MINUTES OF THE MEETING
BUSINESS & INDUSTRY COMMITTEE
MONTANA STATE SENATE

MARCH 8, 1979

The meeting of the Business and Industry Committee was called to order by Chairman Frank Hazelbaker on the above date in Room 404 of the State Capitol Building at 10:00 a.m.

ROLL CALL: All members were present.

HOUSE BILL 325: Representative Jack Moore, sponsor of HB 325, explained the bill to the Committee. This bill prohibits the manufacture, possession, or transfer of a device to be used to avoid telephone, telegraph, or cable television charges. The offense would carry a misdemeanor penalty.

Representative Moore stated that this bill would greatly help in law enforcement. Rep. Moore demonstrated to the Committee how some of these devices work.

PROPONENTS OF HOUSE BILL 325: Mr. James Hughes, representing Mountain Bell, explained to the Committee the types of devices used to fool the system. He further stated that basically these devices are used for criminal purposes.

Mr. Gene Phillips of Kalispell, representing Pacific Power and Light and Northwestern Telephone System, explained further how these devices work and the difficulty in stopping this sort of fraud.

Mr. Les Loble, II, representing General Telephone of the Northwest, Inc., stated they are in support of the bill.

There were no other proponents or opponents present at the hearing.

There was a question and answer period from the Committee after which Representative Moore made closing remarks in support of HB 325.

DISPOSITION OF HOUSE BILL 325: Senator Goodover moved that HB 325 Do Pass. Senator Dover seconded the motion. The Committee voted unanimously that HOUSE BILL 325 BE CONCURRED IN.

Senator Hager will carry House Bill 325 on the floor.

HOUSE BILL 334: Representative Les Hirsch, sponsor of HB 334, was unable to be present at the hearing. Mr. William Groff from the Department of Revenue represented Mr. Hirsch and explained the bill to the Committee.

House Bill 334 is by request of the Revenue Oversight Committee. This bill dispenses with the requirement for a hearing on the issuance or transfer of an all-beverage license unless protests are received.

There were no other proponents or opponents present at the hearing.

There was a question and answer period from the Committee.

DISPOSITION OF HOUSE BILL 334: Senator Blaylock moved that HB 334 Do Pass. Senator Goodover seconded the motion. The Committee voted unanimously that HOUSE BILL 334 BE CONCURRED IN.

Senator Blaylock will carry House Bill 334 on the floor.

HOUSE BILL 486: Representative Jack Moore, sponsor of HB 486, explained the bill to the Committee. HB 486 is an act to permit a licensed wholesaler, subjobber, or retailer to sell cigarettes to a resident or nonresident person, wholesaler, subjobber, or retailer who is exempt from state cigarette taxation provisions.

PROPONENTS OF HOUSE BILL 486: Mr. Tom Maddox, representing the Montana Association of Tobacco and Candy Distributors, stated they are in support of the bill. Mr. Maddox submitted printed testimony to the Committee. This testimony is attached.

OPPONENTS TO HOUSE BILL 486: Mr. James Madison from the Department of Revenue, stated they are in opposition to the bill.

There was a question and answer period from the Committee after which Representative Moore made closing remarks.

Rep. Moore stated that every distributor is licensed and controlled by the Department of Revenue. When a case of cigarettes comes into the state, they have 72 hours to be stamped. Rep. Moore concluded his remarks by recommending that HB 486 be passed.

HOUSE BILL 730: Representative Rex Manuel, sponsor of HB 730, explained the bill to the Committee. This bill is an act to allow a central credit union to borrow an amount not in excess of its total assets.

PROPONENTS OF HOUSE BILL 730: Mr. Jeffry Kirkland, representing Montana Credit Unions League, stated they are in support of HB 730.

Mr. Donald Schroer of Great Falls, treasurer of State Corporate Central Credit Union, stated they are in support of HB 730. He told the Committee there no risks involved.

Mr. Les Alke from the Department of Business Regulation, stated this bill should be passed in its present form. Their Department supervises all credit unions, and they believe they will have a good opportunity to monitor it during the next two years.

There were no other proponents or opponents to HB 730 present at the hearing.

There was a question and answer period from the Committee after which Chairman Hazelbaker closed the hearing on HB 730.

DISPOSITION OF HOUSE BILL 730: Senator Blaylock moved that HB 730 Do Pass. There was a second to the motion by Senator Goodover. The Committee voted unanimously that HOUSE BILL 730 BE CONCURRED IN.

Senator Kolstad will carry House Bill 730 on the floor.

DISPOSITION OF HOUSE BILL 486: Senator Goodover moved that HB 486 Do Pass. Staff Attorney, Bob Pyfer suggested an amendment on page 4, line 1. Strike the word "FELONY" and insert "misdemeanor". Senator Goodover moved that the proposed amendment to HB 486 be adopted. The proposed amendment was adopted unanimously by the Committee.

Senator Kolstad left for another meeting and instructed the secretary to vote "yes" for him on HB 486.

Senator Goodover moved that House Bill 486 Do Pass As So Amended. A Roll Call Vote was taken on the motion. The Committee voted 9-1 that HOUSE BILL 486 BE CONCURRED IN AS SO AMENDED.

Senator Goodover will carry House Bill 486 on the floor.

ADJOURN: There being no further business, the meeting adjourned at 11:17 a.m.

Senator Frank Hazelbaker, Chairman

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

46TH LEGISLATIVE SESSION - - 1979 Date March 8

NAME	PRESENT	ABSENT	EXCUSED
Pat Goodover, Vice Chairman	✓		
Chet Blaylock	✓		
Harold Dover	✓		
Tom Hager	✓		
Allen Kolstad	✓		
Bill Lowe	✓		
John Mehrens	✓		
Bob Peterson	✓		
Pat Regan	✓		
Frank Hazelbaker, Chairman	✓		

DATE March 7, 1979

COMMITTEE ON Bus. & Ind. BILL NO. HB-815

VISITOR'S REGISTER

NAME	REPRESENTING	Check One Support	Check One Oppos
William J. Opitz	M. PSC	X	

NAME: Tony Nagle DATE: 3-1-17

ADDRESS: 4035 E. 6th St., Helena

PHONE: 442-0662

REPRESENTING WHOM? Montana Dept. of Transportation

APPEARING ON WHICH PROPOSAL: HB375

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

question of whether an EIS is required may in certain areas be too limited.

In *Scientists' Institute for Public Information v. AEC, supra*, the court held that the AEC had to prepare an EIS on its Liquid Metal Fast Breeder Reactor program as a whole. The court said (quoting from a memorandum issued to federal agencies by the Council on Environmental Quality):

> Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single, program statement. Such a statement also appears appropriate in connection with . . . the development of a *new* program that contemplates a number of subsequent actions. . . . [T]he program statement has a number of advantages. It provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions. . . .

481 F.2d at 1037, 1088.

In *Scientists' Institute* the AEC prepared environmental impact statements for major individual projects, as well as for the overall program. However, "policy" or program EISs have been upheld as sufficient without individual statements on parts of the project. See, for example, *Natural Resources Defense Council v. TVA*, 357 F. Supp. 128 [3 ELR 20725] (E.D. Tenn. 1973), finding one "policy" EIS for the TVA's term coal contract program adequate. In *Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 [5 ELR 20327] (D.D.C. 1974), a single overall "progammatic" EIS was found inadequate for the Bureau of Land Management's livestock grazing program due to its failure to take into account local geographic conditions. Localized area EISs were held to be required, but an EIS was not required for each separate grazing license. See also *Natural Resources Defense Council v. N.R.C.*, 539 F.2d 824 [6 ELR 20513] (2d Cir. 1976).

In light of the need for an examination of the cumulative effects of rate making and the desirability of avoiding unproductive repetitious examination of matters of rate-making policy, the Commission's decision to proceed with a program or generic EIS on electric utility rates appears reasonable. We assume the Commission is proceeding diligently to complete this undertaking. A court reviewing a rate order of the Commission may take cognizance of a failure in this regard. Once the overall study is completed, individual rate cases may be screened as prescribed in the WEPA guidelines to determine whether there may be significant environmental effects not adequately considered in the generic EIS, thus requiring that the generic EIS be updated or that a separate EIS for a particular rate proceeding be prepared.

Two additional questions arise in regard to the form in which the circuit court's judgment was cast. The judgment provided in part:

> NOW, THEREFORE IT IS ORDERED ADJUDGED AND DECREED that the cause be remanded to the respondent Public Service Commission of Wisconsin for further proceedings consistent with the mandate of the court's Decision of June 16, 1975, including an investigation and evidentiary hearing as to whether or not an environmental impact study was required when the subject rate increase was granted.

The Commission and WEPCO have expressed concern with the requirement of an "evidentiary hearing," pointing out correctly that as to the threshold decision whether to prepare an EIS, no particular form of proceeding or method of gathering information is specified by the statute. The Commission was required by the circuit court to conduct an investigation of the environmental consequences of the proposed action in order to make the threshold decision whether an EIS is needed; we have indicated the investigation must be factual in nature. However, neither the nature of the information an agency may consider nor the manner in which it may be gathered are limited to the confines of a formal administrative evidentiary hearing. Nor do we think an evidentiary hearing is required as to the threshold EIS decision.

In *Hanly v. Kleindienst, supra*, 471 F.2d at 836, it was said:

> . . . The necessity for a hearing will depend greatly upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data.

We agree. An agency may not insulate itself from public participation, even at the threshold stage. The Commission's recently promulgated regulations (Section PSC 2.91(2)(e), note 24, *supra*) recognize the importance of public participation. However, we are of the opinion that the precise manner in which proceedings are conducted and a reviewable record assembled is a matter for the sound discretion of the agency involved.

Finally, we meet a problem presented merely by the passage of time. The circuit court's judgment remanded the matter for further proceedings as to whether an EIS was required in connection with the Commission's rate order of March 16, 1973. That order is now more than four years old, and several subsequent rate increases have been granted to WEPCO in the interim.

