now be willing to allow compensation for mental distress without physical impact wherever such a relationship could be found as a matter of law.[57] Such relationships might include those of doctor and patient, insurer and insured, real estate salesman and prospective buyer, or perhaps even lawyer and client.

The evolution of compensation for mental distress illustrates the increasing trend toward allowing recovery for such damages upon proper proof of its genuineness.[58] The Iowa Supreme Court followed this trend by recognizing in *Meyer* that the possession of a peaceful mental state is a subject for protection in actions for breach of contract. The existence of a noncommercial contract between the parties provides assurance that the mental distress is real. *Meyer* breaks away from the arbitrary rules which have in the past denied recovery for mental distress and held that in appropriate circumstances, there may be recovery for mental distress, absent physical trauma, arising out of a breach of contract to perform funeral services.[59] It can be forcefully argued that *Meyer* opens the door for a finding of a special relationship between a funeral director and a bereaved relative, and in that sense, the case may be viewed as an expansion of the narrow tort rule which allows recovery for mental distress without physical impact where there is a special relationship between the parties. Finally, it is suggested that while *Meyer* does not abrogate the impact rule as it relates to the negligent infliction of emotional distress, it does present another situation where the rule is inapplicable and thus, *Meyer* can be viewed as a step toward the continuing erosion of that doctrine.

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57. For language supporting this proposition *see generally* Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason*, 7 VILL. L. REV. 232 (1962).

58. PROSSER, *supra* note 8; Note, *Torts: Recent Developments in the Law of Nervous Shock: Effect of the Restatement of Torts*, 21 CORNELL L.Q. 166 (1936).

59. Meyer v. Nottger, 241 N.W.2d 911, 921 (Iowa 1976).

**ENVIRONMENTAL & ADMINISTRATIVE LAW**—PLAN OF THE UNITED STATES FOREST SERVICE TO CONTINUE COMMERCIAL LOGGING OF VIRGIN TIMBER IN MINNESOTA WILDERNESS AREA AND SUPPORTING ENVIRONMENTAL IMPACT STATEMENT HELD TO BE IN COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT.—*Minnesota Public Interest Research Group v. Butz* (8th Cir. 1976).

This litigation involves two claims[1] brought by the Minnesota Public Interest Research Group[2] concerning commercial logging in the Boundary Waters Canoe Area in northeastern Minnesota. In the initial action, the Eighth Circuit Court of Appeals affirmed an order issued by the federal district court temporarily enjoining government and private defendants[3] from commercial logging in Boundary Waters Canoe Areas contiguous with virgin forest.[4] The injunction was issued pending completion of an environmental impact statement by defendant United States Forest Service as required by the National Environmental Policy Act of 1969 (NEPA).[5] The Forest Service subsequently completed the final environmental impact statement. A management plan, containing the final decision of the Forest Service to continue commercial logging of virgin timber in the portal zone of the Boundary Waters Canoe Area, was included within the environmental impact statement. That statement purportedly contained a description of the environmental consequences of continued logging upon the area, as well as support for the final decision of the Forest Service.[6] After the final statement and management plan were published,[7] plaintiffs Minnesota Public Interest Research Group and the Sierra

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1. Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584 (D.C. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974); Minnesota Pub. Interest Research Group v. Butz, 401 F. Supp. 1276 (D.C. Minn. 1975), *rev'd*, 541 F.2d 1292 (8th Cir. 1976) [hereinafter cited as MPIRG v. Butz].

2. Minnesota Public Interest Research Group is a nonprofit Minnesota corporation organized for the purpose of promoting the public interest. In fulfillment of this purpose, the organization provides legal representation in matters of public concern when its Board of Directors and staff feel such representation is necessary. MPIRG v. Butz, 358 F. Supp. 584 (D.C. Minn. 1973).

3. Defendants in this litigation were: Earl V. Butz, individually and as Secretary of Agriculture; John B. McGuire, individually and as Chief, United States Forest Service; Jay Cravens, individually and as Regional Forester; Harold Andersen, individually and as Supervisor, Superior National Forest; Consolidated Papers, Inc.; Northwest Paper Co.; Northern Forest Products, Ltd.; Kainz Logging Co.; Emil Abramson; and Boise Cascade Corp. *Id.* at 597-601.

