NEPA, Tipping and the Siting of Low-Income Public Housing: The Dangers of *Strycker's Bay Neighborhood Council v. Karlen*

I. INTRODUCTION

On January 7, 1980, the Supreme Court of the United States, in *Strycker's Bay Neighborhood Council v. Karlen*,[1] eliminated the final legal obstacle to the building of a much-litigated low-income housing tower on Manhattan's West Side. The Court reversed *Karlen v. Harris*,[2] a decision of the United States Court of Appeals for the Second Circuit, and lifted the injunction which had blocked the controversial housing project since 1975. The Court's summary per curiam opinion was, however, a seeming anti-climax to a legal battle that has now seen six decisions over a period of almost six years[3] and that, in an earlier stage in the litigation, had put into question the entire relationship between national environmental policy and national civil rights policy as embodied in federal fair housing legislation. By reversing the Second Circuit's *Karlen* decision in a summary fashion, the Supreme Court neither accepted briefs nor heard argument on the broader issues before it in *Strycker's Bay*, preferring to reverse on the narrow ground that the Second Circuit had grievously misread the proper mandate for substantive judicial review under the National Environmental Policy Act (NEPA).[4]

The Supreme Court's per curiam opinion does, however, recog-

1. ___ U.S. ___, 100 S. Ct. 497 (1980).
2. 590 F.2d 39 (2d Cir. 1978).
3. Trinity Episcopal Schools Corp. v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974) [hereinafter *Trinity I*]; Trinity Episcopal Schools Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975) [hereinafter *Trinity II*]; Trinity Episcopal Schools Corp. v. Hills, 422 F. Supp. 179 (S.D.N.Y. 1976) [hereinafter *Trinity III*]; Trinity Episcopal Schools Corp. v. Harris, 445 F. Supp. 204 (S.D.N.Y. 1978), [hereinafter *Trinity IV*]; Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978); Strycker's Bay Neighborhood Council v. Karlen, ___ U.S. ___, 100 S. Ct. 497 (1980).
4. 42 U.S.C. § 4321 (1978).

nize the existence of a broader issue by quoting from the portion of *Karlen* where the Second Circuit explicitly termed the concentration of low-income housing in a small area an issue of environmental concern.[5] Indeed, *Strycker's Bay* contains an implicit acquiescence in the view that the concept of the "environment" contemplated by NEPA is broad enough to include the issue of whether or not low-income public housing sites are sufficiently dispersed. Absent that acquiescence, the Supreme Court would have had to reverse *Karlen* on the board ground that NEPA does not address itself to the issue of low-income concentration at all, rather than on the narrow ground that HUD had, contrary to the *Karlen* holding, been in compliance with the essentially procedural mandate of NEPA.

In failing to address explicitly the issue of NEPA's application to claims based upon an undue concentration of low-income persons in a given area, the Supreme Court in *Strycker's Bay* left open the general question of NEPA's purview over urban areas and also left unresolved the issue of NEPA's interaction with federal fair housing legislation. These are issues of profound importance, not only in terms of NEPA but also in the context of civil rights litigation. The implicit acceptance of the environmental significance of dispersing low-income public housing in an urban area gives to NEPA a potentially exclusionary impact that could go far toward undermining the gains achieved by civil rights advocates litigating under the Fair Housing Act.[6]

This note will first discuss the factual background litigation history of the case that was finally resolved in *Strycker's Bay*, as well as the *Strycker's Bay* opinion itself. It will argue that the application of NEPA to a claim based upon undue concentration of low-income housing, as was seen throughout this succession of decisions, is an unprecedented extension of the concept of "environment" as it has been recognized by NEPA. Furthermore, this note will argue that neither the statute itself nor NEPA's legislative history supports such an extension. Finally, the argument will be advanced that strong policy reasons militate against extending the scope of NEPA to cover the kind of claim at issue in *Strycker's Bay*.

5. Strycker's Bay, ___ U.S. ___, 100 S. Ct. 497, 499 (1980).

6. 42 U.S.C. §§ 3601-3619 (1976). The Fair Housing Act is also known as Title VIII of the Civil Rights Act of 1968.