The question whether an EIS should have been prepared for the 1973 order is now of purely academic interest. WEPA is designed to ensure that environmental factors will be properly considered by state agencies within their decision processes and to advise other agencies and the public of the environmental impact of the proposed agency action. There is no way in which these purposes can be served in regard to the 1973 order. While the issues presented on this appeal clearly are not moot,[25] any further efforts by the Commission to evaluate environmental effects specific to the March 16, 1973 order would be pointless.

The critical matter at this juncture is not what the Commission should have done in 1973, but what it is doing now to comply with WEPA in respect to its rate-making functions. The circuit court recognized this in its decision (although it cast its judgment in terms of the particular rate order there involved):

> . . . [T]he object of deciding this case now, although it is truly water over the dam, is to get PSC started on a process which, we are convinced, the statute requires—namely, the careful consideration of utility rates as they affect the environment. The water keeps flowing, the rates keep rising, and the environmental effects—whatever they are—keep accumulating. These processes will not cease and PSC's efforts will not be wasted.

While we are confident that the circuit court did not intend by its judgment to require that the Commission concern itself over matters significant only to the 1973 rate proceeding, we think that to avoid uncertainty the judgment should be modified to make this clear, as well as to clarify that a formal evidentiary hearing is not required. The judgment accordingly is modified by deleting from the portion of the judgment quoted above the phrase "including an investigation and evidentiary hearing as to whether or not an environmental impact statement was required when the subject rate increase was granted."

By the Court. Judgment modified as provided in this opinion and, as modified, the judgment is affirmed.

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25. None of the parties have contended that this case should be dismissed on the ground of mootness, and in any event, the case is [illegible] issues where consideration [illegible] orders capable of repetition, yet evading review [illegible] Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. [illegible] by this court in WEPCO v. Allis-Chalmers Workers' Union, 252 Wis. [illegible], 31 N.W.2d 772, 32 N.W.2d [illegible] (1948).

upon which the Commission acts are not themselves static, but are largely a matter entrusted to the Commission's discretion. They are subject to reexamination and alteration in the exercise of that discretion." We think it clear that WEPA mandates consideration of possible environmental consequences of the various alternatives open to the Commission in this regard, and that the Commission could not properly have ignored such matters in determining whether an EIS should be prepared."

The Commission also advanced as a reason for not filing an EIS in respect to rate making the fact that it prepares such statements in connection with licensing of power plants and transmission lines, the theory apparently being that this is the appropriate and adequate time to consider environmental values. This will not avail. The considerations dealt with in licensing such facilities relate primarily to locating and designing them to minimize the environmental damage. The environmental concerns raised by Decade in respect to rate making relate to the underlying demand for electricity, a matter beyond reach of the later decision on where and how to build the plants needed to satisfy that demand. Nor could the fact that the PSC allegedly already considered environmental matters in the rate-making process defeat the applicability of WEPA; if it could, the EIS requirements of the Act could be avoided by any agency with ease, rendering them wholly ineffectual.

In our discussion of the standard of review, we indicated that where a bona fide challenge to a decision not to prepare an EIS is raised, it must appear that the agency has made an investigation of a factual nature sufficient to provide a basis for the exercise of reasoned judgment, and the inquiry must have been of sufficient scope to include relevant areas of environmental concern. On the basis of the record before us, the approach taken by the Commission in the instant case was deficient in both regards. Of necessity, its decision not to prepare an EIS was therefore unreasonable and inadequate to discharge its responsibilities under the statute. The judgment of the circuit court must be affirmed.

IV

We, like the trial court, have conducted our review in this case on the basis of conditions as they were when the Commission's August 1, 1973 order was issued. However, several significant developments have occurred in the meantime. First, the Commission, in compliance with WEPA guidelines issued subsequent to its order herein,[21] has promulgated regulations establishing screening procedures and categorizing its repetitive activities for purposes of determining the need for environmental impact statements. Section PSC 2.90, Wis. Adm. Code, provides in part:

> (2) The following types of commission actions shall be individually screened using a screening worksheet to determine whether an environmental impact statement is required:
>
> . . .
>
> (e) Electric rate orders in which the utility involved sells more than 5 percent of the total electric sales in the state by all public utilities.
>
> . . .
>
> (3) The following types of commission actions shall not require an environmental impact statement:
>
> . . .
>
> (g) Other electric rate orders not specified in (2)(e) of PSC 2.90.

Section PSC 2.91 prescribes the information to be contained on a screening worksheet.[24]

WEPCO accounts for more than five percent of the total electric sales in the state. Thus, had PSC 2.90 been in effect when the Commission acted in this case, a screening evaluation would have been prepared, and an EIS decision made on the basis of that evaluation. This, of course, is exactly what the trial court and this court have required, assuming the screening is executed in a manner consistent with the standards set forth in this opinion.

Second, the Commission has commenced preparation of a "generic" environmental impact statement dealing, as we understand, with recurring problems and overall effects of its electric utility rate-making function.

Neither the validity of the new regulations promulgated by the Commission nor the sufficiency of its generic impact study are now before this court. However, in view of these recent developments, we deem some comment appropriate with respect to the manner of discharge of the Commission's statutory responsibilities.

One of the grounds upon which the Commission sought to justify its original refusal to prepare an EIS was the time consuming and complex nature of the task. The Commission suggested that a conflict might arise with its statutory duty to fix reasonable and just rates with reasonable expedition. In view of the Commission's complete failure to support this conclusory assertion or to otherwise conduct a satisfactory preliminary study, the asserted conflict fails to justify the Commission's decision. Moreover, compliance with WEPA to the fullest possible extent is not excused merely by considerations of administrative difficulty, expense or delay. See *Calvert Cliffs, supra*, 449 F.2d, at 1115; *Flint Ridge Development Co. v. Scenic Rivers Asso. of Oklahoma*, 426 U.S. 776, 96 S. Ct. 2430, 49 L.Ed.2d 205 [5 ELR 20528] (U.S. 1976); Blum, *et al., Negative NEPA: The Decision Not to File*, 6 ENVIRONMENTAL LAW 309, pp. 310-322 (1975).

At the same time, we are not insensitive to the possibility that the environmental issues may in fact be complex and that a comprehensive consideration of these issues might consume considerable time. We have indicated that the obligations imposed by §1.11, Stats., are not inherently discretionary or flexible. However, we think an agency possesses a reasonable amount of discretion as to the precise mode by which compliance is effected. We think such discretion includes the Commission's developing a generic or "programmatic" EIS for rate proceedings. Indeed, the case-by-case or project-by-project approach to the threshold

("Cumulative environmental impacts are, indeed, what require a comprehensive impact statement.").

21. The Commission's authority is of course limited to that prescribed in the statutes. Under ch. 196, Stats., its duty is to fix just and reasonable rates. However, as to the regulatory techniques for the discharge of this obligation, the statutes are silent.

22. WEPCO has argued that a so-called "make whole" rate case, such as the proceeding here involved, is inappropriate for a full consideration of the environmental aspects of rate making. As we understand it, the distinguishing characteristic of a "make whole" proceeding is that the utility does not request a change in the authorized rate of return on common stock equity. Otherwise, a "make whole" proceeding potentially involves the full spectrum of issues that may be raised in a rate case. In any event the Commission's order did not purport to exempt this case on the basis that no EIS need be prepared on the basis that this was a make-whole proceeding.

23. Note 1, *supra*.

24. PSC 2.91 provides:

> . . . Environmental screening procedure. (1) A screening worksheet shall be completed by the commission staff for each individual action for the types of actions identified in PSC 2.90 (2).
>
> (2) The screening worksheet shall contain the following information:
>
> (a) An adequate description of the proposed action, including maps and graphs if appropriate.
>
> (b) A listing, brief description and analysis of alternatives.
>
> (c) A listing of other agencies or groups that may have been contacted and the comments and other pertinent information of the agencies and groups.
>
> (d) An evaluation section which consists of questions, specific to the proposed type of action, that must be considered in evaluating the proposed action.
>
> (e) A finding whether or not an environmental impact statement is required. This shall be based on the findings in the evaluation section.
>
> (f) Identification of the individual evaluating the impact of the proposed action.
>
> (3) Before completion of a screening worksheet, notice of the proposed action and screening procedure shall be sent to known interested parties. Upon completion of a screening worksheet, it shall be made available for public inspection and copies shall be sent to individuals requesting such notification.
>
> (4) If a finding is made in the worksheet that no environmental impact statement is required, the environmental review is complete. If a determination of impact statement is required, the commission staff shall prepare a preliminary environmental report and final environmental impact statement.

consequences "to the fullest extent possible." Any construction limiting the Act to direct environmental effects would be contrary to its manifest intent.

We also reject any suggestion that it was incumbent upon Decade or some other party to prove to the Commission's satisfaction that significant environmental effects would be produced or that a meaningful EIS could be prepared. As we have already discussed, the burden of compliance with WEPA was upon the Commission. If in fact it was impossible to prepare an EIS "based on anything other than pure speculation" or if in fact no significant environmental effects would be involved, it was incumbent upon the Commission to show that it had undertaken a sufficient good faith factual investigation to permit such a conclusion to be reasonably made. Conclusory statements such as the order herein contains are insufficient to discharge the Commission's obligations under the statute to make the factual investigation.