4. MPIRG v. Butz, 358 F. Supp. 584 (D.C. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974).

5. 42 U.S.C. §§ 4321-4347 (1970). The action of the Forest Service with regard to currently existing timber sales within the portal zone of the Boundary Waters Canoe Area constituted the major federal action significantly affecting the environment which required the preparation of an environmental impact statement under NEPA. MPIRG v. Butz, 401 F. Supp. 1276, 1286 (D.C. Minn. 1975).

6. MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976).

7. 39 Fed. Reg. 25,524 (1974); 39 Fed. Reg. 26,477 (1974).

Club[8] filed a second action requesting injunctive and declaratory relief[9] to prohibit commercial logging of virgin timber[10] in the Boundary Waters Canoe Area. Plaintiffs alleged that the environmental impact statement prepared by the Forest Service did not comply with the procedural and substantive requirements of NEPA.[11] Defendants generally denied plaintiffs' claims.[12] The district court held that the environmental impact statement was procedurally inadequate under NEPA,[13] and that the decision of the Forest Service to continue logging in the portal zone[14] of the Boundary Waters Canoe Area was substantively inadequate under the same Act.[15] The court permanently enjoined existing and future timber sales in areas within close proximity to the remaining blocks of virgin forest in the Boundary Waters Canoe Area.[16] The Eighth Circuit, sitting en banc, reversed.[17] The court held that the contents of the environmental impact statement, describing the environmental impact of the Forest Service's management plan on the Boundary Waters Canoe Area, met with the procedural requirements of NEPA. The court also held that the decision of the Forest Service to continue commercial logging was not arbitrary, as it was supported by conclusions drawn in the environmental impact statement, and that the decision therefore complied with the substantive requirements of NEPA.[18] The order permanently enjoining commercial logging in areas wherein the Forest Service had already sold logging rights to the corporate defendants was dissolved.[19] The injunction prohibiting the future sale of logging rights by the Forest Service was continued pending completion of the forthcoming environmental impact statement to be prepared by the Forest Service on the Superior National Forest.[20] *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976).

The Boundary Waters Canoe Area was originally included within the Superior National Forest as created in 1909.[21] In 1926, a large part of the

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8. The Sierra Club intervened in the second action. MPIRG v. Butz, 401 F. Supp. 1276, 1284 (D.C. Minn. 1975).

9. Plaintiffs requested the court to declare that the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1964), prohibits commercial logging of virgin timber. *Id.* at 1282.

10. Throughout this discussion, virgin forest or virgin timber refers to forest areas resulting entirely from natural factors and presently existing in a natural state, as opposed to forests affected by factors controlled by human beings, such as logging, planting, or seeding. The Boundary Waters Canoe Area contains approximately 520,000 acres of virgin forest. MPIRG v. Butz, 358 F. Supp. 584, 594 (D.C. Minn. 1973).

11. MPIRG v. Butz, 401 F. Supp. 1276, 1282 (D.C. Minn. 1975).

12. *Id.* at 1284.

13. *Id.* at 1323.

14. The Boundary Waters Canoe Area is divided into two zones, the portal zone, and the interior zone. *See* note 26 *infra*.

15. MPIRG v. Butz, 401 F. Supp. 1276, 1324 (D.C. Minn. 1975).

16. *Id.*

17. MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976).

18. *Id.* at 1298. The court also held that the Wilderness Act did not prohibit logging in the virgin areas of the Boundary Waters Canoe Area. *Id.*

19. *Id.* at 1308.

20. *Id.*

21. In 1909 the Superior National Forest consisted of 1,159,000 acres. MPIRG v. Butz, 358 F. Supp. 584, 589 (D.C. Minn. 1973). Now it consists of about 3,000,000 acres. *Id.* at 594.