II. BACKGROUND

A. *The Facts*[7]

The dispute underlying *Strycker's Bay* arose from the decision of New York City authorities to designate twenty square blocks of Manhattan's West Side as the West Side Urban Renewal Area[8] (the "Area") and to conduct there a demonstration project that would employ rehabilitation rather than demolition and reconstruction as the primary process of renewal.[9] The West Side Urban Renewal Plan (the "Plan") was first unveiled in 1959 and approved in final form in 1962. It sought to rehabilitate the sound and potentially attractive single family "brown-stone" housing stock on the Area's streets and to replace the tenement buildings on Columbus and Amsterdam Avenues with high rise mixed-income and low-income apartment buildings.

The Plan was intended, from its inception, to provide a model of racial, ethnic and economic integration[10] in urban renewal. It was envisioned that the more affluent members of the community would become owner-occupants of the Area's brown-stones and rehabilitate their homes privately, with the incentive of living in an integrated, renewed community. In order to achieve the desired level of integration, both racially and economically, the 1962 Plan also envisioned that 2500 low income units would be constructed as part of the renewal of the Area. This number was thought to be sufficient to accommodate the low-income relocatees who had been displaced when renovation of the Area had begun and to whom the local authorities therefore felt an obligation. Of these 2500 units, the Plan called for 1010 to be built in public housing towers which would themselves be economically integrated, with seventy per

7. For a complete and detailed description of the factual background which led to litigation in this case, *see* Trinity I, 387 F. Supp. 1044, 1048-57 (S.D.N.Y. 1974).

8. This area is bounded by Central Park West on the east, Amsterdam Avenue on the west, 87th Street on the south and 97th Street on the north.

9. It was the intent of Congress' 1954 Amendments to the National Housing Act that the concept of urban renewal be expanded from that of demolishing and rebuilding thoroughly deteriorated areas to also include that of rehabilitating areas not yet fully deteriorated. *See* Trinity I, 387 F. Supp. 1044, 1048-49 (S.D.N.Y. 1974).

10. The term "economic integration" will be used throughout this note to refer to the phenomenon in which individuals of different income levels reside in close proximity to one another. The legal issue with which this note is concerned deals with HUD's obligation to see that the sites it approves for public (i.e. government assisted through a HUD program) housing are geographically dispersed so as to foster economic integration.

cent of the tenants having moderate incomes and thirty per cent having low incomes.

Although the early years of the Plan achieved some very definite successes, the Plan was amended four times between 1963 and 1966. The amendments were intended to increase the opportunities for low-income housing in the Area and were necessitated by the sharply increasing construction costs that threatened New York City's ability to provide the contemplated number of low-income units within the primarily middle-income buildings. Even with these amendments, by 1968 there was a growing feeling among community residents and City authorities that the City would not be able to meet its commitment to provide low-income housing in numbers adequate to both accommodate the displaced relocatees and remain true to the Plan's professed purpose: creating a truly diverse, integrated community. It was in response to these fears that New York City further amended the Plan in 1970 and 1971. Included among those changes was the planned conversion of one of the as-yet-undeveloped sites, Site 30,[11] from only thirty per cent low-income tenants to one hundred per cent low-income tenants.[12] It was this amendment to the Plan that sparked the nine years of litigation of which *Strycker's Bay* represents the final chapter.

B. *Trinity I*

Trinity I[13] was commenced in 1971 in an attempt to enjoin the changes planned for Site 30. The original plaintiff was the Trinity Episcopal School Corporation ("Trinity"), a private day school located one block north of Site 30.[14] Certain individuals[15] and a community group[16] from the Area intervened as plaintiffs, because they also believed that the changes planned for Site 30 threatened

11. Site 30 is on the west side of Columbus Avenue between 90th and 91st Streets.

12. HUD approved this change in December, 1972.

13. Trinity I, 387 F. Supp. 1044 (S.D.N.Y. 1974).

14. Trinity School had been, some years earlier, induced to remain in New York and at its West Side location by the urban renewal planned for the neighborhood and by the vision of being part of an integrated community. Trinity had not only stayed; it invested substantially in the community both by building an addition to its old building and by allowing a mixed-income residential tower to be built above the new facility.

15. Roland N. Karlen and Alvin C. Hudgins, who, after Trinity School left the case, became the appellants in *Karlen* and the respondents in *Strycker's Bay*.

