nuclear plants. This is because large nuclear plants are economical when they are used continually near their maximum power rating. The demand on the power system on the other hand is far from uniform, having pronounced diurnal peaks above the base load with an amplitude comparable to the base load. A pump storage plant like Cornwall provides the means by which the otherwise incompatible requirements of efficient nuclear plant operation and fluctuating power demand can be meshed. The availability of a Cornwall in the system as a reserve for satisfying the peak-load requirements permits the replacement of the old inefficient plants in the City. This in turn leads to a further reduction of pollutants as well as to economic benefits. Very little City-generated power will be used to pump Cornwall,
an initial eight year period less sulfur dioxide would be produced by a power system including the Cornwall plant.\textsuperscript{53} One consideration mentioned by neither the majority nor the dissent is the difficulty and delay in constructing nuclear powered generating plants.\textsuperscript{54} The FPC asserted in its findings that in the coming years Con Ed nuclear plants would assume a significant portion of the power generation for New York City.\textsuperscript{55} Yet it is interesting to note that in its brief to the Second Circuit, Con Ed stated that substantial delays in the completion of three of its nuclear plants compelled the immediate construction of the Cornwall facility.\textsuperscript{56}

\textbf{C. Aesthetic Impact of the Plant}

The majority and dissent vigorously disagreed on the visual impact of the proposed construction.\textsuperscript{57} The Cornwall powerhouse will be completely particularly as Con Ed's interconnections and nuclear generated capacity increase with time.

Finding 83, 44 FPC at 370-71.

\textsuperscript{53} Although Scenic Hudson contends that a combination of nuclear generation and gas turbines would afford greater anti-air pollution benefits than Cornwall, the Staff study shows that this would be true only in Cornwall's early years . . . . [A]fter eight years of operation less sulphur dioxide would be produced by a system having Cornwall available for peaking purposes.

Finding 87, 44 FPC at 372. \textit{See also} Finding 88, 44 FPC 372, which added: "By 1980 the Con Ed system with Cornwall would be surpassed only by the system with an all nuclear alternative in the reduction of fossil fuel burning in New York City."

\textsuperscript{54} Nuclear power plant development is presently a prime target of environmentalists. Their opposition to the construction of nuclear-powered generating plants has been based most often on issues of plant safety, radiation leakage, and thermal pollution. In Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971), the court ordered the AEC to revise its licensing regulations to conform to NEPA requirements, and these changes will cause new delays in the licensing of both future and nearly completed nuclear power plants. \textit{See also}, Izaak Walton League v. Schlesinger, 337 F. Supp. 287, 3 ERC 1453 (D.D.C. 1971); \textit{In re} Consumers Power Co., 3 ERC 1001 (Mich. Public Service Comm., June 16, 1971); Murphy, \textit{The National Environmental Policy Act and the Licensing Process: Environmental Magna Charta or Agency Coup de Grace?}, 72 COLUM. L. REV. 963, 967-70 (1972). \textit{See generally} Bronstein, \textit{The AEC Decision-Making Process and the Environment: A Case Study of the Calvert Cliffs Nuclear Power Plant}, 1 ECOLOGY L. Q. 689 (1971).

\textsuperscript{55} Findings 81-83, 114-21, 44 FPC at 370-71, 378-79. Findings 81 and 83 are quoted in note 52 supra.

\textsuperscript{56} Con Ed Brief, \textit{supra} note 10, at 28-29. One environmentalist contends that the issue of an energy crisis was intentionally caused by Con Ed itself in order to assure a favorable decision by the FPC:

\textit{Since [Con Ed] planned the [Cornwall] facility to be operational by 1968, its own planning procedures required it to know the site, design, and major engineering details of the project by 1958 at the latest. Yet, by delaying the application until 1963, Con Edison virtually assured a favorable FPC decision since, at that late date, alternative power sources to meet the 1968 demand could not readily be found. Thus, unless the FPC wanted to risk power blackouts, it had to grant the license.}  

\textit{Roberts, \textit{supra} note 38, at 10.}

\textsuperscript{57} On non-visual aesthetic questions the majority agreed with the Commission's
underground, with only the powerhouse entrance, access road, and tailrace above ground. The tailrace will be located at the Hudson River's edge in an area partially occupied at present by a railroad bridge and various dilapidated structures. It will require a vertical rock cut rising from 10 to 32 feet above the river and will be 685 feet long. In concurring with the Commission's finding that the tailrace will not destroy a scenic, unspoiled view of Storm King Mountain, the majority asserted that the scenic impact of the visible portion of the tailrace and cut should be evaluated not in terms of the number of square feet of construction visible, but in terms of the entire visible panorama. Thus, the total area occupied by the tailrace "would be miniscule in proportion to the total area encompassed within a viewer's peripheral vision."

The dissent rejected the majority's "entire visible panorama" test and emphatically disagreed with FPC's conclusion that Storm King Mountain's majestic size would simply visually "swallow up" any construction such as the tailrace and abutments. While the FPC based its finding on the mountain's apparent ability to "swallow up" such prior unsightly constructs as the railroad bridge, the dissent noted that the tailrace would be three stories high and the length of a "good sized football stadium." In rejecting the "swallowing up" concept, Judge Oakes stated: "This argument borders on the outrageous . . . . Two scenic wrongs do not necessarily make a right."

The majority rejected the petitioner's suggestion that the court make a "policy determination" to bar any intrusion upon the area's scenic beauty, conclusion that the Cornwall reservoir would not have a detrimental aesthetic impact. Furthermore, no evidence was found of possible destruction of historical sites due to the construction since no showing was made that any events of historical significance occurred at Storm King Mountain or at Cornwall. 453 F.2d at 474-75, 3 ERC at 1240-41.

It should be noted that the Preservation Conference was not solely concerned with the potential desecration of the scenic qualities of the Storm King area. The contention was phrased more broadly in terms of the area's unique wilderness aspects: "[T]hat it preserves and embodies the most savage and untrammeled characteristics of the wild at the very threshold of New York." Preservation Conference Brief, supra note 8, at 21, quoting Vincent J. Scully, Professor of Art History, Yale University. Both the FPC and the majority subsumed these larger questions in the single issue of the visual impact of the power plant.