Forest was designated as the Superior Primitive Area, wherein road building was prohibited and commercial logging was severely restricted.[22] By 1939, the Primitive Area was expanded and reclassified as the Superior, Caribou and Little Sioux Roadless Areas.[23] Although commercial logging was permitted in some areas,[24] the Department of Agriculture emphasized the preservation of the area as wilderness in its management policies.[25] In 1958, the roadless areas were renamed as the Boundary Waters Canoe Area. That 1,060,000 acre[26] area is presently divided into the interior zone and the portal zone.[27] The previously existing policy prohibiting commercial logging in the interior zone has been left unchanged under the management plan.[28] Although commercial logging in the portal zone has been permitted in the past, prior management of the Boundary Waters Canoe Area as a whole has stressed the preservation of the area as wilderness.[29] There presently are seven existing timber sales in the portal zone which include virgin timber.[30] The plan of the Forest Service at issue was to permit commercial logging of the portal zone, including the logging of virgin timber, to continue.[31]

Plaintiffs questioned the basis for and the propriety of this final decision of the Forest Service in light of the procedural requirements and substantive policy of NEPA. The sections of the Act pertinent to this litigation are sections 101[32] and 102.[33] Section 101(a) contains a statement of the environmental policy of the Act.[34] Section 101(b) places upon the federal government

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22. *Id.* at 590.
23. *Id.*
24. Commercial logging was prohibited in about 362,000 acres just south of the Canadian border. This no-cut zone was set up by the Secretary of Agriculture in 1941, and was expanded in 1965 to form the interior zone of the Boundary Waters Canoe Area. *Id.*
25. A regulation concerning the Roadless Areas promulgated in 1948 by the Secretary of Agriculture read: "The management objective will be to preserve as much of the wilderness value as possible and still permit use of timber and other industrial uses. Only temporary roads will be permitted in roadless areas. Resource uses will be managed to preserve all possible wilderness values." *Id.*
26. *Id.* at 594.
27. 36 C.F.R. § 251.85 (1972).
28. MPIRG v. Butz, 358 F. Supp. 584, 592 (D.C. Minn. 1973).
29. *See* note 25 *supra.* Throughout both zones of the Boundary Waters Canoe Area, no logging is permitted within a certain footage of the shorelines of lakes, rivers and streams, in accordance with the Shipstead-Newton-Nolan Act, 16 U.S.C. § 577a (1930). *Id.* at 590.
30. For a description of the sales, see MPIRG v. Butz, 401 F. Supp. 1276, 1286-87 (D.C. Minn. 1975).
31. The final decision of the Forest Service is contained in its management plan. For a summary of the decision, see MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976). For a more detailed description, see MPIRG v. Butz, 401 F. Supp. 1276, 1292-94 (D.C. Minn. 1975).
32. 42 U.S.C. § 4331 (1970).
33. 42 U.S.C. § 4332 (1970).
34. Section 101(a) states in part:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environment quality to the overall welfare, and development of man, declares that it is the continuing policy of the Federal Government . . . *to use all practicable means* . . . to

the responsibility to utilize all practicable means to fulfill certain stated goals.[35] Summarized, these goals call for diverse and productive use of our natural resources without degradation or risk of harm to the environment. The procedural aspects of NEPA are included in section 102. Section 102(2)(a) requires that federal agencies utilize a "systematic and interdisciplinary" approach when deciding upon proposals which would have a substantial impact on the environment.[36] Preparation of an environmental impact statement is required by section 102(2)(c) to ensure that such broad and encompassing approach to decision-making is employed by federal agencies.[37] Specifically, section 102(2)(c) requires that all federal agencies shall:

> [I]nclude in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on—
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> (i) The environmental impact of the proposed action,
>
> (ii) any adverse environmental affects which cannot be avoided should the proposal be implemented,
>
> (iii) the alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
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> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[38]

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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 of Americans.

42 U.S.C. § 4331(a) (1970) (emphasis added).

35. Section 101(b) states in full:

In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government *to use all practicable means*, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthy, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage and maintain wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities, and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b) (1970) (emphasis added).

36. 42 U.S.C. § 4332(2)(a) (1970).

37. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

38. 42 U.S.C. § 4332(2)(c) (1970). The provisions of § 102 are recognized as "action-forcing" procedures which seek to implement the policies of section 101. *See* Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1132 n.13 (5th Cir. 1974); S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969).

The final agency decision is to be based upon and supported by the information contained in the environmental impact statement.

The Eighth Circuit, in *Minnesota Public Interest Research Group v. Butz*,[39] discusses the adequacy of the Forest Service's environmental impact statement, and the scope of judicial review of its final decision. The court lists established rules for judicial interpretation of NEPA. In its actual analysis of the environmental impact statement and the management plan, however, the court in *Butz* fails to apply the standards which it enunciates.