16. Committee of Neighbors to Insure a Normal Urban Environment (CONTINUE).

the continued viability of the Plan as originally conceived. The defendants included the U.S. Department of Housing and Urban Development (HUD), New York State, New York City and, as intervenor, the Strycker's Bay Neighborhood Council, a community group in favor of increasing the Area's supply of quality housing stock for low-income persons.

Plaintiffs' primary contentions revolved around their claim that the Area as a whole was in danger of being "tipped," i.e. that the influx of more low-income residents into the neighborhood would, at a certain point cause middle-income residents to leave, thereby triggering a rapid exodus from the Area. The proposed changes for Site 30 had to be enjoined, the plaintiffs thus contended, in order to preserve the economic integration of the community. The District Court in *Trinity I* rejected the plaintiffs' tipping claim, holding that the plaintiffs had failed to prove that the Area was in danger of tipping.[17]

Trinity I also rejected the plaintiffs' related claim that the construction of a low-income tower on Site 30 would create a "pocket ghetto" of low-income concentration on West 91st Street and thus tip the immediately surrounding community. While recognizing that the Second Circuit had previously accepted the notion of the "pocket ghetto" in *Otero v. New York City Housing Authority*,[18] Judge Cooper held in *Trinity I* that the plaintiffs had failed to show that the construction of the planned low-income units on Site 30 would, in fact, tip the West 91st Street Area.

The *Trinity I* court also rejected plaintiffs' NEPA claims. It held that HUD's decision not to undertake an environmental impact statement for the proposed Site 30 change was neither arbitrary, nor capricious, and thus not reversible. The court stated that neither the assessment of community fears nor the propensity of certain economic groups to engage in anti-social acts, the two bases of plaintiffs' tipping claims, was properly "environmental" for NEPA purposes. *Trinity I* also rejected the plaintiffs' claim that the HUD Special Environmental Clearance,[18a] undertaken to analyze the ef-

17. For a discussion of the standards Judge Cooper applied in analyzing the tipping claim in *Trinity I, see* text accompanying notes 57-58 *infra*.

18. 484 F.2d 1122 (2d Cir. 1973).

18A. When HUD does not initially classify a proposed action as requiring an environmental impact statement, the proposed action undergoes the internal HUD environmental clearance procedure. A Normal Environmental Clearance is the first stage of internal analysis. It consists of a consistency check with HUD environmental

fect of building exclusively low-income housing on Site 30, was inadequate. On this issue, Judge Cooper wrote that HUD had no statutory obligation to consider alternatives to its proposed action other than in an environmental impact statement. The District Court in *Trinity I* thus held for the defendants, refusing to issue the injunction sought.

C. *Trinity II*

On appeal (*Trinity II*[19]), the Second Circuit affirmed *Trinity I* in all respects except the one relating to HUD's compliance with the mandate to consider alternatives under NEPA. Judge Moore, writing for a unanimous panel, held that HUD had not properly considered alternatives to building as planned on Site 30, and that the lower court was incorrect in maintaining that HUD was not under an independent mandate to consider alternative sites once it had determined that there was no need for an environmental impact statement. The court held that Section 102(2)(E) of NEPA[20] imposes a separate obligation on HUD to "study, develop, and describe"[21] alternatives whenever a proposal involves "unresolved conflicts concerning alternative uses of available resources."[22]

In directing HUD to consider possible alternative sites for low-income housing, the Second Circuit said that such consideration should address specifically the issue of avoiding a concentration of low-income population.[23] The court thus explicitly placed the issue of dispersal of low-income public housing sites within the cog-

policies and standards and a brief evaluation of environmental impact. If the Normal Clearance determines that there will be "significant or potentially significant environmental impact" even after appropriate project modifications, then a Special Environmental Clearance, constituting an environmental evaluation of greater detail and depth, is done. *See* HUD Circular 1390.1, "Departmental Policies, Responsibilities and Procedures for Protection and Enhancement of Environmental Quality." 38 Fed. Reg. 19182 (July 18, 1973).

19. Trinity II, 523 F.2d 88 (2d Cir. 1975).

20. 42 U.S.C. § 4332(2)(E) (1976). Until the 1975 amendments to NEPA, this alternatives provision was codified as 42 U.S.C. § 4332(2)(D). For the sake of consistency, the current code designation will be used throughout.

21. 42 U.S.C. § 4332(2)(E) (1976).