We are unimpressed with the Commission's claim that an analysis of the environmental effects of rate making would be so speculative in nature as to render meaningless any EIS which might be produced. The Commission relies on *First National Bank of Homestead v. Watson*, 363 F. Supp. 466 [3 ELR 20610] (D.D.C. 1973). The issue in that case was whether under NEPA the comptroller of currency had to prepare an EIS in connection with the chartering of a national bank in Southern Dade County, Florida. In affirming the comptroller's negative decision, the district court recognized that there are limits on the extent of environmental investigation that an agency must undertake and that it need not engage in purely speculative inquiries concerning remote theoretical possibilities.[18] However, *Homestead Bank* does not lend support to the idea that an agency may reach a negative EIS determination without investigation of relevant areas of concern. The comptroller had prepared a five-page factual memorandum, summarizing the administrative record, which included an analysis of the proposed new bank as it related to the size of the community, the bank's proposed physical location and traffic generating potential, the patterns of growth in the area, the number of existing banks in Homestead and their rate of expansion, housing and land availability, and the economic effects of the proposed bank's operations. *Id.* at 470. The district court's approval of the comptroller's decision was predicated on its finding that the memorandum "show[ed] that the Comptroller has considered all relevant environmental factors and has reached a fair and informed preliminary decision under NEPA," *id.* at 474, and that in the situation before it, "the actual impact [upon the environment] appears to be minimal and adequately accounted for in the (government) memorandum." *Id.* at 473.

In stating that an agency need not indulge in improbable speculation regarding environmental effects, the court in *Homestead Bank* relied upon *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079 [3 ELR 20525] (D.C. Cir. 1973). *Scientists' Institute* held that the AEC was required to prepare an environmental statement on its program to develop the Liquid Metal Fast Breeder Reactor (LMFBR) as a commercially feasible method of producing energy. The AEC had argued that it was required to prepare an EIS only for the actual construction of facilities, not on the overall program, and that the environmental consequences of the program were too remote and speculative to be susceptible to treatment in an EIS. These contentions were rejected:

> Certainly NEPA does not require the commission to forecast the development and effects of LMFBR power reactors in the year 2000 in the same detail or with the same degree of accuracy as another agency might have to forecast the increased traffic congestion likely to be caused by a proposed highway. . . . The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to a particular agency action requires some degree of forecasting. And one of the functions of a NEPA statement *is to indicate the extent to which environmental effects are essentially unknown.* It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and the effects become fully known. *Reasonable forecasting and speculation is thus implicit in NEPA*, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling all discussion of future environmental effects as "crystal ball inquiry" (emphasis added).

481 F.2d at 1092.

We think the Commission's claim with respect to the asserted speculative nature of rate making's environmental effects cannot be sustained. The *Homestead Bank Case* stands for the proposition, with which we agree, that an informed reasonable judgment that no EIS is required will not be upset by the fact that additional alleged environmental effects of an apparently minimal, improbable, and speculative nature were not considered by the agency. The need for a reviewable record disclosing an adequate factual investigation of environmental effects remains. So too does the need for reasonable forecasting and speculation, which is as much implicit in WEPA as it is in its federal counterpart. The Commission's order is but a "bald conclusion, unaided by preliminary investigation," *Maryland National Capital Park & Planning Commission, supra*, and the Commission did not, on the record, undertake minimal attempts to predict the environmental effects of its rate-making function.

The Commission's preoccupation with the lack of expert consensus regarding price elasticity of demand reflects an unnecessarily cramped construction of the Act. The Commission, and WEPCO, as well, appear to assume that a single rate proceeding can and should be viewed in isolation and that limitations on the degree to which price elasticity of demand is understood together with the large number of possible combinations of individual rates that might make up a given rate schedule make meaningful environmental study impossible. However, there was no attempt to show—and we are unwilling to assume—that usable estimates of elasticity were in fact impossible under the circumstances existing here. WEPA cannot be construed to require evaluation only of those environmental effects which can be described with computer-like precision.

Commissioner Cudahy's concurring opinion is instructive. He is willing to assume "a significant degree of elasticity of demand for electrical energy under given conditions and over given periods of time," and he further concedes that this result involves a direct impact upon the electric power economy, which in turn interacts with the environment. Yet he concludes that WEPA was not intended to apply to such a case, mainly by falling back on an assumed need for a degree of precision of understanding that he asserts is not available.

Moreover the Commission appears to take a similarly constricted view of its own regulatory activities as they may relate to the environment. In respect to electric utilities the Commission exercises a continuing, broad regulatory jurisdiction in which a given rate case is but a single episode. The Commission's actions in rate cases consist in large measure of applying existing Commission policies and general principles of rate making to the specific situation presented in the proceeding before it[19] and the possibility of a cumulative environmental impact resulting from such underlying precepts, repetitively applied, was a matter the Commission could not properly have ignored.[20] The precepts

18. The court said, 363 F.Supp. at 472, 473:

> Certainly, the burden is on the agency to prove there will be no environmental impact as a result of its action under 102(2)(C). . . . But the facts of this case indicate only that the federal action will *possibly* allow others to set into motion projects which *possibly* will affect the local environment. In considering the effect of its actions for purposes of sec. 102(2)(C), it would mean that an agency is not required to let its imagination run wild as to whether there will be any environmental impact. "NEPA requires predictions, but not prophecy" in order to draft a meaningful impact statement under 102(2)(C). Scientists Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1092 [3 ELR 20525]

19. See J. Bonbright, *Principles of Public Utility Rates* (1961).

20. In respect to the need to consider the cumulative effect of a series of related actions, see the WEPA and CEQ Guidelines, note 17, supra; [illegible] Sierra Club, 427 U.S. 390, 413, 96 S.Ct. 2718, 49 L.Ed.2d 576 [6 ELR [illegible]] (1976).

generating facilities. Among the aspects of rate making which Decade claims will affect demand, and hence the environment, are (1) the rate itself, the premise being that prices affect demand for electricity; (2) the so-called "declining block" rate design, by which the rate charged the customer for additional units of electrical energy decreases as the customer's usage increases, thus resulting in a decreased incentive for large users to avoid energy waste; (3) preferential rates designed to favor, and thereby encourage, electric heating of residences; (4) allowing the utility to include the cost of advertising designed to foster demand for electricity in calculating its revenue requirements; and (5) setting the rate of return on common stock equity at a level which encourages the flow of capital into the business, thereby facilitating the construction of new generating capacity which would damage the environment and further the process of escalation in the consumption of electricity.

The Commission's order of August 1, 1973, in which it concluded that no impact statement was required, was very brief and did not specifically address the contentions advanced by Decade. No findings of fact were made, and insofar as appears on the record, no significant factual investigation had been undertaken by the Commission. The Commission stated that since WEPA had become effective it had followed the policy of determining the need for impact statements on a case-by-case basis, but with presumptions as to certain categories of cases, and that impact statements had not been deemed necessary in such rate increase proceedings as had been conducted theretofore. As to the March 16, 1973 rate increase order the Commission's reasons for concluding that no EIS was required were that the direct effect of the order was economic, not environmental, that whatever environmental effects there might be would be "remote and indirect," and that nothing had been submitted to the Commission to show that an EIS prepared for the rate proceeding there involved "could be based on anything other than pure speculation."

In support of the Commission's decision, the concurring opinions of Chairman Eich and Commissioner Cudahy advanced several additional considerations, which we restate as follows.

(1) The relationship between price of electricity and demand—*i.e.*, the price elasticity of demand for electricity—is too poorly understood to enable prediction of the effects of rate changes upon demand, especially in view of the "infinite variety of specific rate possibilities" that assertedly would have to be taken into account.

(2) Whatever EIS might be prepared would, because of the complexity of the issue, be of little or no practical value to the decision process involved in rate cases; at least the value of the EIS would not justify the time and talent that its preparation would cost.

(3) An EIS would be required in connection with any power plants or transmission lines that might be required in the future, and the environmental effects of such facilities, unlike rate proceedings, are clearly identifiable.

(4) The Commission already considers matters relating to the environment and to energy conservation when passing on rate increase applications.

(5) Because of the complexity of the price/demand/environment relationship, the task of preparing an EIS might be so difficult and time consuming as to impair the Commission's ability to discharge its duty of establishing reasonable and just rates with reasonable expedition.

(6) No evidence had been presented to the Commission to show that the rate order of March 16th would have a significant effect upon the environment.

We think the trial court was fully justified in rejecting the Commission's decison. We do not believe the record in this case presents a sufficient effort by the Commission to fulfill its statutory obligations. Rather, it reflects an effort to support by argument and conclusion a predetermined position that no EIS should be prepared.

Initially, we reject any intimation in the Commission's order, that because the environmental effects of a rate order are "indirect" they need not be considered under WEPA. There is nothing in the Act to suggest that only direct environmental consequences need be considered.

In *Citizens Organized to Defend the Environment v. Volpe*, 353 F. Supp. 520, 540 [3 ELR 20239] (S.D. Ohio 1972), the court stated regarding NEPA:

> *A federal action "significantly affecting the quality of the human environment" is one that has an important or meaningful effect, directly or indirectly, upon any of the many facets of man's environment.* [cit omitted] The phrase must be broadly construed to give effect to the purposes of NEPA. A ripple begun in one small corner of an environment may become a wave threatening the quality of the total environment. Although the thread may appear fragile, *if the actual environmental impact is significant, it must be considered.* (Emphasis supplied.)

Both the *Guidelines for the Implementation of WEPA*[16] and the *CEQ Guidelines* prepared for federal agencies under NEPA[17] indicate that both direct and indirect effects must be considered. WEPA was intended to require cognizance of environmental

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16. Section I. 4. D of the Revised Guidelines for the Implementation of WEPA (note 2, *supra*) includes in the definition of "action" the "review and authorization of environmentally significant public and private actions," and states as an example of this category of action the setting of public utility rates. As to the types of effects of an action which must be considered in assessing its environmental significance, §I. 5. provides in part:

> B. Stimulation of secondary effects. Even if the action itself has minimal or no direct environmental effects, if its nature is to stimulate or induce significant, secondary effects—such as major new developments encouraged by new highways or sewer extensions—the need for an impact statement is increased. Secondary effects may often be even more substantial than the primary effects of the original action. . . .
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> . . .
>
> F. Cumulative impacts. Many state agencies' actions regarding a project or complex of projects can be individually limited but cumulatively considerable. When an action forms a precedent for future individual actions or represents a decision in principle about a future major course of action, the cumulative effects of future actions should be considered when determining if an impact statement is required.