Since the passage of NEPA, courts have adopted a pragmatic standard for purposes of judicial review of a federal agency's compliance with the procedural requirements of the Act.[40] When examining an environmental impact statement, the courts have held the responsible agency to a standard of reasonableness and good faith in the agency's delineation of the environmental factors which led to the resultant decision.[41] The environmental impact statement need not be exhaustive, but must provide a sufficient basis for a reasoned choice among alternatives.[42] The agency need not include every piece of information that it has gathered,[43] although unsupported and unexplained conclusions are inadequate.[44] The statement is designed to inform the public and a reviewing court of the environmental consequences of a proposed action,[45] compel decision-makers to give serious consideration to environmental factors,[46] and ensure that the decision-makers did in fact take environmental factors into consideration in reaching their decision.[47] Procedural compliance is required "to the fullest possible extent."[48]

The Forest Service, in the environmental impact statement involved in *Butz*, describes the environmental impacts of the proposed action by the use of seven matrices.[49] Each matrix is in the form of a grid, with various management activities listed along the top, and several environmental factors listed down the side. A circle divided into four sections is placed where the two columns intersect. One letter, out of a choice of a total of eight, is placed in each section of the circles to describe the impact of a particular management

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39. 541 F.2d 1292 (8th Cir. 1976).
40. Sierra Club v. Froehlke, 534 F.2d 1289, 1292 (8th Cir. 1976).
41. Carolina Environmental Study Group v. United States, 510 F.2d 796, 798-801 (D.C. Cir. 1975); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973).
42. Natural Resources Defense Council v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).
43. *Id.* at 838.
44. *Id.* at 834-36; Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973).
45. MPIRG v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976); Sierra Club v. Morton, 510 F.2d 813, 820 (5th Cir. 1975); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972).
46. Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).
47. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *see* 115 Cong. Rec. 40,416 (Senate Dec. 20, 1969).
48. 42 U.S.C. § 4332 (1970); *accord*, MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976).
49. The matrix used to describe the impacts of logging and logging-related activities is reproduced at MPIRG v. Butz, 401 F. Supp. 1276, 1338 (D.C. Minn. 1975).

activity upon a segment of the environment. The Forest Service does not include any supporting data indicating its source for the stated impact.[50] The court in *Butz* approved of the use of the matrices, stating simply that there was no indication the conclusions of the Forest Service were not reached in good faith.[51] In the past, however, the Eighth Circuit has stated that an environmental impact statement must not be too vague and conclusory, and that an agency is required to explicate fully its course of inquiry, its analysis and its reasoning.[52] The matrix system employed in the environmental impact statement does not meet that standard because of a lack of explanatory and analytical data. The court in *Butz* cites *Sierra Club v. Morton*,[53] wherein the Fifth Circuit approved of the use of a matrix to numerically predict the effects of oil spillage on protected resources.[54] The only data involved in the matrix used in *Sierra Club* was the distance between the oil rig and the resource sought to be protected; the supporting data was therefore necessarily included in the matrix itself. The matrix used in *Butz*, however, requires the reader to speculate as to the supporting reasons for the conclusions contained therein.

The environmental impact statement in the case at bar also lacked adequate discussion of the unavoidable and irreversible adverse effects of logging upon virgin forest in the Boundary Waters Canoe Area. The Forest Service did recognize that logging in the virgin areas generally results in irretrievable losses, and that there is a need to protect remaining blocks of virgin forest; specific losses, however, were not delineated in the statement.[55] The Forest Service also recognized that logging affects the use of the virgin forests as a natural laboratory, but did not discuss the effect of logging upon the primitive recreational experience.[56] The Forest Service stated that it intends to issue detailed environmental analysis reports whenever virgin timber is about to be harvested;[57] but each such report will cover only one timber sale and not the entire area subject to the overall plan of the Forest Service. NEPA specifically requires that an environmental impact statement be "detailed"[58] and complete "to the fullest extent possible."[59] The statement involved in *Butz* is not sufficiently detailed and complete because of its cursory treatment of the effects of logging upon virgin forests. Mere statements that logging will result in environmental losses is not a detailed statement of "irreversible and irretrievable commitments of resources,"[60] described to the fullest extent possible. Furthermore, an environmental impact statement must not ignore the human element,[61]