58. 453 F.2d at 473-74, 3 ERC at 1239-40.
59. While the majority does not indicate that its "entire visible panorama" test is to be applied to all similar circumstances involving aesthetics, it seems likely that such reasoning could be used by other courts in comparable situations. The test, which is commonly used to assess aesthetic impact in everyday life, also comports with a test of reasonableness suggested by Professor Jaffe based on the "reasoning of experience." See text accompanying notes 127-28 infra. However, in positing the "entire visible panorama" test the court failed to indicate from what perspective the panorama would be viewed. Obviously, the proportion of the panorama occupied by the tailrace and abutments will vary with the viewer's distance and direction from the mountain.

60. 453 F.2d at 474, 3 ERC at 1240.
62. 453 F.2d at 491, 3 ERC at 1252-53.
63. Id.
and not only concluded that the FPC's aesthetic impact findings were supported by substantial evidence, but also asserted that the court did not have the power to impose such a non-intrusion policy upon the FPC. While the majority did not specify why such a "policy determination" was beyond its competence, at least four possible reasons can be adduced. First, the court apparently considered aesthetic considerations, like all other relevant factors, to be within the province of administrative expertise. Second, there is no statutory authorization for the imposition of a "no-development" policy where power plant construction intrudes upon areas of scenic beauty. Third, such a policy determination would have a profound impact upon all future power plant development by potentially prohibiting all plant construction in areas of scenic beauty. Understandably, the Second Circuit was unwilling to make a sweeping decision which would reshape the future of power plant development in the United States. Finally, the majority position also reflects a reluctance to define that which is or is not beautiful, since the lens through which the court would look is no less colored than that of Con Ed or the Scenic Hudson Preservation Conference.

D. National Environmental Policy Act

The final issue over which the majority and dissent disagreed involved the FPC's fulfillment of NEPA requirements, particularly those of section 102 of the Act requiring a "systematic, interdisciplinary approach" to the consideration of environmental issues. The majority found the FPC hear-

64. Id. at 475-76, 3 ERC at 1241.
65. 42 U.S.C. § 4332(2)(A) (1970). The FPC's NEPA Regulations detail the Commission's procedures for licensing or relicensing of major hydroelectric plants consistent with NEPA requirements. See 18 C.F.R. §§ 2.80-82 (1972). The FPC's original NEPA Regulations were issued before Scenic Hudson II was decided. See 36 Fed. Reg. 10040 (1971). Scenic Hudson I's strong language concerning the basic necessity to preserve and protect natural beauty and resources was one of many factors impelling the enactment of NEPA. Section 102(2)(C) of the Act requires all agencies to:

[I]nclude in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement 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,
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.


Con Ed conceded the applicability of NEPA to the proceedings [Con Ed Brief, supra note 10, at 103-04], and, in any case, the statute was made applicable by Zabel v. Tabb, 430 F.2d 199, 213, 1 ERC 1449, 1459 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971), which held applicable present environmental standards, such as NEPA, and not simply those in existence at the time a permit or license was granted or denied. See also EDF v. Corps of Engineers, 325 F. Supp. 749, 2 ERC 1280 (E.D. Ark. 1971), aff'd, — F.2d —, 4 ERC 1721 (8th Cir. 1972); United States v. Moretti, 331 F. Supp. 151, 3 ERC 1052 (S.D. Fla. 1971).
nings and order in compliance with NEPA and resolved any questions of environmental impact statement sufficiency by commenting that the Commission’s "exhaustive environmental findings" fulfilled the statutory requirements. The dissent asserted statutory noncompliance, attacking the FPC's NEPA findings.

Judge Oakes noted that Finding 213, which was made under section 102(D) of NEPA and related to alternative uses of the resources available at the Storm King site, omitted consideration of the "no project" alternative and concluded that it was therefore inadequate. This contention is supported by Udall v. FPC, which reversed and remanded an FPC decision to license the construction of a hydroelectric plant where the Commission failed to consider public interest factors such as future power needs, alternative power sources, and preservation of wild rivers and wilderness areas. In remanding the matter for study of these factors, the Court also stated that the FPC should consider whether any project should be constructed at all.

In Keith v. Volpe suit was brought to halt construction of the Century Freeway near Los Angeles until the appropriate federal and state officials complied with NEPA's requirement to file an environmental impact statement. In granting a preliminary injunction, the district court stated: "Defendant's statement should consider all possible alternatives to the proposed freeway, including changes in design, change in the route, different systems of transportation and even abandonment of the project entirely."

Judge Oakes' position on the "no project" alternative is weakened, however, by the FPC's extensive investigation of alternative sites and its finding that no feasible economic alternatives were available within a radius of approximately 100 miles of New York City. Furthermore, an alterna-

66. 453 F.2d at 481, 3 ERC at 1245. The FPC's conclusions as to the overall environmental impact of the Storm King project are contained in Findings 211-18, 44 FPC at 394-97.

67. The finding states:

The Sierra Club points out that Section 102(D) of [NEPA] requires Federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The point missed by the Sierra Club in its opposition to the project is that there is essentially no conflict concerning alternative uses of available resources because with the exception of the small part of the Black Rock Forest to be flooded by the reservoir practically none of the other parts of the project preclude alternative uses of available resources. The space taken by the scenic overlook does not preclude any alternative use of the vast remaining resources which are available. Nor does the project in any way preclude the development of the Storm King section of the Palisades Interstate Park.

Finding 213, 44 FPC at 395.

68. 453 F.2d at 492-93, 3 ERC at 1254.

69. 387 U.S. 428, 1 ERC 1069 (1967).