17. CEQ Guidelines, note 2, *supra*, 40 C.F.R. §1500.6, provides in part:

> §1500.6 Identifying major actions significantly affecting the environment.
>
> (a) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. 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. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decison involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several Government agencies individually make decisions about partial aspects of a major action. In all such cases, an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. The Council, on the basis of a written assessment of the impacts involved, is available to assist agencies in determining whether specific actions require impact statements.
>
> (b) Section 101(b) of the Act indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The Act also indicates that adverse significant effects include those that degrade the quality of the environment, curtail the range of beneficial uses of the environment, and serve short term, to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial. Significant effects also include secondary effects, as described more fully, for example, in §1500.8(a)(iii)(B). The significance of a proposed action may also vary with the setting, with the result that an action that would have little impact in an urban area may be significant in a rural setting or vice versa. While a precise definition of environmental "significance," valid in all contexts, is not possible, effects to be considered in assessing significance include, but are not limited to, those outlined in Appendix II of these guidelines.

courts have not been in agreement on the formulation of the standard to be employed. Some cases have undertaken to review the decision *de novo*,[10] while others have adopted the arbitrary and capricious standard of review.[11] The standard which appears to have been most widely accepted, however, is whether the decision not to prepare an EIS was reasonable under the circumstances. In *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248, 1249 [3 ELR 20330] (10th Cir. 1973), the Court of Appeals for the Tenth circuit held that the district court had erred in applying the "arbitrary and capricious" standard of review, and explained the reasonableness standard as follows:

> We are persuaded . . . that the administrative decision was not one of discretion such as administrative agencies have in innumerable matters and which is referred to in the general terms of §706(2)(A) of the Administrative Procedure Act, 5 U.S.C.A. §706(2)(A) [setting forth the "arbitrary and capricious" standard]. NEPA's specific requirements in §102 clearly speak in mandatory terms, and do not leave the determination to administrative discretion. . . . This Court recently stressed that "[t]he sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action," . . . .
>
> Of course, there must be a determination whether the statute applies and some area of judgment is involved. However, we are convinced that the compass of the judgment to be made is narrow and that the determination must be reasonable in the light of the mandatory requirements and high standards set by the statute. . . .
>
> We are persuaded that the general reference to discretion in §706(2)(A) of the Administrative Procedure Act, although applicable to some other reviewable administrative decision, see *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 [1 ELR 20110] (U.S. 1971) does not apply here to the agency's determination under NEPA. Under the specific terms of NEPA we feel that the proper standard, as stated earlier, is whether the negative determination was reasonable in the light of the mandatory requirements and high standards set by the statute so as to be "in accordance with law"—another ground of review in §706(2)(A) which may be applied consistently with the procedural demands of NEPA." (Footnotes and citations omitted.)

See also *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465, 466 [3 ELR 20041] (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1319, 1320 [4 ELR 20700] (8th Cir. 1974); *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1246 (N.D. Cal. 1976).[12]

We are of the opinion that the test of reasonableness should be applied to review a negative threshold decision under WEPA. Complete *de novo* review would be akin to treating the entire question of significant environmental effect as one of law. Where a question of law is presented, the reviewing court of course will determine the question independently regardless of the standard by which the agency's overall decision is to be tested. See *Pabst v. Department of Taxation*, 19 Wis.2d 313, 322-324, 120 N.W.2d 77 (1963). However, the question whether there is present in a given case a major action significantly affecting the environment will in general be a matter of both law and fact. Moreover, there may be cases under WEPA when some degree of deference to agency expertise is appropriate, provided the agency is shown to possess such expertise and to have applied it in good faith.

The arbitrary and capricious standard of review, on the other hand, gives too much room for the exercise of discretion by the agency. The obligation imposed by §1.11(2)(C), Stats., like that of §102 of NEPA, is not inherently discretionary.[13] It contemplates the exercise of judgment by the agency, but that judgment must be reasonably exercised within the limits imposed by the Act.

No general statement of a standard of review can provide a precise guideline of universal applicability. It is obvious that the inquiry needed to support an agency decision not to file an EIS will vary greatly with the circumstances. We do not doubt the correctness of the trial court's observation that there may be cases where it will be obvious to agency and court alike on the basis of facts that no EIS need be prepared. Moreover, we further agree with the trial court that facts constituting a bona fide challenge must be alleged by the petitioners for review. See *Save Our Ten Acres v. Kreger, supra*. The agency may not shift to petitioners such as Decade the duty of environmental inquiry placed upon the agency by statute,[14] but neither should allegations of environmental effect which are patently trivial or frivolous subject the agency decision to searching judicial review. However, where issues of arguably significant environmental import are raised—as we think are raised here—the agency must show justification for its negative-EIS decision.

We therefore conclude that the questions by which the agency decision was to be tested in the case at bar were these: first, has the agency developed a reviewable record[15] reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

III

Fundamentally, Wisconsin Environmental Decade's position at all stages of this case has rested on the assertion that the Commission's actions in controlling the rates to be charged for electricity exert an effect on the demand for electricity which in turn will produce significant effects on the environment so as to require the preparation of an environmental impact statement. Decade asserts that a greater demand for electricity will (1) lead to increased pollution from existing generation facilities; (2) result in more rapid depletion of energy resources; and (3) in the long run, result in the construction of more environmentally destructive

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NEPA Negative Statement, 53 Boston Univ. L. Rev. 879 (1973); Peltz & Weinman, *NEPA Threshold Determinations: A Framework of Analysis*, 31 Univ. of Miami L. Rev. 71 (1976). Baum, *et al.*, *Negative NEPA: The Decision Not to File*, 6 Env. Law 309 (1975); Note, *Threshold Determinations Under Section 102(2)(c) of NEPA: the Case for "Reasonableness" as a Standard for Judicial Review*, 16 Wm. & Mary L. Rev. 107 (1974); Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U.Pa. L. Rev. 509 (1974). Cases interpreting NEPA are collected in an annotation at 17 A.L.R. Fed. 33 (1973)

10. Kisner v. Butz, 350 F. Supp. 310 [2 ELR 20709] (N.D. W.Va. 1972).

11. Hanly v. Kleindienst, 471 F.2d 823 [2 ELR 20717] (2d Cir. 1972), *cert. denied* 412 U.S. [illegible] (1973).

12. The [illegible] have in some cases gone beyond materials developed by [illegible] to take additional evidence. Save Our Ten Acres v. Kreger, [illegible] 7; Kisner v. Butz, *supra* note 10. Of course, in [illegible] the court's review is confined to the administrative record [illegible] on alleged procedural irregularities may be taken in court. [illegible]

13. "Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." Calvert Cliffs Coord. Comm. v. AEC, 449 F.2d 1109, 1114 [1 ELR 20346] (D.C. Cir. 1971).

14. To say that an agency may not shift to others its own obligations under WEPA is not to say, however, that it may ignore such investigations [illegible] may undertake voluntarily. One of the values WEPA seeks to advance is public awareness of and participation in decisions affecting the environment. Where an interested party does undertake to furnish information to an agency with respect to possible environmental effects of a proposed action, or to raise [illegible] questions in respect thereto, it would be inconsistent with the intent of [illegible] for the agency not to give reasonable consideration to the matter presented [illegible]

15. The record for this purpose need not follow a particular form [illegible] v. Kleindienst, 471 F.2d 823, 835 [2 ELR 20717] (2d Cir. 1972), *cert. denied* [illegible] U.S. 908. However, it must reveal in a form susceptible of [illegible] evaluation by a court the nature and results of the agency's [illegible] reasoning and basis of its conclusion.

1. The environmental impact of the proposed action;

2. Any adverse environmental effects which cannot be avoided should the proposal be implemented;

3. Alternatives to the proposed action;

4. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

5. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

6. Such statement shall also contain details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages of the proposal.[3]

Before making the environmental impact statement the agency is required by §1.11(2)(d), Stats., to obtain the comments of any other agency which has jurisdiction or special expertise with respect to any environmental impact involved. The impact statement together with the comments of the appropriate agencies must be made available to the governor, the Department of Natural Resources and the public, and a public hearing must be held before a final decision on the proposed action is made.[4]

II

The Commission contends that the circuit court erred by placing upon the Commission the burden of demonstrating that the rate proceeding herein was not a major action significantly affecting the quality of the human environment. We think this contention somewhat mischaracterizes the circuit court's approach. A reading of the circuit court's well-reasoned decision indicates that the burden it placed upon the Commission was not that of proving the absence of a significant environmental effect, but of producing a reviewable record which demonstrated that its decision was reached upon a sufficient preliminary factual inquiry premised upon a proper construction of the obligations WEPA imposes. As explained below, we believe the circuit court was correct in placing this burden upon the Commission and in determining that it was not met here.

It is important to note that the threshold decision whether an EIS should be prepared is not of the usual variety of administrative determination. The agency is not here adjudicating the rights of parties before it, nor is it exercising a delegated legislative power. WEPA imposes upon agencies of the state duties which the legislature has determined to be necessary for the public welfare. When a negative EIS determination is challenged, the question is whether the agency itself has complied with the letter and spirit of WEPA. What was said in a leading federal case regarding the United States Atomic Energy Commission's responsibilities under NEPA is equally appropriate here:

> . . . NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values. . . .[5]

Moreover, the threshold decision whether to prepare an EIS occupies a critical position within the context of WEPA's operation. A negative determination at the initial stage may eliminate to a significant degree environmental consideration by the agency and may curtail much of the input, which an EIS is designed to foster, of other governmental agencies and the public in the agency's decision process. It is obvious that achievement of WEPA's goals will be significantly compromised if ill-advised determinations not to prepare an EIS are permitted by the courts to stand. Thus a consideration of the manner in which WEPA was intended to function dictates a liberal approach to the threshold decision of whether the impact statement should be prepared.