50. *Id.* at 1309.
51. MPIRG v. Butz, 541 F.2d 1292, 1299 (8th Cir. 1976).
52. *Id.* at 1299-1300.
53. 510 F.2d 813 (5th Cir. 1975).
54. *Id.* at 821 n.16 (matrix reproduced).
55. MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976).
56. MPIRG v. Butz, 401 F. Supp. 1276, 1312 (D.C. Minn. 1975).
57. *Id.*
58. 42 U.S.C. § 4332(2)(c) (1970).
59. 42 U.S.C. § 4332 (1970).
60. 42 U.S.C. § 4332(2)(c)(v) (1970).
61. Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378, 388

which in this case is the use of the Boundary Waters Canoe Area for recreational purposes. The Area is primarily a recreational one,[62] its main attraction being a large and seldom encountered expanse of virgin timber. The absence of a complete analysis and evaluation of the adverse effects of logging upon recreational use of the Area's virgin forest constitutes a major gap in the environmental impact statement. Finally, a segmented evaluation of proposed activity, such as the Forest Service's intention to prepare an environmental analysis report when virgin timber is about to be harvested, is only permitted when the project as a whole is separable into two or more distinct projects.[63] Here, however, the logging of virgin timber has been and should be treated as one project alone. The court in *Butz* makes no specific comment on the stated deficiencies in the Forest Service's evaluation of the effects of logging on virgin forest, indicating its approval of such sparse treatment of important issues by an agency in an environmental impact statement.

The Forest Service's discussion and evaluation of alternatives to the proposed action are both conflicting and incomplete. The environmental impact statement contains a chart in which each alternative is assigned one of three numbers indicating the best, average, or least response to inherent values of the Boundary Waters Canoe Area.[64] The assigned responses are in need of explanation. For example, both a total prohibition and no prohibition upon commercial cutting of virgin timber are assigned an average response to the value of the Boundary Waters Canoe Area as a recreational area.[65] These conclusions are conflicting because the primary value of the Boundary Waters Canoe Area as a recreational area is due to the existence of virgin forest. The cutting of virgin timber would be obviously detrimental to the primitive nature of the area. The court in *Butz* approves of the chart, stating simply that the conclusions of the Forest Service are supported by the record.[66] Furthermore, the environmental impact statement fails to discuss the possibility of mitigation of the adverse effects of the logging of virgin timber. The Eighth Circuit, in *Environmental Defense Fund Inc. v. Froehlke*,[67] wherein an environmental impact statement concerning a river channelization project was held inadequate, stated, "We see no practical reason why the Corps could not have included in its final impact statement a thorough exploration of the possibility of mitigation in order to give decision-makers an opportunity to consider the possibility of delaying

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(2d Cir. 1975); Hanly v. Mitchell, 460 F.2d 640, 647 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

62. The more than 1,000 lakes connected by streams and portages make the Boundary Waters Canoe Area the only wilderness canoe area in the world. MPIRG v. Butz, 498 F.2d 1314, 1316 (8th Cir. 1974). The use of the Area by hikers, campers, and canoers is continually increasing. MPIRG v. Butz, 358 F. Supp. 584, 595 (D.C. Minn. 1973).

63. Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

64. MPIRG v. Butz, 541 F.2d 1292, 1304 n.21 (8th Cir. 1976) (chart reproduced in part).

65. *Id.*; MPIRG v. Butz, 401 F. Supp. 1276, 1321-22 (D.C. Minn. 1975).

66. 541 F.2d 1292 (8th Cir. 1976).

67. 473 F.2d 346 (8th Cir. 1972).

construction until a mitigation plan was put into effect."[68] The same court, in *Butz*, ignores the omission of a discussion of mitigation as well as the conflicting evaluation of alternatives. Given the inadequate discussion of alternatives and the absence of a discussion of mitigation, it is not clear from the environmental impact statement that the most environmentally sound course of action was chosen by the Forest Service.