22. *Id.*

23. "The statement of possible alternatives . . . should be made . . . as to how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact. In this endeavor, consideration might well be given to . . . whether there may be ways of spreading low-income units throughout the area rather than concentrating them in a few plots such as Site 30." 523 F.2d 88, 94 (2d Cir. 1975).

nizance of NEPA. *Trinity II* remanded the case to the District Court, which enjoined further construction on Site 30 pending compliance with NEPA Section 102(2)(E) as it had been interpreted by the Second Circuit.

D. *Trinity IV*[24]

In *Trinity IV*,[25] the District Court found that HUD's resubmitted Special Environmental Clearance[26] complied with the obligation under NEPA Section 102(2)(E) to consider alternatives. The court thus endorsed HUD's decision to approve the construction planned for Site 30 and therefore lifted the injunction that had prevented construction on the site for twenty-eight months. The court held that HUD had considered all the factors relevant to a choice between alternate sites for low-income housing.[27] It also held that HUD had taken an objective view of these factors in good faith and had not engaged simply in a post hoc rationalization of a decision already made.[28] Ruling that such a good faith consideration of alternatives was all that NEPA demanded, Judge Cooper refused to weigh the merits of HUD's substantive decision to approve the building of low-income housing on Site 30, finding only that the decision was neither arbitrary, capricious nor otherwise contrary to law.

Trinity IV addressed itself specifically to HUD's treatment, in the environmental clearance, of the question of dispersal of low-income housing sites. Judge Cooper found that HUD had recognized the potential for community opposition to concentration of low-income housing and that HUD had conditioned its approval of low-income housing for Site 30 on the taking of certain steps by

24. Trinity III, 422 F. Supp. 179 (S.D.N.Y. 1976), is not described here because it did not deal with issues with which this note is concerned. It dealt solely with the issue of whether or not the plaintiffs could recover costs and attorney's fees.

25. Trinity IV, 445 F. Supp. 204 (S.D.N.Y. 1978).

26. HUD prepared this document in response to the opinion of the Second Circuit in *Trinity II*. The Clearance was filed with the District Court on April 25, 1977. It is detailed and extensively documented and is over two hundred pages in length.

27. "HUD's decision was based upon a consideration of all relevant factors, to wit, site selection and design, density, displacement and relocation of residents, quality of the built environment, impact of the environment on the current residents and their activities, decay and blight, implications for the city growth policy, traffic and parking noise, neighborhood stability, and the existence of services and commercial enterprises to service the new residents." 445 F. Supp. 204, 220 (S.D.N.Y. 1978). *See* HUD Project Selection Criteria, 24 C.F.R. §§ 200.700-.710 (1979).

28. *See* text accompanying notes 115-121 *infra*.

New York City authorities to ameliorate such opposition. Such a solution satisfied the court as an arrangement pursuant to which the necessary low-income units could be built without endangering the economic integration of the community.

E. *Karlen v. Harris*

Karlen v. Harris[29] was an appeal from *Trinity IV*'s holding that HUD had complied with NEPA and that the building of the one hundred per cent low-income tower on Site 30 could proceed. The Second Circuit, with Judge Moore again writing the opinion, reversed for the second time on the issue of NEPA compliance and reinstated the injunction as to Site 30. In so doing, *Karlen* not only examined the HUD clearance for compliance with the good faith duty to consider alternatives, but also inquired deeply into the merits of the substantive HUD decision. It is clear from the opinion that the Second Circuit reversed *Trinity IV* and remanded the case again to insure not only that HUD would comply with the procedural duties imposed by NEPA Section 102(2)(E) but also that, through the use of NEPA, the substantive aim of dispersal of low-income housing sites would be achieved and maintained.[30]

F. *Strycker's Bay Neighborhood Council v. Karlen*

The Supreme Court, in *Strycker's Bay*,[31] reversed *Karlen* on the ground that the Second Circuit had reached its conclusions by deciding that HUD's weighing process had not considered legitimately "environmental" concerns to an adequate degree. By so holding, said the Supreme Court, the Second Circuit had inquired too deeply into the substantive merits of HUD's decision and had thus overstepped the bounds of substantive judicial review permissible under NEPA. The Supreme Court thus rejected *Karlen*'s assertion that mere consideration of environmental concerns was in sufficient to comply with NEPA's mandate and stated in strong language that the primary role of a court reviewing agency action for such compliance was to insure the agency's procedural compliance, *i.e.*, the agency's consideration of environmental conse-

29. 590 F.2d 39 (2d Cir. 1978).