70. Id. at 436, 1 ERC at 1071.


72. Id. at 1336, 4 ERC at 1357. See Note, Litigating the Freeway Revolt: Keith v. Volpe, 2 Ecology L. Q. 761 (1972).

73. Both Con Ed and Staff conducted extensive surveys for conventional hydroelectric or pumped storage sites within a radius of approximately 100
tive site at the foot of Crow's Nest Mountain "under and within lands of the Palisades Park in an area of great scenic beauty," was licensed by the Commission as an alternative in the event that the Storm King site was not affirmed. It should also be noted that *Conservation Council v. Froelhke* held that there is NEPA compliance with respect to environmental impact statement examination of alternative sites and uses of resources even if project costs exceed benefits and strong evidence argues against continuing the project.

Judge Oakes also attacked Finding 215, which concluded that no site within 100 miles of New York City would suffer any less environmental impact than the Storm King site. He questioned the choice of the 100 mile range as a magic maximum distance for power transmission when high voltage transmission can make longer distances between source and consumer a minor obstacle at most. This criticism of the finding initially seems valid; yet as one commentator has wondered, where would the siting inquiry end in such a case? If 100 miles is not adequate, what combination of distance and site factors is?

The basic problem with the dissent as it relates to the question of NEPA compliance is that Judge Oakes broadly interpreted an ambiguous statute. *Calvert Cliffs' Coordinating Committee, Inc. v. AEC* and its progeny unquestionably compel a thorough consideration of environmental

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miles from New York City. All of their witnesses concluded that there are no suitably located alternative conventional hydroelectric or pumped storage sites available. All of the potential sites were deemed to be not as economic, or economic only for local needs but not, when combined with extensive transmission costs, for New York City. Finding 122, 44 FPC at 379. Findings 75-140, 44 FPC at 369-82 consider all alternatives to the proposed plant except for the "no project" alternative.

74. Finding 312, 44 FPC at 414.
75. Finding 335, 44 FPC at 418.
77. 340 F. Supp. at 228, 3 ERC at 1690. In *Froelhke*, conservationists sought an injunction under NEPA to halt the New Hope Lake project in North Carolina, which involved dam construction for flood control, water quality control, general recreation, and fish and wildlife protection. The plaintiffs maintained that the project would cause environmental degradation, that such costs were not properly reflected by the cost-benefit analysis in the Army Corps of Engineers' environmental impact statement, and that the impact statement failed fully to consider possible alternatives to the project. Even given these shortcomings, the district court ruled that there had been procedural compliance with NEPA and refused to substitute its judgment on the propriety of the dam construction. *Id.*
78. 453 F.2d at 493, 3 ERC at 1254. Judge Oakes also criticized Finding 217, which referred to the Cornwall site as "acreage" committed to power plant development. 44 FPC at 396. Not surprisingly, he was unhappy with such a reference in light of the almost religious exaltation of the site's physical beauty during the proceedings. *See Preservation Conference Brief, supra* note 8, at 20-23.
79. See Murphy, *supra* note 54, at 980.
80. *Id.* at 965-66.
81. 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).
impact under NEPA; yet it is difficult to argue that the FPC did not give serious consideration to such issues in *Scenic Hudson II*. On both NEPA and other issues the dissent was rightfully concerned with possible FPC rubber-stamping of Con Ed requests, and this concern was borne out, to some extent, by the highly debatable findings on air pollution and aesthetics. Yet the evidence raised close questions and placed the Second Circuit in the unenviable position of having to second-guess the FPC after the Commission and parties had developed a massive record on these issues. Furthermore, numerous cases have held that judicial review under NEPA is limited to insuring an agency's procedural compliance with the Act and does not permit a court to substitute its own judgment on whether or not the project should be undertaken.82

However, the recent decision by the Eighth Circuit Court of Appeals in *EDF v. Corps of Engineers*83 would expand the scope of judicial review under NEPA. The plaintiffs had challenged the sufficiency of the defendant's impact statement for the proposed Gillham Dam on the Cossatot River in Arkansas. The court held that the impact statement contained a full and accurate disclosure of the relevant information and thus complied with the procedural requirements of section 102(2)(C) of NEPA.84 But the opinion went on to state that, where NEPA compliance is at issue, courts are not precluded from reviewing the merits of agency decisions to ascertain if they comply with the substantive requirements of NEPA.85 Noting that NEPA's substantive requirements include a "full, good faith consideration and balancing of environmental factors," the court asserted that where an impact statement reflects a cost-benefit analysis which is arbitrary or clearly gives insufficient weight to environmental factors, then agency findings can be set aside.86 The court also commented, however, that it could not substitute its judgment for that of the agency on the overall propriety of the project but could only remand the matter to the agency for further consideration of the relevant factors which were not adequately explored.87


83. — F.2d —, 4 ERC 1721 (8th Cir. 1972).


85. The trial court's opinion is in error insofar as it holds that courts are precluded from reviewing agencies' decisions to determine if they are in accord with the substantive requirements of NEPA. In light of our holding, there is no alternative but to subject the decision of the Corps to build Gillham Dam to review under the arbitrary and capricious standard.

86. — F.2d at —, 4 ERC at 1728, *citing* Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).

87. *Id.* See also NRDC v. Morton, 337 F. Supp. 167, 168, 3 ERC 1623, 1624
While this decision may alter the nature of judicial review under NEPA, its holding is not inconsistent with the Scenic Hudson II majority position. The Scenic Hudson II majority found proper NEPA procedural compliance and, furthermore, considered and rejected the contention that the FPC decision was arbitrary or capricious. While the sheer length of the Scenic Hudson II record should not be conclusive proof that sufficient weight was given to environmental factors, the absence of a showing that the extensive environmental data available to the FPC was ignored or played an insignificant role in the final substantive decision to grant a license precluded the Second Circuit from remanding the case for a further cost-benefit analysis under NEPA. Given the FPC's lengthy analysis and discussion of all the factors involved, it is difficult to say that questions of environmental impact were not given sufficient weight in the overall decision-making process or that, by giving insufficient weight to environmental factors, the FPC's cost-benefit analysis was arbitrary or capricious.