Nevertheless, within an agency there are countervailing forces to an agency's adopting this liberal approach. The preparation of a statement may require considerable time and effort and may entail consideration of factors with which the agency has not previously dealt and which are foreign to its perceived primary function. The agency's primary function is generally not environmentally oriented. The agency may in complete good faith believe it is already giving full consideration to environmental factors, that compliance with WEPA would therefore be superfluous, and that additional consideration of environmental factors would unduly impede the primary function of the agency. For these and related reasons, it is apparent that an agency called upon to make the threshold decision about the need for an EIS under WEPA may very well approach the question with a bias favoring a negative conclusion.[6]

These circumstances distinguish the threshold WEPA determination from the usual administrative determinations, and they must be considered by reviewing courts. The circuit court was correct in subjecting the Commission's decision to a searching inquiry. The circuit court was entitled to demand that a reviewable record be produced to support the agency decision and to ask with respect to that record:

> First, did the agency take a "hard look" at the problem, as opposed to bald conclusions, unaided by preliminary investigation? . . . Second, did the agency identify the relevant area of environmental concern? . . . Third, as to problems studied and identified, does the agency make a convincing case that the impact is insignificant?[7]

As one federal court observed with respect to NEPA:

> The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review.[8]

The appropriate standard of review of decisions by federal agencies not to file impact statements under NEPA is a problem that has received much attention from commentators and in the courts.[9] Though review has generally been exacting, the federal

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the council to, among other things, issue guidelines to federal agencies for the preparation of environmental impact statements. The council thereafter published three sets of NEPA guidelines: *CEQ Interim Guidelines*, May 11, 1970, 35 Fed. Reg. 7390 (1970); *CEQ Guidelines*, April 23, 1971, 36 Fed. Reg. 7724 (1971), superseding the interim guidelines; and *CEQ Guidelines*, August 1, 1973, 40 C.F.R. §1500.1, *et seq.*, which superseded the April 23, 1971 guidelines.

WEPA did not establish any parallel to the Council on Environmental Quality created by NEPA. However, the Governor of Wisconsin has, by executive order, promulgated two sets of guidelines, based upon proposals of the Interagency WEPA Coordinating Committee, and has directed compliance therewith by all state agencies listed in ch. 15, Stats., including attached boards and commissions. *Guidelines for the Implementation of the Wisconsin Environmental Policy Act*, issued by Executive Order No. 69, of December 5, 1973; *Revised Guidelines for the Implementation of the Wisconsin Environmental Policy Act*, issued by Executive Order No. 26, of February 12, 1976.

3. Section 1.11(2)(c), Stats.

4. Section 1.11(2)(d), Stats., provides in part:

> . . . Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has jurisdiction or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate agencies, which are authorized to develop and enforce environmental standards shall be made available to the governor, the department of natural resources and to the public. Every proposal other than for legislation shall receive a public hearing before a final decision is made. Holding a public hearing as required by another statute fulfills this section. . . .

For a survey of state agency compliance with WEPA, see Special Student Project, Jerry Hanson, *Agency Decision Making Under the Wisconsin Environmental Policy Act*, 1977 Wis. L. Rev. 111.

5. Calvert Cliffs Coordinating Committee v. AEC, 449 F.2d 1109, 1119 [1 ELR 20346] (D.C. Cir. 1971).

6. *See* Peltz & Weinman, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. of Miami L. Rev. 71, 87-88 (1976).

7. Maryland Nat. Capital Park & Planning Comm'n v. U.S. Postal Service, [illegible] F.2d 1029, 1040 [3 ELR 20702] (D.C. Cir. 1973); *see also* [illegible] v. Butterfield, 373 F. Supp. 1175, 1180 [4 ELR 20431] (D.D.C. 1974).

8. Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 [3 ELR [illegible]] (5th Cir. 1973).

9. *See for example*, Deutsch, *The National Environmental Policy Act's First Five Years*, 8 Env. Affairs 3, 19-33 (1975); Comment, *[illegible] Review of a*

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Abrahamson, J.:

On December 4, 1972, Wisconsin Electric Power Company (WEPCO) filed an application with the Public Service Commission of Wisconsin for authority to increase its electric rates so as to be "made whole" for increases in taxes, depreciation, the cost of money, and other operating costs occurring subsequent to a December 3, 1971 rate order of the Commission. The application requested rate increases such as would permit a return on common stock equity of not less than the 12 percent authorized by the Commission in its December 3, 1971 order. Hearings were held January 16 and 17, 1973 at Madison and the record was closed at the conclusion of the January 17th hearing. Wisconsin's Environmental Decade (Decade) participated in these proceedings, contending, among other things, that the Commission was required by the Wisconsin Environmental Policy Act (WEPA), ch. 274, Laws of 1971, to prepare an environmental impact statement before making its decision on the rate increase.

On March 16, 1973, the Commission issued its order authorizing rate increases averaging approximately 5.2 percent which were designed to provide for an increase in revenue of $12,722,500. The Commission did not address Decade's WEPA contentions in its March 16th order. On April 5, 1973, Decade filed an application for rehearing before the Commission, asserting again that the Commission's order of March 16, 1973 was a major action significantly affecting the quality of the human environment which required the preparation of an environmental impact statement (EIS). Rehearing was granted by order of April 25, 1973 "for the sole, exclusive and limited purpose of receiving briefs and hearing oral argument" on this issue. On August 1, 1973, the Commission issued an order affirming its order of March 16th and holding that no EIS was required, stating in part:

> The . . . rate Order of March 16, 1973, in this proceeding does not have a direct effect upon the environment. Rather the direct effect of the Order is economic, not environmental. Whatever connection such Order has with the environment is remote and indirect. Moreover, nothing has been submitted to the Commission which would cause it to conclude that any environmental impact statement prepared for purposes of this proceeding could be based on anything other than pure speculation. In these circumstances, the Commission is of the opinion that an environmental impact statement is not required.

Chairman William F. Eich and Commissioner Richard D. Cudahy each filed lengthy concurring opinions explaining their reasons for concluding that the impact statement was not required.

On August 28, 1973, Decade petitioned the circuit court for Dane county for review of the Commission's orders pursuant to §§227.15 and 227.16, Stats. Numerous issues were raised in the petition for review. However, only the Commission's ruling that no environmental impact statement need be prepared was addressed by the circuit court. In a memorandum decision filed June 16, 1975 [6 ELR 20192], the trial court concluded that the Commission's order did not demonstrate sufficient consideration of environmental factors to validate its negative EIS determination. The court was of the view that some actual attempt to investigate the environmental consequences of rate orders was required before the Commission's determination that no EIS was warranted could stand. In view of the Commission's apparent failure even to study and analyze in its no impact statement the various authorities dealing with price/demand relationships for electricity which were cited to the Commission by the parties, the court was unimpressed by the Commission's protestations that an EIS would be a futile exercise. Accordingly, by judgment entered August 25, 1975, the court remanded the matter to the Commission for further investigation and an evidentiary hearing as to whether an environmental impact statement was required. From this judgment both the Commission and WEPCO have appealed.

Two issues are presented: (1) what is the standard for judicial review of the Commission's decision not to prepare an EIS; and (2) under that standard, was the trial court correct in holding the Commission's decision inadequate?

I

The Wisconsin Environmental Policy Act is substantially patterned after the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.* Like its federal counterpart, WEPA contains a broad statement of governmental commitment to the protection and enhancement of the environment (ch. 274, Laws of 1971, §1)[1] and imposes upon governmental agencies certain procedural obligations with respect to their decision-making processes to assure that the substantive policies of the Act will be implemented (ch. 274, Laws of 1971, §2, creating §1.11, Stats.).

The evident purpose of WEPA was to effect an across-the-board adjustment of priorities in the decision-making process of agencies of state government. The Act constitutes a clear legislative declaration that protection of the environment is among the "essential considerations of state policy," and as such, is an essential part of the mandate of every state agency. However, the scheme of the Act is not directly to control agency discretion, but to require that agencies consider and evaluate the environmental consequences of alternatives available to them in the exercise of that discretion, and to require that they undertake that consideration in the framework §1.11 provides.

Of specific concern here is the environmental impact statement provision of §1.11(2)(c), Stats. That section requires that "to the fullest extent possible," all agencies of the state shall prepare a detailed environmental impact statement (EIS) on "proposals for legislation and other major actions significantly affecting the quality of the human environment . . . ." The impact statement is to substantially follow the guidelines issued by the United States Council on Environmental Quality under NEPA,[2] and must include considerations of:

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1. Section 1 of ch. 274, Laws of 1971, which was not made a part of the Wisconsin Statutes, provides:

> SECTION 1. LEGISLATIVE PURPOSE. (1) The purposes of this act are to declare a policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the important ecological systems and natural resources.
>
> (2) The legislature, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of this state, in cooperation with other governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations.
>
> (3) In order to carry out the policy set forth in this act, it is the continuing responsibility of this state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state may:
>
> (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (b) Assure safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> (c) Attain the widest range of beneficial uses of the environment without attempting to minimize degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (d) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.
>
> (4) The legislature recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

2. Title II of NEPA, 42 U.S.C. §4341, *et seq.*, created the Council on Environmental Quality with broad responsibilities to review and appraise the various programs and activities of the federal government in light of NEPA's policies and goals, and to report to the President thereon. By Executive Order 11514, March 5, 1970, 3 C.F.R. 271, 35 Fed. Reg. 4247 [illegible]

and collateral estoppel. The United States and the State of Washington were parties to the action in the Court of Appeals, and surely we must assume, in the absence of any suggestion to the contrary, that the parties fully litigated their positions respecting reservation status. The Court of Appeals squarely held, contrary to the contention of the State of Washington, that the reservation continued to exist, and review here was denied. 419 U. S. 1032 (1974). The Supreme Court of Washington in the case now before us accepted the Ninth Circuit's holding as federal law binding on it. It is inappropriate now for the Court to denigrate the impact of that holding, particularly when the result is to oust authority in the State that lost on just that issue in the Court of Appeals.