30. "HUD has shown that there are ways to avoid [a low-income] concentration. Pending such a solution we reinstate the injunction against the construction of a low-income apartment on Site 30 . . . ." Karlen, 590 F.2d 39, 45 (2d Cir. 1978).

31. Strycker's Bay Neighborhood Council v. Karlen, ___ U.S. ___, 100 S. Ct. 497 (1980).

quences.[32] The Court thus reversed *Karlen* summarily, neither hearing argument nor accepting briefs on the merits, and stated flatly that "there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more."[33]

Although rejecting the Second Circuit's reasoning as to the scope of substantive judicial review permissible under NEPA, the Court in *Strycker's Bay* did not explicitly question the assumption that NEPA could be used to mandate the dispersal of low-income housing sites. The Court's per curiam opinion, in describing the *Karlen* decision appealed from, even quotes directly from Judge Moore's reference to "environmental factors, such as crowding low-income housing into a concentrated area."[34] Although the summary nature of the *Strycker's Bay* proceeding does indicate that the Court limited itself to consideration of only one issue, the scope of NEPA substantive review, it is also clear that the Court's failure to at least question the applicability of NEPA to claims of economic tipping has legitimized the use to which NEPA was put in the *Trinity* cases and in *Karlen*. The remainder of this note will argue that such a use of NEPA is unprecedented and unsupported as a matter of law and is, for various policy reasons, undesirable as well.

III. The Extension of NEPA to Cover the Substantive Aim of Dispersing the Sites of Low-Income Public Housing Is Unprecedented and Unsupported as a Matter of Law

The construction of NEPA that underlies the *Karlen* decision and that was incorporated in the *Strycker's Bay* decision is significantly broader than any previously advanced even by the court that has pioneered the broad application of NEPA to federal actions impacting upon urban areas, the Second Circuit.[35] This is not to say,

32. "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences . . . ." *Id.* at 500.

33. *Id.*

34. *Id.* at 499.

35. The Second Circuit, perhaps due to a sensitivity to urban issues borne of its New York City location, had been, even before *Trinity II* and *Karlen*, the leader in giving NEPA a broad role in protecting the quality of life for city residents. *See* City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976); Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972).

however, that NEPA has generally been viewed as encompassing only a narrow notion of the physical environment. On the contrary, it has universally been held to cover the socio-economic impacts of agency action and thus to apply to the quality of urban life. Indeed, the Seventh Circuit has written that NEPA embodies an environmental policy "as broad as the mind can conceive."[36]

It is thus not surprising that while the *Trinity-Karlen-Strycker's Bay* decisions are the only ones which have made dispersal of low-income housing sites a factor for NEPA purposes, there was support in both other cases and in HUD regulations to which the Second Circuit could look in doing so. Population distribution,[37] deteriorating neighborhood influences,[38] site selection,[39] and the impact of the environment on people and their activities[40] have, as examples, all been cited as factors appropriate for discussion in HUD environmental analyses. All four could be said to represent at least a part of the dispersal problem in the context of the *Trinity-Karlen-Strycker's Bay* fact situation.

The psychological effect of agency action on residents of the impacted area has, moreover, also been recognized as an environmental concern for NEPA purposes.[41] The design of public housing, for example, is generally considered to be important to the success of such housing insofar as it helps to define the way in which public housing tenants react psychologically to their sur-

36. First National Bank of Chicago v. Richardson, 484 F.2d 1369, 1377 (7th Cir. 1973).

37. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 426 (5th Cir. 1973).

38. *Id.*

39. *See* HUD Circular 1390.1, *supra* note 18A, 38 Fed. Reg. 19182 (July 18, 1973).