II

AMBIT OF THE SUBSTANTIAL EVIDENCE TEST IN JUDICIAL REVIEW OF ADMINISTRATIVE FINDINGS

The fundamental majority-dissent conflict in Scenic Hudson II concerned the applicability of the substantial evidence test to the FPC's environmental findings. The majority held this test, which has been defined as a test of "reasonableness," applicable to all the FPC findings, including those related to environmental impact, alternative sites, fisheries, historical sites, transmission lines, and aqueduct safety. The majority found that all of these findings complied with the substantial evidence test since there was some evidence on each issue to support the Commission's conclusions. Consistent with the substantial evidence test, the court deferred to the FPC's fact-finding and technical expertise and merely inquired whether all factors relevant to the construction and operation of the Cornwall plant had been considered in a manner that was not arbitrary, refusing to substitute its judgment for that of the FPC on any issues of fact.

(D.D.C.), aff'd, 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972). No remand occurred in Corps of Engineers, however, as the court concluded on the basis of the full record that the Corps' decision could not be set aside as arbitrary and capricious even if all factual disputes were resolved in favor of the plaintiffs. — F.2d at —, 4 ERC at 1728.

88. The court noted that the record comprised more than 19,000 pages, and that in over 100 hearing days the FPC and Hearing Examiner heard 60 expert witnesses and received 675 exhibits. 453 F.2d at 469, 3 ERC at 1236.


90. 453 F.2d at 468-69, 3 ERC at 1235-36.

91. Id. at 470, 3 ERC at 1237.

92. See id. at 468, 481-82, 3 ERC at 1235, 1245.
The dissent indicated its acceptance of the substantial evidence test in non-environmental cases where the agency is acting within the scope of its expertise. However, Judge Oakes asserted that the Commission acted arbitrarily and abused its discretion in making inconsistent and insufficient findings on aqueduct safety and failed to consider all factors relevant to the issue of increased New York City air pollution. While Judge Oakes maintained that these deficiencies in the Commission's findings were violative of the Scenic Hudson I mandate to consider all relevant factors, he did not indicate his rationale for expanding the scope of judicial review in environmental cases through modification or abandonment of the substantial evidence test. Though not labelled as such, his position would require de novo judicial review of FPC environmental findings.

If Judge Oakes construed Scenic Hudson I to broaden the scope of review through a relaxation of the substantial evidence test, his interpretation is contrary to that case's rejection of judicial substitution of judgment on administrative decisions. Furthermore, while the dissent revealed some weaknesses of the FPC decision and the Scenic Hudson II majority opinion, most notably on the air pollution and aesthetics issues, it failed to articulate a well-defined alternative to the substantial evidence test in environmental cases. This problem was compounded by Judge Oakes' failure to define key terms such as "abuse of discretion," although the precise meaning of those terms is crucial to an understanding of his position.

This part, therefore, will examine both the traditional basis of the substantial evidence test and the arguments for its modification in certain circumstances, particularly where environmental issues are raised.

A. The Statutory Authorization for Judicial Review of Administrative Decisions

Two statutes, the Federal Power Act and the Administrative Procedure Act (APA), defined the scope of judicial review of the Federal Power Commission's licensing order in Scenic Hudson II. The Federal Power Act permits "[a]ny person, State, municipality, or State commission aggrieved" by a final FPC order to appeal to the appropriate United States

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93. Id. at 482-83, 3 ERC at 1245-47.
94. Id. at 484-85, 3 ERC at 1248.
95. It should be noted that in dissenting from the Second Circuit's en banc denial of rehearing in Scenic Hudson II, Judge Timbers expressed reservations as to the applicability of the substantial evidence test to the Commission's environmental findings. 453 F.2d 494 (2d Cir. 1971). Justice Douglas, in his dissent from the Supreme Court's denial of certiorari, expressed similar doubts about the relevance of the substantial evidence test where NEPA issues are involved: "I share Judge Timbers' doubts that under § 101 [of NEPA] the balance struck by an agency unskilled in environmental matters should be reviewed only through the lens of the 'substantial evidence' test." 407 U.S. at 931, 4 ERC at 1750 (1972).
96. See 354 F.2d at 620, 1 ERC at 1093. See note 14 supra.
Court of Appeals within 60 days of the issuance of the Commission’s order and after proper exhaustion of administrative remedies. In reviewing the FPC’s order the court’s scope of review is somewhat constrained since, under the Federal Power Act, “the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”

The APA also authorizes judicial review for persons aggrieved by agency action where the action is final. The APA allows the reviewing court to:

- 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—

- hold unlawful and set aside agency action, findings, and conclusions found to be—
  - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - 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
  - unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Thus, section 706(2)(E) of the APA prescribes use of the substantial evidence test in cases, such as Scenic Hudson II, where the agency record was developed consistent with sections 556 and 557 of the APA, which articu-

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100. Id.
102. Id. § 706. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 2 ERC 1250 (1971), indicates the scope of judicial review in those cases where the court is constrained by the “committed to agency discretion” provision of the APA. 5 U.S.C. § 701(a)(2) (1970). In Overton Park, the Court reviewed a decision made by the Secretary of Transportation under the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970), and the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138 (1970), which prohibit the Secretary from approving a highway through a park site if a “feasible and prudent” alternative exists. While acknowledging that the APA permits legislative commitment to agency discretion, the Court held that if the Secretary failed to comply with his statutory duty to assess alternative sites, his decision would not merit the requested finding that it was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and so would require remand for further agency consideration. 401 U.S. at 416, 2 ERC at 1256. However, the Court emphasized that although neither de novo review nor application of the substantial evidence test was appropriate in Overton Park because of the commitment to agency discretion, de novo review would be permissible when the action is adjudicatory in nature and the agency fact-finding procedures are deemed inadequate. Id. at 415, 2 ERC at 1256. In all other cases of adjudicatory hearings designed to produce a record that is the basis of agency action, the substantial evidence test is still applied. Id. at 414, 2 ERC at 1255. See also Sierra Club v. Froehlke, — F. Supp. —, 5 ERC 1033, 1060-61 (S.D. Tex. 1973) (post-Overton Park interpretation of scope of review under NEPA); Citizens to Preserve Overton Park v. Volpe, 335 F. Supp. 873, 3 ERC 1510 (W.D. Tenn. 1972) (interpreting the Supreme Court’s mandate and remand); Comment, Discretion in a Crystal Closet: Applying a Systemic Approach to Determine the Reviewability of Agency Discretion, 3 Rutgers-Camden L.J. 452 (1972).
late the procedures to be used by agencies in arriving at licensing decisions. Furthermore, the language of section 706(2)(E) invoking the substantial evidence test in "a case . . . reviewed on the record of an agency hearing provided by statute," also applies to Scenic Hudson II, since the Federal Power Act contains rules of procedure for developing the record in matters involving public utilities.103