The Court also questions whether on-reservation fishing is at issue in this case, relying on the fact that the Puyallups have alienated almost all of their land, and that only 22 acres of the reservation now remain in trust status. *Ante*, at 8-9. The Court does not go so far as to deny the existence of the reservation, and, of course, selling reservation land to non-Indians can be "completely consistent with continued reservation status," *Mattz* v. *Arnett*, *supra*, at 497; *Rosebud Sioux Tribe* v. *Kniep*, *supra*, at —, *DeCoteau* v. *District County Court*, *supra*, at 432, 444. Nor does the Court, or indeed any party, contend that somehow the sale of most of the lands included the sale of the exclusive fishing rights the Puyallups were granted by Art. II. The Court's argument seems to be that since the Puyallups do not now "hold the Puyallup River fishing grounds for their 'exclusive use'" they have forfeited any claim to enforce their exclusive fishing rights under Art. II. *Ante*, at 8. This analysis ignores the fact that the Puyallups do not now hold their fishing grounds for their exclusive use precisely because the State has relentlessly sought for many years to prevent their doing so. Indeed, this very suit was begun 13 years ago in an effort to prevent the Puyallups from exercising what they claimed to be their treaty rights on their old reservation.

Today's decision, ironically, is at odds with the position taken by the State in another case involving Indian fishing rights in Puget Sound. There the State agreed that on-reservation fishing is not subject to regulation by the State. In *United States* v. *Washington*, 384 F. Supp. 312, 332 (WD Wash. 1974), aff'd, 520 F. 2d 676 (CA9 1975), cert. denied, 423 U. S. 1086 (1976), District Judge Boldt, construed the language of Art. II of the Treaty of Medicine Creek and that of virtually identical treaties entered into by Governor Stevens with other western Washington tribes to mean that "[a]n *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations, wherein tribal members might make their homes if they chose to do so." (Emphasis in original.) This proposition was apparently so self-evident to the parties, including the State of Washington, that "[a]ll parties in this case agree[d] that on reservation fishing is not subject to state regulation. . . ." *Id.*, at 341.[5]

[5] This decision was handed down a month and a half before the Court of Appeals for the Ninth Circuit decided in *United States* v. *State of Washington*, 495 F. 2d 620, that the Puyallups' reservation continued to exist. On appeal from Judge Boldt's decision, the State challenged certain aspects of the calculation of the allocation under Art. III related to certain catches, but it appears never to have asserted that it had authority to regulate the on-reservation fishery. The Court of Appeals affirmed Judge Boldt's decision in all relevant respects, 520 F. 2d 676, and nowhere suggested that on-reservation fishery by the Puyallups was treated differently from that of any other tribe. The Court of Appeals affirmed Judge Boldt's decision over a year after it found that the Puyallup reservation had never been extinguished.

Doubtless 13 years of litigation has made the Court anxious to bring this case to an end, and this explains today's holding—just broad enough to dispose of the Puyallups' substantive claims but so narrowly fact-specific that it will probably have no significant impact on the Puget Sound Indian fishing rights case still pending in the District Court. This suggests that the result would not be the same were the case here for the first time instead of the third. For the language of the treaty is very clear: on-reservation fishing is governed by Art. II.

I respectfully dissent.

Wisconsin's Environmental Decade, Inc. v. Public Service Commission

No. 75-403 (Wis. Sup. Ct. July 1, 1977)

Modifying and then affirming a trial court decision, 6 ELR 20192, the Wisconsin Supreme Court holds that the Wisconsin Environmental Policy Act (WEPA) applies to utility rate-making proceedings. Wisconsin Electric Power Company (WEPCO) in 1972 filed for a rate increase. The Commission granted the request in 1973 after deciding that no environmental impact statement (EIS) under WEPA need be filed because the rate order had no direct effect on the environment. The court concludes that agencies must consider environmental consequences of available alternatives within the framework of an EIS which is substantially similar to an EIS prepared by federal agencies under the National Environmental Policy Act. The agency has the burden of producing a reviewable record that shows that its decision whether or not to file an EIS is based on sufficient factual inquiry. A threshold determination on preparing an EIS is critical because an ill-advised determination not to file will eliminate the environmental input WEPA was designed to foster. Courts must therefore subject negative determinations to a searching inquiry. The standard of review is whether the decision not to file was reasonable under the circumstances. As here, when issues of arguably significant environmental impact are raised, the agency must justify its negative decision. The Commission's conclusory decision not to file is not adequately supported. The court rejects the Commission's assertions that WEPA does not apply to indirect environmental effects, that challengers must prove to the Commission's satisfaction that an action will produce significant environmental effects, that an EIS on rate making would be so speculative as to be meaningless, that expert disagreement on electricity demand elasticity precludes an adequate EIS, that the Commission may ignore cumulative impacts of its continuing regulatory function, and that the proper time for EIS preparation is prior to power plant construction. Since the filing of the contested order in this case, the Commission has revised its administrative rules so that EIS preparation would have been required in this instance, and the Commission is preparing a generic EIS on rate making. These facts do not render the appeal moot; the issue is the Commission's current compliance with WEPA. Finally, the court reverses the circuit court's holding that the threshold filing decision requires an evidentiary hearing because the Commission has discretion to determine the form in which it gathers environmental data.

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factual conclusion that prediction of the environmental effects of electric rate structures was impossible." The court could have seized upon exactly that point, which was made in the concurring opinions, and waited for an easier WEPA case to come along. Yet in this instance, it seems that hard cases make thorough law because the court was able to examine the scope of judicial review of agency threshold decisions not to file as well as to explain that WEPA's procedural requirements are not inherently flexible and demand strict compliance. In the context of rate proceedings, the court made clear that the gratuitous sentiments in the concurring opinions to the PSC's order, to the effect that the Commission already considers environmental factors, do not suffice and that the PSC must carry out its WEPA duties to the letter of the law.

Conclusions

In another sense, the decision in *WED II* comes very near to being an advisory opinion. The challenged rate increase had taken effect, and WEPCO had been granted several additional rate increases. The court recognized the consequent futility of ordering the PSC to prepare an impact statement on a four-year-old, already-implemented rate decision. So the court must actually have been aiming its language at future agency compliance with WEPA. Indeed, the court took notice of newly-adopted PSC rules that would have, if they had existed in 1973, required the PSC to do a factual evaluation of this rate increase to determine whether or not to file an impact statement.[19] Furthermore, the court relied in its analysis on the newly-revised (in 1976) WEPA Guidelines, issued by the Interagency WEPA Coordinating Committee,[20] to buttress its point that WEPA applies to actions with indirect as well as direct environmental effects.

Again pointing toward future court review, the court noted that the PSC is currently preparing a generic impact statement on electric rates and approved this exercise of the Commission's discretion. But the court reemphasized that any challenge to this generic statement or consequent individual statements would be measured under a strict standard of judicial review. In its opinion, the court drew substantial support from the D.C. Circuit's early NEPA decision in *Calvert Cliffs' Coordinating Committee v. AEC*[21] to demonstrate the non-discretionary nature of agency compliance with WEPA. The Wisconsin court has served notice that as *Calvert Cliffs'* did at the federal level, the standards set forth in *WED II* will promote close administrative and judicial adherence to the environmental goals of WEPA.

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18. Respondent's Brief and Appendix on Appeal at 33, Wisconsin's Environmental Decade, Inc. v. Pub. Serv. Comm'n, ___ Wis. 2d ___, ___ N.W.2d ___, 7 ELR 20563 (July 1, 1977).

19. WIS. ADMIN. CODE PSC §2.90(2) provides in part:

> The following types of commission actions shall be individually screened using a screening worksheet to determine whether an environmental impact statement is required:
>
> . .
>
> (e) Electric rate orders in which the utility involved sells more than 5 percent of the total electric sales in the state by all public utilities.

WEPCO accounts for more than five percent of the total electric sales in Wisconsin.

20. INTERAGENCY WEPA COORDINATING COMM., REVISED GUIDELINES FOR THE IMPLEMENTATION OF THE WISCONSIN ENVIRONMENTAL POLICY ACT 3 (Feb. 1976).

21. 449 F.2d 1109, 1 ELR 20346 (D.C. Cir. 1971).

○ Excess Land Regulations Finally Enforce Limits on Federal Water Project Benefits

After 75 years of haphazard administration, the Department of the Interior has proposed "Reclamation Rules and Regulations for Acreage Limitations" to enforce basic provisions of the reclamation laws which are designed to foster creation of family-sized farms in areas irrigated by federal water projects.[1] The proposed regulations have been issued in response to a court order[2] requiring initiation of public rulemaking proceedings to develop criteria for ensuring enforcement of two important statutory provisions, §5 of the Reclamation Act of 1902[3] and §46 of the Omnibus Adjustment Act of 1926.[4] The goal of the regulations is implementation of the statutory requirements that ownership of land receiving water from federal irrigation projects be limited to 160 acres per person and that any "excess" land above this limit be sold at a price equivalent to its value absent the right to federal water. Since the proposed rules make major changes in existing policy while establishing methods for implementing some statutory requirements not previously enforced, substantial criticism and delaying litigation can be expected.

The successful effort to compel promulgation of these regulations rests on a lawsuit by National Land For People, a non-profit California corporation composed of small farmers unable to buy excess lands because of past Bureau of Reclamation policies that enabled landowners in the Westlands Water District of the San Joaquin Valley to obtain holdings far in excess of 160 acres. On November 17, 1975, the organization filed a rulemaking petition before the Bureau of Reclamation seeking adoption of standards to prevent circumvention of the 160-acre limitation.[5] The group specifically sought to compel adoption of procedures to prevent those practices previously approved by the Bureau that enabled land-

---

1. 42 Fed. Reg. 43044 (Aug. 25, 1977) (to be codified in 43 C.F.R. pt. 426).

2. National Land for People, Inc. v. Bureau of Reclamation, No. 76-928 (D.D.C. Aug. 13, 1976).

3. 43 U.S.C. §431.

4. 43 U.S.C. §423e.