40. *Id.*

41. Psychological impacts have been accorded a firm place in the NEPA statutory scheme. NEPA requires that all federal agencies both rely on numerous disciplines in analyzing the environmental effects of their actions and develop procedures by which unquantifiable environmental considerations are incorporated into decision-making. 42 U.S.C. §§ 4332(2)(A)-(B) (1978). These sections have been interpreted as providing the statutory basis for agency speculation as to potential environmental impacts of diverse character. *See* Environmental Defense Fund v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971); Comment, *Socio-economic Impacts and the National Environmental Policy Act of 1969*, 64 GEO. L.J. 1121 (1976). The agencies are thereby released from the constraints of empirical, scientific and cost/benefit analyses in reaching their decisions as to environmental issues. *See* Environmental Defense Fund v. Corps of Engineers of the United States Army, 492 F.2d 1123, 1133 (5th Cir. 1974).

roundings.[42] NEPA, therefore, makes specific provision for the inclusion of design considerations in the environmental documentation which must accompany agency decision-making.[43] It is thus not surprising that courts have held that HUD must consider design in its evaluation of the environmental factors involved in building public housing.[44] Similarly, the Second Circuit in *Karlen* suggested that, on remand, HUD consider low rise housing as an alternative to the planned development scheme for Site 30.[45] Even where NEPA speaks less directly to the issue, courts have recognized other psychological impacts of agency action as being within the scope of NEPA's cognizance: from the "psychic irritation" involved in commuting[46] to the psychological disadvantages of nonresident ownership.[47]

It can thus be seen that the argument which seeks to make economic integration an environmental factor by looking to the psychological effect of the site selection of public housing is one that draws on established precedents. Consequently, the selection of Site 30 for a tower comprised solely of low-income residents is by no means entirely devoid of significance for NEPA purposes. While the case for bringing economic integration and the tipping argument within NEPA may thus seem strengthened, one must look further to see whether the psychological effects produced by the location of public housing and any resulting concentration of low-income persons are, for NEPA purposes, distinguishable from the psychological effects which have, heretofore, been judicially and legislatively determined to be within NEPA's purview.

The psychological effects traditionally recognized by NEPA and

42. Note, *The Psychology of the Designed Environment: NEPA and Public Housing*, 60 IOWA L. REV. 674 (1975).

43. "To the fullest extent possible: . . . (2) all agencies of the Federal Government shall- (A) utilize a systematic, inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an effect on man's environment. . . ." 42 U.S.C. § 4332(2)(A) (1976). *See also* 115 Cong. Rec. 40417 (1969), which, in NEPA's legislative history, cites as evidence of America's poor environmental management, "poor architectural design and ugliness in public and private structures."

44. Chelsea Neighborhood Ass'ns v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975); Cedar-Riverside Environmental Defense Fund v. Hills, 422 F. Supp. 294, 300, 301, 306, 317, 320 (D. Minn. 1976).

45. 590 F.2d at 44-45 (2d Cir. 1978).

46. Town of Groton v. Laird, 353 F. Supp. 344, 351 (D. Conn. 1972).

47. Cedar-Riverside Environmental Defense Fund v. Hills, 422 F. Supp. 294, 318-19 (D. Minn. 1976).

the psychological phenomenon underlying a tipping claim may be distinguished as, on the one hand, effects which produce changes in one's environment and, on the other hand, effects which produce changes only in one's perception of one's environment. This distinction is not merely one of semantics. An agency action which actually does produce changes in one's environment is an action whose effects have a spatial quality: such changes have an actual effect on the space in which a NEPA plaintiff carries on the activities of his or her life. In contrast, an agency action whose effect is merely to change the perception which a NEPA plaintiff has of his or her spatial environment need not produce any tangible changes at all. An example of this latter type of effect can be seen in the *Strycker's Bay* case, where the effect of the HUD action about which the plaintiffs complained was that of changing the proportion of low-income residents in the community, a change which was claimed would result in an exodus of middle-income residents. Whether or not such a tipping scenario would come to fruition, the only effects of HUD's approval of low-income housing for Site 30 which are cited by the plaintiff are concerned not with spatial changes in their environment, but with the plaintiffs; and other residents; perceptions of the demographic changes which would come from construction of the planned housing.

The significance of the distinction between physical, spatial effects and perceived effects for the purposes of defining the breadth of NEPA's scope is one that can be seen both in NEPA's legislative history and in HUD's own approach to fulfilling its environmental responsibilities.[48] Senator Henry Jackson's original exposition of national environmental policy in 1969 contained this emphasis on dealing with the physical effects of federal government action: "The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings."[49] This basic policy orientation was expressed in the negative as well as in the positive, with Jackson's exhaustive enumeration of the nation's environmental problems consisting exclusively of the broad range of man's relations with the physical environment.[50] The Council on Environmental Quality,

48. Looking to the language of NEPA itself for this distinction is a less fruitful exercise: the statute does not elaborate on what are the limits of its conception of "environment."