*Butz* does not demand, nor discuss, the environmental impact statement in terms of procedural compliance "to the fullest extent possible."[69] The court fails to question the absence in the statement of the reasoning, analysis and supporting data which are purportedly the basis for the conclusions of the Forest Service. Rather than requiring detail and comprehensiveness for the purpose of ensuring an informed decision-making process, *Butz* emphasizes the informational role of an environmental impact statement. The court states that "The requirement of an objective, comprehensive and understandable 'detailed statement' ensures that the EIS [Environmental Impact Statement] will fulfill its primary function to provide *information* as to the environmental consequences of a proposed action."[70] However, the authorities relied upon in *Butz* envision a different role for the statement. The court in *Environmental Defense Fund Inc. v. Corps of Engineers*,[71] frequently cited by *Butz*, stated that "The language of NEPA, as well as its legislative history, make it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decision making. . . ."[72] The court in *Calvert Cliffs' Coordinating Committee Inc. v. Atomic Energy Commission*[73] saw the requirements of section 102 as a means to ensure that federal agencies will make the most beneficial and intelligent decision.[74] *Corps* and *Calvert* require that the environmental impact statement show, to the fullest extent possible, that the final agency decision is compatible with and in furtherance of the policy and goals of NEPA. A document filled with unsubstantiated conclusions, in the form of charts and technical diagrams, geared toward public inspection, does not ensure that an environmentally sound decision such as is contemplated by NEPA will be reached. The court in *Butz* concluded that the environmental impact statement in this situation was reasonable and was prepared in good faith, but fails to address important omissions and deficiencies. If the statement is reasonable, and the Forest Service has exhibited good faith in its preparation, then the standards of judicial review of an environmental impact statement are indeed very flexible.

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68. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 352 (8th Cir. 1972).
69. 42 U.S.C. § 4332 (1970).
70. 541 F.2d 1292, 1300 (8th Cir. 1976).
71. 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).
72. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).
73. 449 F.2d 1109 (D.C. Cir. 1971).
74. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

The courts initially limited their role under NEPA to procedural review,[75] and precluded judicial review of the merits of an agency decision. Substantive review of an agency decision was first suggested in *Calvert*, wherein the Circuit Court of Appeals for the District of Columbia stated in dictum that a reviewing court "probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[76] The Eighth Circuit, in *Corps*, was the first federal circuit court to state unequivocally that federal courts have the power and the duty to review substantive agency decisions on the merits.[77] Since *Corps*, a majority of the federal circuits have expanded their role to include substantive review of agency decisions.[78] According to these decisions, courts are obligated to review the balance struck by the agency in accordance with the standards and policies set forth in NEPA.[79] The standard of review, however, is narrow. The full impact of NEPA upon the decisions of federal agencies depends upon the continual judicial expansion in the area of substantive review.

*Butz* purports to employ the same rules for substantive review of an agency decision as enunciated by the Eighth Circuit in *Corps*. Substantive review involves two stages. First of all, the reviewing court must determine whether the agency, in reaching a decision, considered and balanced, fully and in good faith, the environmental amenities involved.[80] The balancing which is required consists of the weighing of environmental costs with economic and technical benefits. The courts and other authorities are not in agreement as to the amount of detail required in the cost-benefit analysis in order to fulfill NEPA's balancing requirement.[81] Nevertheless, *Corps* and *Calvert* clearly mandate that

75. *See* Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

76. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

77. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298 (8th Cir. 1972).

78. Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975); Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C. Cir. 1975); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123 (5th Cir. 1974).

79. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972).

80. MPIRG v. Butz, 541 F.2d 1292 (8th Cir. 1976).

81. Not all authorities, agree that a cost-benefit analysis is required by NEPA. On the one hand, it is argued that environmental effects are too difficult to estimate and predict, and that such effects do not lend themselves to monetary expression. *See* Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund, Inc. v. Callaway, 497 F.2d 1340 (8th Cir. 1974); Note, 88 HARV. L. REV. 735 (1975). But administrative difficulty is no reason for an agency to evade the requirements of NEPA. Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971). Some authorities have devised a method of computing the present value and discount rate of environmental values. Note, *Cost-Benefit Analysis in the Courts: Judicial Review Under NEPA*, 9 GA. L. REV. 417 (1975). Despite the difficulties, a cost-benefit analysis appears to be mandated by NEPA and to be ultimately in the best interests of society. *See* Note, 24 STAN. L. REV. 1092 (1972).