Since the relevant statutes clearly make the substantial evidence test applicable to Scenic Hudson II, it is useful to make reference to the principal definitions of the test. In Consolidated Edison Co. v. Labor Board,104 it was stated that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;"105 and in Labor Board v. Columbian Enameling & Stamping Co.,106 the Supreme Court added that for evidence to be substantial "it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."107 These two definitions, according to Professor Davis, remain the most authoritative pronouncements on the substantial evidence test.108

Under section 706(2)(A) of the APA, the reviewing court can set aside findings and conclusions found to be arbitrary, capricious, or an abuse of discretion. Professor Berger offers perhaps the most adequate explanation of these elusive concepts in noting that the APA uses the term "arbitrary" or "capricious" interchangeably with "abuse of discretion" and asserting that all three are the equivalent of "action unreasonable in the circumstances."109 On the issue of discretion, Professor Jaffe writes that "discretion . . . is the power of the administrator to make a choice from among two or more legally valid solutions,"110 and that abuse of discretion is "an exercise of discretion in which a relevant consideration has been given an exaggerated, an 'unreasonable' weight at the expense of others. The 'letter' has been observed; the 'spirit' has been violated."111 In Wong Wing Hang v. Immigration Naturalization Service,112 Judge Friendly equated

104. 305 U.S. 197 (1938).
105. Id. at 229.
107. Id. at 300.
108. 4 K. DAVIS, supra note 89, § 29.02 (1958).
110. L. JAFFE, supra note 44, at 586.
111. Id.
112. 360 F.2d 715 (2d Cir. 1966).
abuse of discretion with actions alleged to be "arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view."113 Since Judge Friendly, along with Judge Hays, constituted the Scenic Hudson II majority, it is probable that his view of abuse of discretion was employed. Furthermore, because the substantial evidence test is basically a test of "reasonableness," the "arbitrary and capricious" standard does little to expand the scope of judicial review in those cases, such as Scenic Hudson II, where the substantial evidence test is applicable.

B. Traditional Application of the Substantial Evidence Test

There is ample authority for the majority's traditional application of the substantial evidence test and its concomitant rule of deference to agency expertise. The leading case on the applicability of the test is Universal Camera Corp. v. NLRB,114 in which the scope of review of an NLRB decision under the Taft-Hartley Act was in issue. In holding that a court must defer to agency expertise even in matters not requiring expertise, the Supreme Court stated that the substantial evidence test as articulated in the APA precluded substitution of judicial judgment for that of the agency "even though the court would justifiably have made a different choice had the matter been before it de novo."115 A similar position was taken in NLRB v. Hearst Publications, Inc.,116 which held that "it is not the court's function to substitute its own inferences of fact for the Board's where that latter have support in the record."117 In the Permian Basin Area Rate Cases,118 the Supreme Court ruled that "[a] presumption of validity . . . attaches to each exercise of the Commission's expertise . . . . We are not obliged to examine each detail of the Commission's decision."119 While these cases lack environmental overtones and may be distinguishable from litigation such as Scenic Hudson II, the long-standing judicial predisposition to defer to the judgment of an agency clearly constrains the scope of review.

The concept of deference to administrative expertise arises from the legislative determination that agencies such as the FPC will have a "continuous, systemative supervisory and adjudicatory authority" over regulatory problems.120 While these agencies are not necessarily "expert" in handling the problems they were designed to regulate, by requiring use of the substantial evidence test Congress has chosen to restrict judicial reassessment of the data collected and analyzed by the agency in resolving questions of

113. Id. at 718, citing Delno v. Market Street Ry., 124 F.2d 965, 967 (9th Cir. 1942).
115. Id. at 488.
117. Id. at 130.
119. 390 U.S. at 767.
120. L. JAFFE, supra note 44, at 25.
fact. Jaffe contends that this deference to administrative fact-finding expertise is designed to foster agency autonomy and can "invigorate the [administrative] sense of responsibility, stimulate initiative, and encourage resourcefulness."\textsuperscript{121} While Jaffe recognizes that agencies are often "conservative and lethargic" and have frequently been captured by the interests they are designed to regulate, he nevertheless maintains they can be effective organs for environmental reform.\textsuperscript{122} In support of this assertion, he cites the impact of Scenic Hudson I on standing to intervene and the duty of administrative agencies to examine all relevant factors, two landmark reforms in administrative law.\textsuperscript{128} Yet, he does not indicate precisely what will compel an agency to pay more than lip service to the ideal of thoroughly examining all relevant factors. If judicial pressure such as that applied in Scenic Hudson I was the catalyst for major administrative reforms, perhaps similar pressure will be necessary to assure their full realization.

As Professor Davis notes, the substantial evidence test is a "middle position" in judicial review in which the court may decide questions of law but "limits itself to the test of reasonableness in reviewing findings of fact."\textsuperscript{124} Davis indicates that "questions of law" include common law, statutory interpretation, constitutional law, administrative procedure such as that prescribed by NEPA, and protection against arbitrary and capricious action or abuse of discretion.\textsuperscript{125} Jaffe concurs in general with this view and states: "The administrative [agency] is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but with certain exceptions its function is at that point exhausted. It has, as it were, a veto but no positive power of determination."\textsuperscript{126} Yet, Jaffe asserts that the substantial evidence test has changed from its original reasonableness standard, and that the question is no longer "whether a reasonable man would consider the evidence of record sufficient under the law to support the verdict . . . ."\textsuperscript{127} Instead, he provides the following test of reasonableness "as measured by a yardstick outside the law:"

\begin{quote}
 [W]hen a finding is attacked the judge must decide whether experience permits the reasoning mind to make the finding; he must decide whether the finding could have been made by reference to the logic of experience. He will conclude that the finding is unreasonable (either because it was badly reasoned or not the result of reasoning) when in his experience or in common experience as he knows it the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.\textsuperscript{128}
\end{quote}