5. Rulemaking petition to the Bureau of Reclamation (Bur. Recl., filed Nov. 17, 1975). Copies of the petition and supporting memorandum are available from ELR (1 ; . $1.75, ELR Order No. 465A-B). For a summary of the arguments, *see* ELR 65309.

Service Commission (PSC) came Wisconsin's Environmental Decade, a statewide organization whose goals are to preserve, maintain, and enhance the human and natural environment. The Decade demanded that the PSC write an impact statement before granting the rate increase because, the Decade claimed, the higher rate would attract new capital to WEPCO which would then construct more power plants and increase its electricity generation from existing facilities and thus harm the environment through increased fuel use and land disruption.

The Commission denied the Decade's request in a terse order, the substance of which reads:

> The Commission's rate Order of March 16, 1973, in this proceeding does not have a direct effect upon the environment. Rather the direct effect of the Order is economic, not environmental. Whatever connection such Order has with the environment is remote and indirect. Moreover, nothing has been submitted to the Commission which would cause it to conclude that any environmental impact statement prepared for purposes of this proceeding could be based on anything other than pure speculation.[10]

Two commissioners went to great lengths to justify this decision, arguing essentially that a "fair" reading of WEPA showed that it applies only to agency actions with "palpable" environmental effects and that the PSC in its discretion ought to be able to determine when best to apply the statute to its proceedings.[11]

The Decade petitioned for review of this order in the circuit court, which, in 1975, held[12] that the PSC must prepare an impact statement. Rejecting the PSC's rationales, the court held that neither alleged remoteness of impact, speculative nature of effects, nor administrative delay excused compliance and remanded the case for a WEPA investigation and evidentiary hearing.

Judicial Review of Threshold Decisions

On appeal, the Wisconsin Supreme Court first had to determine the appropriate standard with which to review the PSC's threshold decision not to file an impact statement. Noting that this decision is neither typically adjudicatory nor rulemaking and that an agency might necessarily be biased against filing an impact statement, the court said that WEPA's broad purpose demanded a searching inquiry by the reviewing court. In other words, the crucial decision for the agency comes when it decides whether or not to prepare the impact statement and possibly foreclose investigation of environmental considerations. Therefore, the court followed the majority of federal circuits[13] and applied the test of whether the PSC's decision not to file was reasonable under the circumstances and high standards set by the statute. Furthermore, the agency was allocated the burden of proving that a negative decision is justified.

Applying this standard to the PSC's decision, the court in no uncertain terms declared the PSC's choice to be woefully inadequate. In so doing, the court—for the most part—deftly avoided dealing with the substance of the PSC's rate decision and the attendant economic morass of price elasticity of electricity demand.[14] It was able to do so by emphasizing the nondiscretionary procedural requirements of WEPA and focusing on the record—or lack thereof—used by the Commission in reaching its decision not to file an impact statement. The court looked at the procedural adequacy of the agency's effort rather than the substantive adequacy of the agency's conclusion. Measured against this standard, the Commission's brief order and its supporting concurring opinions did not substitute for the preliminary factual investigation that is necessary to support the agency's decision.

WEPA and Electricity Rates

The court picked an unusually difficult case to use as a vehicle for elaborating its views on WEPA. Admittedly, environmental effects are only indirectly connected to electric ratemaking, and they are harder to forecast than the effects from concrete threats to the environment such as highway construction. Furthermore, there are no federal cases directly on point.[15] Defendants' attempt to rely on federal natural gas curtailment cases,[16] in which the Federal Power Commission has been relieved of the duty to file impact statements on its interim natural gas curtailment plans, was particularly unfortunate in view of the court's companion decision announced the same day in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*[17] that WEPA requires the PSC to "study, develop and describe" alternatives to its gas curtailment scheme.

Moreover, the court could easily have ruled the other way in *WED II* without irreparably damaging WEPA. Plaintiffs admitted in their brief that an impact statement might not have been necessary if the PSC had made a

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10. *In re* Wisconsin Electric Power Co., No. 2-U-7131, Order After Rehearing (Wis. Pub. Serv. Comm'n, Aug. 1, 1973), *reprinted in* Appellants' Joint Appendix at 144, 147, Wisconsin's Environmental Decade, Inc. v. Pub. Serv. Comm'n, ___ Wis. 2d ___, ___ N.W.2d ___, 7 ELR 20563 (July 1, 1977).

11. *Id.* at 148-75.

12. Wisconsin's Environmental Decade, Inc. v. Pub. Serv. Comm'n, 6 ELR 20192 (Wis. Cir. Ct. June 17, 1975), *reprinted in* Appellants' Joint Appendix, *supra* note 10, at 101-23.

13. Save Our Ten Acres v. Kreger, 472 F.2d 463, 3 ELR 20041 (5th Cir. 19[illegible]; Minnesota Public Interest Research Group v. Butz, 498 F. Supp. 1314, 4 ELR 20709 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1247, 3 ELR 20830 (10th Cir. 1973). *Contra* Hanly v. Kleindienst, 471 F.2d 823, 2 ELR 20717 (2d Cir. 1972).

14. *See generally* Comment, *Energy Conservation Through Rate Structure Reform: Electricity Rates Based on Marginal Costs*, 6 ELR 10221 (Oct. 1976).

15. Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 5 ELR 20113 (1975), which held that the Interstate Commerce Commission could file an abridged impact statement for railroad haulage rates, cannot help defendants because of the peculiar nature of the administrative proceedings in that controversy. *See* Comment, *SCRAP II: No Excuse for NEPA Foot-Dragging*, 5 ELR 10126 (1975).

16. American Smelting & Refining Co. v. FPC, 494 F.2d 1925, 4 ELR 20348 (D.C. Cir. 1974); Louisiana v. FPC, 503 F.2d 844 (5th Cir. 1974); Alabama Gas Light Co. v. FPC, 475 F.2d 122, 3 ELR 20213 (5th Cir. 1973). *Accord*, Louisiana Power & Light Co. v. FPC, ___ F.2d ___, 7 ELR 20572 (5th Cir. Aug. 19, 1977).

17. ___ Wis. 2d ___, ___ N.W.2d ___, 7 ELR 20352 (July 1, 1977). This decision is the holding of the companion case *WED I*. *See* note 7 *supra*.

not shirk their responsibilities in implementing the statute. While the amendments do not pose as a cure for slipped deadlines, President Carter's statement[43] upon signing the legislation made clear that the measure does reflect an intention that the new timetables are firm and will be enforced rather than extended again.

The 1977 amendments also introduce into the Act several promising regulatory schemes for approaching the difficult task of providing for continued economic growth throughout the nation in an environmentally sound manner. The statutory provisions for state-run permit programs to deal with the problems of significant deterioration and nonattainment are noteworthy because they are rational and workable. But they are additionally important because they bring home the essential truth that one pollution source or category of sources which fails to reduce its emissions to the greatest degree technologically feasible is unnecessarily restricting further economic growth by using up that remaining portion of the air shed which would otherwise be available for allocation to a new source or sources.

A final element of the new law that warrants applause is its introduction of economically tailored noncompliance penalties as a new enforcement tool. If imposition of a monetary penalty equal to the costs of cleanup proves an efficient and effective enforcement device against noncompliance in the air pollution area, the use of economic disincentives as a regulatory mechanism in the control of other types of pollution should soon be forthcoming.

43. Statement, *supra* note 3.

◎ WEPA in the Court: Wisconsin Environmental Policy Act Receives Staunch Judicial Endorsement

In its first major decision interpreting Wisconsin's Environmental Policy Act,[1] the Wisconsin Supreme Court on July 1 announced unswerving support for the Act (known as WEPA) that promises to make environmental analysis an important component of Wisconsin agency decisions. Reviewing an electric utility rate proceeding, the court in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*[2] *(WED II)* settled in one stroke many thorny interpretive questions regarding judicial review and the scope of WEPA's requirement that state agencies prepare environmental impact statements on major actions that significantly affect the human environment. The court seemed at times to stretch logic and law to achieve its salutory result, but it nonetheless served notice that it will searchingly review agency actions to assure that strict compliance with WEPA's requirements has occurred.

Statutory and Factual Background

WEPA, like statutes in many other states,[3] is modeled on the National Environmental Policy Act.[4] WEPA requires state agencies to include in every "recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment" a detailed statement discussing the same five factors set forth in §102(2)(C) of NEPA. Added to this parallel language are the further requirements that the statement follow the guidelines promulgated by the federal Council on Environmental Quality, that it include a discussion of the beneficial aspects of the action and the economic advantages and disadvantages, and that a public hearing be held on the proposal following circulation of the impact statement for agency and public comment.

As has been the experience with WEPA's federal counterpart, agencies have only begrudgingly accepted WEPA's mandates. In fact, a recent study documents that many Wisconsin agencies have simply ignored the statute.[5] Federal agencies could not ignore NEPA because of watchful public interest groups that successfully forced compliance with NEPA through the judicial system. But, like environmental laws in other states, notably Michigan,[6] the relative absence of well-funded and vocal environmental groups at the state level has hampered oversight of agency compliance with WEPA. Indeed, prior to *WED II* only three WEPA cases of any importance had been decided. One of these, *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*[7] *(WED I)* declared that plaintiffs had standing to enforce WEPA but did not construe the statute. In the second, *Robinson v. Kunach*,[8] the Wisconsin Supreme Court interpreted WEPA's "state agency" language to mean that county governments did not have to prepare impact statements. The third important case, surprisingly, was the trial court decision in *WED II*, which focused state agencies' attention on WEPA by its uncompromisingly strict enforcement of the statute's provisions.[9]

WED II involved the request by the Wisconsin Electric Power Company (WEPCO), which serves about 600,000 people in the greater Milwaukee area, to raise its electricity rates in order to be "made whole" on the rate of return authorized by a previously granted rate hike. Into this seemingly routine proceeding before the Public

1. Wis. Stat. §1.11 (1975).

2. ___ Wis. 2d ___, ___ N.W.2d ___, 7 ELR 20563 (July 1, 1977).