49. 115 Cong. Rec. 40416 (1969).

50. 115 Cong. Rec. 40417 (1969).

created by NEPA to oversee the battle against these problems, has progressively concentrated its efforts on land use as the most fundamental determinant of environmental quality.[51] Although "land use" is susceptible to almost as broad an interpretation as is "environment," the very use of the term "land" limits its application to the physical and spatial rather than the perceived elements of the environment.

HUD's own environmental policy is also based on an awareness of a very broad range of environmental impacts, all of which result from physical, spatial changes of one kind or another. HUD's enumeration of environmental goals also reflects this orientation.[52] Perhaps the best indication of this spatial approach is HUD's overall socio-environmental goal: "appropriate planning for the proper juxtaposition of spaces for various human activities."[53] HUD is thus careful to note that it is not the human activities themselves which they seek to accommodate, but rather the physical space in which such activities can take place.[54]

The Supreme Court in *Strycker's Bay* was presented directly with the issue of whether NEPA should be broadened in scope to recognize the claim that one's environment is affected by one's community's collective perception of an incoming group of new residents. This issue was presented both because Judge Cooper, in

51. "Sound land use is fundamental to preserving stable ecosystems, to controlling pollution and to creating the political, social and economic structure of our society." Council on Environmental Quality, *5th Annual Report* (1974).

52. "Efforts to improve the quality of the environment certainly involve the abatement and prevention of many annoying and threatening nuisances- air pollution, water pollution, land pollution, noise- which impinge on our daily living. But efforts to improve environmental quality also include more positive actions such as provision of open space, the development of aesthetically pleasing urban areas, provision of adequate access to employment and cultural opportunities, reductions in structural deficiencies, maintenance of high quality in new construction . . . ." HUD Circular 1390.1, *supra* note 18A, 38 Fed. Reg. 19182, 19183 (July 18, 1973).

53. *Id.*

54. HUD's orientation toward the spatial results of its programs is also demonstrated, in the specific context of *Strycker's Bay*, by the urban renewal enabling legislation under which HUD was operating in regard to Site 30. Such an inquiry is relevant to HUD's environmental policy since NEPA is largely a procedural device for decision-making involving actions commenced under other statutory authority; thus it is entirely sensible to use HUD's other statutory objectives as an interpretive guide to NEPA. The urban renewal enabling legislation authorizes HUD to act "for the elimination and for the prevention of the development or spread of slums and blight" through the use of "slum clearance and redevelopment . . . or rehabilitation or conservation," 42 U.S.C. § 1460(c) (1976), and thus stresses spatial changes in the affected urban environment.

Trinity I, recognized that the question of perception and attitude lies at the heart of a tipping claim[55] and because Judge Moore, in *Trinity II*, explicitly held that NEPA creates, so long as HUD action is involved, a judicially enforceable right to live in an integrated community.[56] Judge Cooper devised a tripartite test for analyzing a claim of tipping under NEPA. The three criteria to which Judge Cooper referred were (1) the gross number of families of a measurable economic, social, racial or ethnic group which is likely to affect adversely community conditions, (2) the quality of community services and facilities, and (3) the attitudes of majority group families who might be persuaded by their subjective reactions to the first two criteria to leave the community.[57] Judge Cooper thus recognized that, in the tipping scenario, it is as a result of majority attitudes to minority influx that deterioration in the quality of community services and facilities, and thus in the quality of the community's spatial environment, occurs. His three criteria also demonstrate, however, the contradictions inherent in the use of NEPA to analyze such a tipping claim, for Judge Cooper's criteria recognize that the evidence of spatial impact represented by criterion (2) is at the heart of any NEPA claim and that objective measurable data, represented by both criteria (1) and (2), must support any claim of tipping. According to Judge Cooper's analysis, therefore, a tipping claim, despite being based on attitudinal change, cannot succeed under NEPA unless supported by evidence of spatial environmental harm.[58] In other words, this analysis leaves no room for a pure claim of tipping to succeed under NEPA.