\textsuperscript{121} Id. at 573.
\textsuperscript{123} Jaffe, supra note 122, at 235-36.
\textsuperscript{124} 4 K. Davis, supra note 89, § 29.01, at 114 (1958).
\textsuperscript{125} Id. § 29.01.
\textsuperscript{126} L. Jaffe, supra note 44, at 546.
\textsuperscript{127} Id. at 596.
\textsuperscript{128} Id. at 598. The test applied by the majority in Scenic Hudson II to assess the FPC's findings concerning the aesthetic impact of the Storm King project would fit within this definition. See text accompanying notes 58-63 supra.
While the Jaffe test of reasonableness does not expand the substantial evidence test, it explicates a reasoning process that a judge can apply to administrative findings. Although the test would appear to support the dissent to the extent that Judge Oakes relied on the "logic of experience," it is really very similar to the traditional substantial evidence test in requiring "no felt appreciable probability of the conclusion" before the finding can be rejected. Thus, the notion of reasonableness as applied in *Scenic Hudson II* is in accord with the tests articulated by two major recognized experts in administrative law.

Davis also notes that the substantial evidence test should not be confused with the "clearly erroneous" test since the former permits rejection of administrative findings only upon a showing of "unreasonableness" through the absence of minimal data in support of the finding, whereas the latter test permits such rejection even if there is minimal support for the finding.¹²⁰ The "clearly erroneous" test thereby permits the court to substitute its judgment for that of the agency on questions of fact. That Davis rejects the "substitution of judgment" concept is indicated by his support for the decision in *Consolo v. Federal Maritime Commission*.¹³⁰ In that case the Supreme Court refused to allow a lower court to determine the equitableness of a Federal Maritime Commission reparations order, and held that the lower court was required merely to ascertain whether or not there was substantial evidence to support the order.¹³¹

### C. Potential Expansion of the Scope of Review of Administrative Decisions

#### 1. Redefinition of Fact and Law Questions

The problem of determining what are purely fact issues as opposed to legal issues has long plagued administrative law. In *NLRB v. Marcus Trucking Co.*,¹²² Judge Friendly proposed the following categorization of fact-law questions:

(a) Cases . . . where the chief problem is the propriety of an administrative conclusion that raw facts undisputed or within the agency's power to find, fall under a statutory term as to whose meaning, at least in the particular case, there is little dispute;

(b) Cases where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term;

(c) Cases where the only or principal dispute relates to the meaning of the statutory term.¹³³

Judge Friendly stated that classification (a) clearly referred to questions of fact, classification (c) to questions of law, and classification (b) to questions of mixed fact and law.

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¹³¹ 383 U.S. at 618-21.
¹³² 286 F.2d 583 (2d Cir. 1961).
¹³³ *Id.* at 590-91 (footnotes omitted).
of both fact and law, depending upon the circumstances. In *Scenic Hudson II*, Judge Friendly, significantly, gave no indication that the disputed findings were within the independent judicial decision-making scope of classifications (b) or (c).

Perhaps the most expeditious method for expanding the scope of judicial review is to redefine certain questions of fact as questions of law. Professor Jaffe provides the foundation for such an approach when he defines a finding of fact as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." With this definition in mind, David Sive, in his pre-*Scenic Hudson II* article on proposals for an expanded scope of judicial review in environmental cases, states that the ultimate FPC finding to be articulated in licensing determinations is whether

"the project" . . . [will] be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial uses, including recreational purposes.

Sive maintains that this ultimate finding is neither "independent of nor anterior to any assertion as to its legal effect," particularly in its public interest aspect, and that as a question of law under the Jaffe definition, the broader scope of review is appropriate. Thus, Judge Oakes' de novo consideration of "fact" questions constituting the foundation for the basic, yet ultimate, "conclusion of law" mandated by the Federal Power Act was proper under the methodology proposed by Sive. Naturally, this model rejects reliance by courts on the "comprehensive plan" or "public interest" conclusions of the FPC since such findings are classified as "law" and not "fact." Since all underlying fact considerations necessarily provide input for the ultimate FPC finding, they, too, come within the purview of judicial consideration of questions of law.

134. *Id.* at 591.
137. *Id.* at 624, quoting Federal Power Act § 10(a), 16 U.S.C. § 803a (1970). The precise nature of the "comprehensive plan" and "other beneficial uses" is not explained in the Act.
138. Sive, supra note 136, at 624-25. While the Federal Power Act does not specifically address the "public interest" factor mentioned, *Scenic Hudson I* held that in discharging the planning duties listed in section 10(a) of the Act, the FPC must show "that the 'licensing of the project would be in the overall public interest.'" *354 F.2d* at 620, 1 ERC at 1093. The public interest factors referred to in *Scenic Hudson I* included investigation of alternative power sources, cost and aesthetic impact of transmission lines, and the effect of the project on Hudson River fish and fisheries. The passage of NEPA also compelled FPC investigation of the overall environmental impact of the proposed project, an issue clearly related to the public interest. *See also* Udall v. FPC, 387 U.S. 428, 1 ERC 1069 (1967); Michigan Consol. Gas Co. v. FPC, 283 F.2d 204, 224 (D.C. Cir.), cert. denied, 364 U.S. 913 (1960).
139. Sive, supra note 136, at 625.
140. *Id.*
The obvious defect in the suggested model is administrability. Although the Sive proposal is appealing in FPC cases—where environmental issues are often present—it implies no less than a wholesale transformation of fact findings to law findings under the Federal Power Act. Even Judge Oakes did not go that far as indicated by his willingness to apply the traditional test where environmental issues were not involved. It is submitted that the Sive alternative is simply not administrable since, in FPC cases, the frequent need for de novo review of purported questions of law would be unduly time consuming and would confuse judicial and administrative functions. Furthermore, since administrative expertise in some fact issues is unquestioned, the expanded scope of judicial review through a fact-law transformation would have to be limited to public interest questions—such as environmental impact problems—in order to assure minimal judicial administrability and competence. In addition, the determination of what is or is not a public interest question is extremely difficult and, therefore, merely adds another ambiguous variable to an already unclear formula for expanded judicial review.