the balancing process employed by the agency be closely examined by the courts. The court in *Butz* does not mention whether the balancing analysis, if any, employed by the Forest Service was adequate. Certain facts alluded to by the district court indicate that a cost-benefit analysis is necessary here. For example, the Forest Service apparently has insufficient funds to adequately reforest logged areas, indicating that the environmental costs of commercial logging are high. On the other hand, all five corporate defendants combined utilize timber from the Boundary Waters Canoe Area for less than 16 percent of their needs, indicating the economic benefits of commercial logging in the Area are low.[82] Furthermore, the environmental impact statement did not contain any information on future timber sales. Although another statement will be prepared on the Superior National Forest which will include an evaluation of future sales in the Boundary Waters Canoe Area, the final decision to continue logging was made without any consideration of long-range effects of commercial logging. Any sort of balancing analysis would be incomplete without taking into consideration the effects of logging in the future. The court in *Butz* should have at least discussed the balancing issue and justified the approach of the Forest Service.

Secondly, the reviewing court, in analyzing an agency decision, must decide whether the final balance struck by the agency in its decision was arbitrary.[83] The arbitrary standard used under NEPA has its source in the Administrative Procedure Act (APA).[84] As a general rule, under the APA and now under NEPA, a court may not substitute its judgment for that of an agency.[85] However, the scope of review is not severely limited in every situation. Davis, a well-known authority on administrative law, states that courts limit themselves to a standard of reasonableness when reviewing agency findings of fact.[86] More specifically, Davis states that a court must determine whether, in support of each finding, there is "[s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[87] However, Davis makes a distinction between judicial review of conclusions of fact and review of an agency's resolution of conflicting policy interests. Courts are required to scrutinize carefully the balance struck by an agency to ensure that legislative policy has not been ignored by the agency. To highlight this distinction, Davis quotes from the United States Supreme Court in *NLRB v. Brown*:[88]

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82. MPIRG v. Butz, 358 F. Supp. 584, 597-601 (D.C. Minn. 1973).
83. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972).
84. 5 U.S.C. § 706(2)(A) (1966); *see* MPIRG v. Butz, 401 F. Supp. 1276, 1282 (8th Cir. 1975); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 298-99 n.14 (8th Cir. 1972).
85. MPIRG v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976); Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 416 (1971); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972).
86. K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.01 at 525 (3d ed. 1972) [hereinafter cited as DAVIS].
87. *Id.* § 29.02 at 527-28.
88. 308 U.S. 278, 290-92 (1965).

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions. . . . Due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where . . . the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, the deference owed to an expert tribunal cannot be allowed to skip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.[89]

Judicial review of the decision of the Forest Service should have involved an examination of the balance struck by the Forest Service—a balance between the environmental values espoused by NEPA, and the benefits of commercial logging as contended by the Forest Service. A requirement that merely a reasonable balance be struck is inappropriate, for the reasonable standard applies only to an agency's determination of facts. Nevertheless, the holding in *Butz* in support of the final decision of the Forest Service is couched in terms of reasonableness. The court states that there is sufficient information to justify the conclusions or general policy of the Forest Service.[90] No mention is made of the policy considerations contained in section 101 of NEPA. The court treats an important agency decision, purportedly reached after a full balancing process, as a mere finding of fact. *Butz* gives far too much deference to the determination of the Forest Service, when principles of administrative law call for an evaluation in light of legislative policy considerations.

The Eighth Circuit, once considered progressive for its decision in *Corps*, has retreated from its earlier stand. The court in *Butz* criticizes the lower court for emphasizing substantive review of the decision of the Forest Service: "The district court was primarily concerned with the vegetation management policy contained in the Management Plan. Its focus was misplaced, because the major concern under NEPA is the adequacy of the timber policies *considered* in the EIS, not the substantive merits of the timber policy which the Forest Service chose to *follow* in its management plan."[91] *Butz* merely requires that an agency decision be supportable. The Eighth Circuit has quite obviously removed NEPA and the courts from the agency decision-making process. Judge Skelly Wright, in *Calvert*, foresaw in part the future of NEPA in the courts:

> These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment. . . . But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role . . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.[92]

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89. DAVIS, *supra* note 86, § 29.02 at 527-28, *quoting* NLRB v. Brown, 308 U.S. 278, 290-92 (1965).
90. MPIRG v. Butz, 541 F.2d 1292, 1307 (8th Cir. 1976).
91. *Id.* at 1301 n.16.
92. 449 F.2d 1109, 1111 (D.C. Cir. 1971).

Yet upon whose shoulders does the duty fall to ensure that important legislative purposes are not lost in the vast hallways of the federal courts?