3. *See* Comment, *"Little NEPA's" in the Courts: Washington and Montana Environmental Policy Acts are Alive and Well*, 6 ELR 10216 (Oct. 1976).

4. 42 U.S.C. §4321 *et seq.*, ELR Stat. & Reg. 41009.

5. Special Student Project, *Agency Decisionmaking Under the Wisconsin Environmental Policy Act*, 1977 Wis. L. Rev. 111.

6. *See* Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law from Citizen Suits*, 6 ELR 50067, 50068 (Sept. 1976).

7. 69 Wis. 2d 1, 230 N.W.2d 243 (1975). Although denominated the same as the case discussed in this Comment, *WED I* involved WEPA's application to natural gas curtailment plans. *See* text at note 17 *infra*.

8. ___ Wis. 2d ___, ___, 251 N.W.2d 449, 7 ELR 20554 (1977).

9. *See* Special Student Project, *supra* note 5, at 124 n. 64.

Dennis L — Frank
Frank Bucke
Utility Staff
Let's discuss!
TJS

CENTER FOR THE PUBLIC INTEREST, INC.
POST OFFICE BOX ~~XXX~~ 1308 PHONE (406) 587-0906
BOZEMAN, MONTANA 59715
AN ADVOCACY RESEARCH CENTER

March 13, 1978

Gordon Bollinger, Chairman
Public Service Commission
Capitol Station
Helena, Montana 59601

Dear Gordon:

Recently, the Center received the enclosed comment in the Environmental Law Reporter. As you can see, the case involves construction of a statute very similar to the Montana Environmental Policy Act. I have attached a copy of the case as well.

For some time I have wondered about the Public Service Commission's failure to apply the Environmental Policy Act in rate cases and other deliberations. Since, on the face of it, there is no exemption for PSC from the requirements of the Montana Environmental Policy Act, I would strongly suggest that the Public Service Commission initiate a proceeding to determine the extent to which and the manner in which the Public Service Commission can comply with MEPA.

If we can supply additional information, please let me know.

Best to you.

Sincerely,

Rick Applegate
Director

RA:pah

Enclosure

cc: Public Service Commissioners
Environmental Quality Council

Upon receipt of such evidence, the commission shall consider the same and may modify, amend, or rescind its order relating to such rate, fare, charge, classification, joint rate, regulation, practice, or service complained of in said action and shall report its action thereon to said court within 10 days from the receipt of such evidence.

~~(2)~~ (4) If the commission shall rescind its order complained of, the action shall be dismissed. If it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order."

Amendments to HB 21

1. Title, line 9.
Following: line 8
Strike: "SECTION"
Insert: "SECTIONS"
Folloiwng: "69-3-402"
Insert: "AND 69-3-404"
Following: "69-3-402,"
Strike: "MCA; AND REPEALING SECTION 69-3-404,"

2. Page 2, line 3.
Following: "~~trial~~"
Strike: "ARGUMENT"
Insert: "hearing"

3. Page 2, line 8.
Following: "~~trial~~"
Strike: "ARGUMENT"
Insert: "hearing"

4. Page 2, lines 8 and 9.
Following: "thereof."
Strike: the remainder of line 8 through "actions." on line 9

5. Page 2, lines 16 and 17.
Following: "Section 2."
Strike: the remainder of line 16 and line 17 in its entirety
Insert: "Section 69-3-404, MCA, IS AMENDED TO READ:

"69-3-404. ~~Effect of introduction of new evidence -- resubmission to commission.~~ Review confined to record -- exceptions. (1) Except as otherwise provided in this section, review shall be conducted by the court without a jury and shall be confined to the record.

(2) In cases of alleged irregularities in procedure before the agency not shown in the record, evidence thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(3) If ~~upon the trial of such action evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto~~, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court, before proceeding to render judgment~~, unless the parties to such action stipulate in writing to the contrary,~~ shall may transmit a copy of such evidence to the commission and, if such transmission is made, shall stay further proceedings in said action for 15 days from the date of such transmission. The court shall, within 7 days after the introduction of such evidence, decide whether or not to transmit a copy of such evidence to the commission. The court is considered to have ruled that the evidence must be transmitted to the commission unless it orders otherwise within such 7-day period.

PUBLIC SERVICE COMMISSION 1227 11th Avenue • Helena, Montana 59601
Telephone: (406) 449-3007 or 449-3008

March 7, 1979

Senator Frank Hazelbaker
Chairman, Senate Committee on
Business and Industry
State Capitol
Helena, MT 59601

Dear Senator Hazelbaker:

On March 5, 1979, the following individuals met to discuss H.B. 21, which is presently being considered by your committee:

Eileen Shore, PSC Counsel
James Paine, PSC Counsel
Frank Buckly, Administrator, Utility Division, PSC
Geoffrey Brazier, Montana Consumer Counsel
Bob Gannon, Montana Power Company
Les Loble, Montana-Dakota Utilities Company
Eugene Phillips, Pacific Power and Light Company
George Bennett, Mountain Bell
Jim Hughes, Mountain Bell

All of these individuals and, therefore, the companies represented by them, agreed to the compromise bill which is attached.

Sincerely,

William J. Opitz
Executive Director

WO/jk

Encl.

cc: Rep. Joe Quilici
PSC Staff
Geoffrey Brazier
Bob Gannon
Les Loble
Eugene Phillips
George Bennett
Jim Hughes
Members of the Senate Committee on Business and Industry
Bob Pyfer, Legislative Council

NAME: William J. Opitz DATE: March 9, 1979

ADDRESS: 2 Wood Court Helena, Mont

PHONE: 443-3624

REPRESENTING WHOM? Mont. PSC

APPEARING ON WHICH PROPOSAL: HB-815

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: The Montana PSC has been threatened with possible legal action if it does not write Env. Imp. Statements on its rate case decisions. A one environmental group (7 people) would cost the general fund approximately $135,000 per year. This bill is sponsored by our joint sub-committee on appropriations as an alternative to hiring the 7 FTE's. The Commission's decisions are based on use of a rate base which is already used & useful to the consumer, i.e. the impact on the environment

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

STANDING COMMITTEE REPORT

March 9, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Joint Resolution XXX No. 49

Quilici (Regan)

Respectfully report as follows: That House Joint Resolution XXX No. 49

third reading bill, be amended as follows:

1. Page 1, line 17.
Following: line 16
Insert: "WHEREAS, federal savings and loans, federal credit unions, and state credit unions have the ability to maintain branch facilities; and"

And, as so amended
BE CONCURRED IN
XXXXX

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 9, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 815

Nathe (Lowe)

Respectfully report as follows: That House Bill No. 815

third reading bill, be amended as follows:

1. Title, line 8.
Following: "MCA"
Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

2. Page 4, line 3.
Following: line 2
Insert: "Section 2. Effective date. This act is effective on passage and approval."

And, as so amended
BE CONCURRED IN

DO PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 9, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 375

Seifert (Hazelbaker)

Respectfully report as follows: That House Bill No. 375

BE CONCURRED IN

DO PASS

Chairman.

STATE PUB. CO.
Helena, Mont.

STANDING COMMITTEE REPORT

March 9, 1979

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 24

Oberg (Dover)

Respectfully report as follows: That House Bill No. 24

third reading bill, be amended as follows:

1. Page 1, line 15.
Following: "revenue"
Strike: "account"
Insert: "fund"

And, as so amended
BE CONCURRED IN

Chairman.

STATE PUB. CO.
Helena, Mont.

4. Page 2, lines 8 and 9.
Following: "thereof."
Strike: the remainder of line 8 through "actions." on line 9

5. Page 2, lines 16 and 17.
Following: "Section 2."
Strike: the remainder of line 16 and line 17 in its entirety
Insert: "Section 69-3-404, MCA, IS AMENDED TO READ:

"69-3-404. ~~Effect of introduction of new evidence -- resubmission to commission.~~ Review confined to record -- exceptions. (1) Except as otherwise provided in this section, review shall be conducted by the court without a jury and shall be confined to the record.

(2) In cases of alleged irregularities in procedure before the agency not shown in the record, evidence thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(3) ~~If upon the trial of such action evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto,~~ before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court, before proceeding to render judgment, ~~unless the parties to such action stipulate in writing to the contrary,~~ shall may transmit a copy of such evidence to the commission and, if such transmission is made, shall stay further proceedings in said action for 15 days from the date of such transmission. The court shall, within 7 days after the introduction of such evidence, decide whether or not to transmit a copy of such evidence to the commission. The court is considered to have ruled that the evidence must be transmitted to the commission unless it orders otherwise within such 7-day period.

Upon receipt of such evidence, the commission shall consider the same and may modify, amend, or rescind its order relating to such rate, fare, charge, classification, joint rate, regulation, practice, or service complained of in said action and shall report its action thereon to said court within 10 days from the receipt of such evidence.

~~(2)~~ (4) If the commission shall rescind its order complained of, the action shall be dismissed. If it shall alter, modify, or amend the same, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order."

And, as so amended,
BE CONCURRED IN

Al

Chairman.

STANDING COMMITTEE REPORT

March 9, 19 79

MR. President:

We, your committee on Business and Industry

having had under consideration House Bill No. 21

Quilici (Regan)

Respectfully report as follows: That House Bill No. 21

third reading bill, be amended as follows:

1. Title, line 9.
Following: line 8
Strike: "SECTION"
Insert: "SECTIONS"
Following: "69-3-402"
Insert: "AND 69-3-404"
Following: "69-3-402,"
Strike: "MCA; AND REPEALING SECTION 69-3-404,"

2. Page 2, line 3.
Following: "trial"
Strike: "ARGUMENT"
Insert: "hearing"

3. Page 2, line 8.
Following: "trial"
Strike: "ARGUMENT"
Insert: "hearing"

DO PASS

(Continued)

Chairman.

STATE PUB. CO.
Helena, Mont.