The Catskill Aqueduct issue illustrates the problems posed by Sive's fact-law transformation. The aqueduct issue was a close one, with experts in conflict over the potential danger posed by the powerhouse excavation. The Commission resolved this fact question in favor of Con Ed, and, since there was sufficient evidence to support the reasonableness of the findings, the substantial evidence test was fulfilled and the findings accepted by the Second Circuit. Yet, under the Sive model the aqueduct's structural integrity would be a public interest question, since the water supply of New York City is potentially involved and because the finding is integrally related to the overall decision on the Cornwall plant. As such it would become a question of law for determination by the court, which would then face the same close question already decided by the FPC. Such duplication of effort would be undesirable, not only for reasons of administrability and competence, but also because the judicial second-guessing it would permit might well be unfavorable to environmentalists in some instances and would encourage actions by industry and government to challenge adverse agency findings protective of environmental values.

2. The "Practical Approach" to an Expanded Scope of Judicial Review

Sive offers a second proposal for expanding the scope of review which is based on Professor Davis' "practical approach" to judicial review of administrative decisions. Davis states that the practical approach is one which "tries to avoid allocations of functions merely on the basis of the literal meaning of the terms 'law' and 'fact' but which attaches these labels only on the basis of weighing the practical reasons for and against each possible allocation". He notes that one of the most important considera-

141. See 453 F.2d at 482-83, 3 ERC at 1245-46.
142. See part I, A supra.
143. 4 K. Davis, supra note 89, § 30.02, at 192-93 (1958).
tions for the practical allocation of responsibility is the "comparative qualification of the agency and of the court to decide the particular issue." Sive maintains that the "bulk of important questions in environmental cases call more for the talents of the courts and judges than for those of the administrative agencies" since the courts are said to be more capable of balancing the opposing economic and social interests. This alternative approach would also place a strong check on "captive agencies" which tend to act as a rubber stamp for the interests they purport to regulate. What is most interesting about this methodology is that it offers a court the opportunity to review certain public interest factors in a licensing proceeding without being compelled to reconsider all questions of fact. In *Scenic Hudson II*, it would have been feasible to isolate certain environmental fact questions and to re-examine them, if deference to administrative expertise on those issues was not presupposed. This is precisely what Judge Oakes did on the air pollution and aesthetics issues, maintaining that those questions were integrally related to environmental protection and were beyond the scope of FPC expertise. However, on the aqueduct issue, it is questionable whether the "practical approach" would have permitted de novo review of the findings since the FPC was no less qualified than the Second Circuit to judge the rock-stress data.

The following "inarticulate factors" posed by Davis in his examination of the proper scope of judicial review form an important part of the Sive-Davis model: (1) the character of the administrative agency; (2) the nature of the problems dealt with; (3) the consequences of the administrative action; (4) the confidence in the agency's record of dealing with such issues; (5) the degree to which judicial review would interfere with agency functions or overburden the courts; and (6) the nature of the agency proceedings. Under the "practical approach," these factors would be weighed to determine the validity of and respect to be accorded to the findings of a particular agency and, therefore, would aid in establishing the scope of review of those findings. With respect to *Scenic Hudson II*, it can be argued that the nature of the problem and the consequences of the action to be taken in the licensing proceeding had significant public policy characteristics regarding the potential effects on the Storm King site, New York City air pollution, and the power crisis in general. The presence of these

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144. *Id.* § 30.09, at 241.
147. See part I, B & C *supra*.
148. 453 F.2d at 488-91, 3 ERC at 1250-52.
149. For convenience, Sive's proposal, which builds upon Professor Davis' theories, is termed the Sive-Davis model. However, it is highly unlikely that Professor Davis subscribes to Sive's adaptation of his analysis of judicial review of administrative decision making.
factors would support a more rigorous scope of review since they are, ac-
cording to this analysis, more amenable to judicial decisions. In addition,
the FPC has not generated confidence in its treatment of environmental is-
issues, and this fact would also authorize a wider review under Sive's test.
As he indicates, the very newness of environmental considerations is an
"inarticulate factor" which may preclude administrative expertise in the
area and thereby permit judicial substitution of judgment in certain cases. The Sive-Davis model employing the "practical approach" is far more
palatable than the fact-law transformation proposal simply because it re-
stricts de novo consideration to those matters arguably more within the
court's competence. However, it must be remembered that this approach
conflicts with the rejection by both Davis and Jaffe of judicial substitution of
judgment on issues supported by substantial evidence. The Sive-Davis
model also runs the risk of permanently eliminating agency responsibility for
ultimate environmental findings, a result undesirable not only for reasons of
judicial administration but also because it is preferable to encourage re-
 sponsible administrative assessment of environmental impact issues through
thorough agency staff analysis of the complex technical data involved.
Furthermore, responsible administrative action could reduce the present an-
tagonism between conservationists and agencies and prevent lengthy and
expensive court battles.