*Butz* signifies a major setback in procedural and substantive review under NEPA. The court exhibited a lax and cursory attitude in both areas of judicial review. In the area of procedural review, *Butz* viewed an environmental impact statement as nothing more than a lengthy document containing a catalogue of information about a project planned by a federal agency. In the past, however, courts have required that an environmental impact statement contain a complete and systematic basis for an environmentally sound project, as well as a comprehensive evaluation of the effects of the project as planned. The standard of procedural review set by *Butz* requires a reviewing court merely to determine whether an environmental impact statement was prepared in good faith, and to ignore blatant inconsistencies and omissions. The ultimate effect of such a holding will be a less rigorous and comprehensive approach by the agency in preparing an environmental impact statement, as a document with little factual support will be approved by a reviewing court. The effect of *Butz* will be most crippling in the area of substantive review. Although the court maintained that review of the merits of an agency decision is a mandate, the brief analysis of the agency decision in issue successfully precludes meaningful substantive review in the future. According to the standard of substantive review set by *Butz*, a court is not required to evaluate, in light of the environmental policy of NEPA, the balance struck by an agency. Instead, a reviewing court will merely determine whether an agency decision is reasonable and supportable. Without taking into consideration the policies espoused by section 101 of NEPA, any decision would arguably be supportable and reasonable. NEPA sought to interject an emphasis upon environmental protection into the agency decision-making process. *Butz*, however, has rendered the environmentally oriented policy of NEPA meaningless, and has made the Act just another means by which the courts can, with minimal effort, rubber-stamp the decisions of federal agencies.

SANDRA LEE BONDY

**MEDICAL MALPRACTICE**—STANDARD OF CARE WHICH GENERAL MEDICAL PRACTITIONER IS HELD TO IS "SUCH REASONABLE CARE AND SKILL AS IS EXERCISED BY THE ORDINARY PHYSICIAN OF GOOD STANDING UNDER LIKE CIRCUMSTANCES," AND LOCALITY IN QUESTION IS MERELY ONE CIRCUMSTANCE TO BE CONSIDERED, NOT AN ABSOLUTE LIMIT ON THE SKILL REQUIRED.—*Speed v. State* (Iowa 1976).

Plaintiff Speed, a student at the University of Iowa, was inflicted with an upper respiratory infection which had persisted several weeks. He also had several teeth extracted at the Oral Surgery Department of the University Hospitals, and was then sent home. Speed experienced severe headaches and nausea following his oral surgery and was given medication for the pain, although it was determined that the extractions were healing properly. Shortly thereafter, Speed was taken to the University Student Health Infirmary where the examining physician noted that Speed was suffering from cold, headache, nausea, loss of appetite, dehydration, dizziness and inflamed eyelids; however, a definite diagnosis for his illness was not reached. Doctors were called early the following morning and found his eyes beginning to bulge abnormally. Speed was taken to the Neurology Department and was operated on the following day for the removal of ethmoid sinuses. It was determined that an infection, probably originating in the sinus area had caused blood clotting, and while intensive medical care saved Speed's life, he emerged permanently blind. Speed filed suit against the state under the Iowa Tort Claims Act,[1] alleging negligence on the part of the treating physicians at the State University Hospitals. The Johnson County District Court entered judgment for the plaintiff, and the state appealed, alleging *inter alia* that plaintiff's expert witnesses were incompetent to testify as they lacked knowledge of the standard of care applicable in the community. The Supreme Court of Iowa *held*, affirmed. The standard of care which a general medical practitioner is held to is "such reasonable care and skill as is exercised by the ordinary physician of good standing under like circumstances," and the locality in question is merely one circumstance to be considered, not an absolute limit on the skill required. *Speed v. State*, 240 N.W.2d 901 (Iowa 1976).

The central issue in *Speed* was whether Iowa would continue to adhere to the "locality rule," which prior to the case at bar defined the standard of care required of practicing physicians in Iowa. The locality rule itself is an American creation[2] and can be traced to the second half of the nineteenth century. An early statement of the rule appears in the case of *Smothers v. Hanks*.[3]

1. IOWA CODE ch. 25A (1973).
2. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, 18 DE PAUL L. REV. 408, 410 (1969) [hereinafter cited as Waltz].
3. 34 Iowa 286 (1872).