3. A Proposal for Procedural Change

Scenic Hudson II poses the classic problems of judicial competence and
administrability. Many environmentalists are dismayed with the judicial
disposition of cases of this type, yet their desire for expanded review of
many environmental issues would amount to de novo review and would
place an enormous burden on the courts' time and talents. One possible
method for improving judicial review and administrative decision making
would be to revise agency procedures to allow for hearing and consideration
of the environmental impact of a proposed project prior to the hearings on
other aspects of the project. This could be accomplished either through
legislation, revision of the guidelines for environmental impact statement
preparation promulgated by the Council on Environmental Quality (CEQ),
or independent administrative action. Significantly, Greene

151. Sive, supra note 136, at 630. Judge Oakes agreed with this position and
noted that when the administrative findings lacked a full consideration of such issues, a
scope of review broader than the substantial evidence test was proper. 453 F.2d at
484-85, 3 ERC at 1247-48.
152. See 3 K. DAVIS, supra note 89, § 27.21 (Supp. 1970); 4 id. § 29.01 (1958)
& (Supp. 1970); L. JAFFE, supra note 44, at 596.
153. See Goldman, Administrative Delay and Judicial Relief, 66 MICH. L. REV.
1423 (1968); Kaufman, Power for the People—And by the People: Utilities, the
Environment and the Public Interest, 46 N.Y.U.L. REV. 867 (1971); Kaufman, Judicial
County Planning Board v. FPC held that NEPA required administrative agencies to prepare environmental impact statements on both contested and uncontested cases independent of any statements submitted by the parties. This statement must be a "single coherent and comprehensive environmental analysis, which is itself subject to scrutiny during the agency review processes," thus indicating that completed impact statements should be available early in the proceeding to permit complete development of the record on environmental issues.

Carrying this directive a few steps further, such early and complete record development could allow the agency to make environmental findings prior to those on other issues and could permit an immediate appeal by an aggrieved party. Such an appeal would stay further agency action on the non-environmental matters. On appeal, the scope of review could remain narrow, with application of the substantial evidence test, and remands should occur only when the agency has failed to consider all relevant environmental factors or to show support for the findings with substantial evidence. Once the agency findings were sustained by the court, further proceedings on non-environmental issues could begin with the benefit of early, finalized environmental findings. Naturally, such findings might preclude further proceedings on the non-environmental issues if the agency found the project environmentally unsound and these findings were sustained by the court. While this new procedure could conceivably expedite administrative consideration and judicial review of environmental findings, such a savings in time is not likely in light of the massive records which can be developed on these issues.

The real benefit of the procedure is that it would allow the agency to conduct a licensing proceeding within the frame of reference of finalized environmental findings.

The most serious problem with the proposal is that it is extremely difficult to differentiate environmental and non-environmental issues or to guarantee that new issues will not arise subsequent to the judicial review of the environmental findings. However, Greene County's mandate for early prep-

155. 455 F.2d 412, 3 ERC 1595 (2d Cir.), cert. denied, 41 U.S.L.W. 3184, 4 ERC 1752 (U.S., Oct. 10, 1972). The plaintiffs asserted in Greene County that the FPC had not complied with NEPA in a proceeding upon the application of the Power Authority of the State of New York (PASNY) for authorization to construct a high-voltage transmission line as part of a one million kilowatt pumped storage project (much like Storm King) in an area approximately 40 miles southwest of Albany, New York. The principal issue in the case, decided adversely to the FPC, was whether the agency had met the procedural requirements of section 102(2)(C) of NEPA [see note 69 supra] by simply reviewing the impact statement submitted by PASNY rather than having its own staff prepare an independent statement. 455 F.2d at 414-16, 3 ERC at 1597-99.

156. 455 F.2d at 420-21, 3 ERC at 1600.

157. Especially with regard to the FPC, administrative action on environmental issues could conceivably be expedited and simplified through the use of "across-the-board" or "generic" hearings and findings which establish fixed standards for certain common pollution problems which arise in most agency licensing cases. See Murphy, supra note 54, at 980-82.
ulation of impact statements may somewhat alleviate this problem. Two other obstacles may not be so easily avoided. First, unless agencies were willing to revise their procedures independently, significant CEQ action or legislation would be required. Such action might be slow in coming due to political pressure from both regulated industries and agencies to soften NEPA’s mandate. The second obstacle is the present judicial refusal to review any agency action before a final administrative order is made. Thus, it might not be possible for an administrative agency to modify its procedures to make environmental determinations the first order of business in a licensing proceeding. In Sherry v. Algonquin Gas, the court refused to permit a challenge to a FPC hearing examiner’s initial decision under NEPA, holding that judicial review must await final FPC action. Such a decision illustrates the present judicial unwillingness to act without a legislative mandate for revision of administrative procedures to allow early judicial review of environmental findings.

CONCLUSION

The decision in Scenic Hudson II illustrates the continued viability of the substantial evidence test as applied to administrative fact findings on all issues including those related to environmental impact. This narrow scope of review still precludes judicial substitution of judgment on environmental issues, and NEPA, the Federal Power Act, and the Administrative Procedure Act are not presently being construed to permit an expanded scope of review of administrative findings such as those made by the FPC on the Storm King project. While recent cases such as Greene County and EDF v. Corps of Engineers are beginning to broaden the scope and depth necessary in impact statements, they have not prescribed an expansion of the

158. See Gillette, Will Success Wreck NEPA?, SIERRA CLUB BULL., April 1972, at 12. In the Ninety-Second Congress bills were introduced which would provide support for Judge Oakes’ position in Scenic Hudson II. The Hart-McGovern bill [S. 1032, 92d Cong., 1st Sess. (1971)] would give any person a cause of action against an individual or governmental unit to enjoin activity which might result in “unreasonable pollution, impairment, or destruction” of the environment. Id. § 3(a). And the bill clearly would authorize courts to make de novo review of administrative decisions having environmental ramifications since “existing administrative and regulatory procedures . . . shall be reviewable . . . to the extent necessary to protect the rights recognized herein . . . .” Id. § 6. It is interesting to note that the legislation has been pending for the last two sessions of Congress with no action forthcoming. For opposing views as to the desirability of such citizen suit legislation, see Cramton & Boyer, supra note 122 (con) and Comment, Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation, 1 ECOLOGY L. Q. 561 (1971) (pro).

159. See FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938), in which the Court stated that judicial review of intermediate administrative orders would result in constant delays. But see Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334 (1st Cir. 1953), in which the court recognized that although an order may be “part of the underlying proceeding . . . [it should] . . . really be regarded as carved out of the main proceeding” and be immediately reviewable. Id. at 338.

scope of judicial review to permit de novo consideration of the data contained in the impact statements. It is contended, however, that requiring early, administrative environmental findings, which would be subject to immediate judicial scrutiny under the substantial evidence test could improve the quality of administrative action and possibly expedite licensing proceedings.

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