Judge Moore, in both *Trinity II* and again in *Karlen*, was not troubled by this inherent contradiction in attempting to bring a tipping claim under NEPA. *Trinity II* states that just as NEPA creates judicially enforceable rights to agency compliance with its procedural requirements,[59] NEPA also creates a judicially enforceable

55. Trinity I, 387 F. Supp. 1044, 1065 (S.D.N.Y. 1974).

56. The Second Circuit wrote in *Trinity II*, and then quoted itself in *Karlen*, both opinions being concerned exclusively with NEPA issues, as follows: "Those who live [in the Area] and those who hope to live there are entitled to obtain their housing aided by federal funds in a balanced and integrated community . . . ." Karlen, 590 F.2d 39 (2d Cir. 1978); Trinity II, 523 F.2d 88, 94 (2d Cir. 1975).

57. Trinity I, 387 F. Supp. 1044, 1065-1066 (S.D.N.Y. 1974).

58. "[Tipping] analysis must focus particularly upon objective and measurable criteria; community attitudes should then be considered only to the extent that they are supported by such criteria." Trinity I, 387 F. Supp. 1044, 1073 (S.D.N.Y. 1974).

59. *See* Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

right to live in an economically integrated community.[60] Judge Moore thus held that NEPA recognizes environmental harm not only where physical deterioration will occur from an influx of low-income persons, but also simply where the fears and perceptions of the middle-income residents of the area will result in their moving out as that influx occurs.

Having shown that the *Trinity-Karlen* decisions, in violation of HUD's own environmental policy and NEPA's legislative intent,[61] recognize a perceived environmental harm, it remains to be demonstrated that these decisions also represent a major extension of any previous judicial holdings as to NEPA's breadth. That demonstration will lead to the conclusion that the *Trinity-Karlen* decisions cannot be justified without resort to the policy questions that such an application of NEPA raises. Nowhere prior to *Trinity-Karlen* was NEPA applied to a claim premised solely on a perceived effect on the environment caused by the presence of other humans only. In *City of Rochester v. United States Postal Service*[62] the Second Circuit did recognize the significance, for NEPA purposes, of the abandonment of a downtown postal facility in that such an abandonment could spark a further business exodus from the downtown area and thus "contribute to an atmosphere of urban decay and blight."[63] The Second Circuit's concern in *Rochester*, however, was with the possible spreading of urban blight caused by the fact that the Postal Service's move would in itself create physical deterioration downtown. The purely subjective and psychological reactions of the Post Office's downtown neighbors were not addressed.

Chelsea Neighborhood Associations v. United States Postal Service[64] goes further in this regard than *Rochester*, but is still clearly distinguishable from *Trinity II* and *Karlen*. *Chelsea* held that the environmental impact statement prepared for a new postal facility with high rise housing built on its roof was inadequate in that it failed to discuss the possible psychological reactions of those housed there to the isolation of living atop another building.[65] The court certainly did speak of human perceptions of the environment; it was concerned, however, not with a perceived effect on the en-

60. *See* note 56 *supra*.
61. *See* text accompanying notes 48-54 *supra*.
62. 541 F.2d 967 (2d Cir. 1976).
63. *Id.* at 973.
64. 516 F.2d 378 (2d Cir. 1975).
65. *Id.* at 388.

vironment caused by other humans, but with perceptions of a purely spatial environment, that of design.[66]

It is thus clear that even the broadest constructions of NEPA prior to *Trinity-Karlen-Strycker's Bay* did not embody a conception of "environment" as broad as that implicitly accepted by the Supreme Court in *Strycker's Bay*. In order to fully appreciate that such a broad construction is not only unprecedented but also undesirable, one must look beyond the question of law that is raised as to NEPA's intended breadth and examine the policy problems inherent in an extension of NEPA to cover the substantive aim of dispersing the sites of low-income public housing.

IV. THE EXTENSION OF NEPA TO COVER THE SUBSTANTIVE AIM OF DISPERSING THE SITES OF LOW-INCOME PUBLIC HOUSING IS INADVISABLE AS A MATTER OF POLICY

The implicit assumption in *Strycker's Bay* that an influx of low-income persons into a community can, in itself, constitute environmental harm for NEPA purposes must be analyzed as a policy question since, as has been demonstrated, it is strictly supported neither by NEPA nor by existing case law. This note will hereafter argue that, as a matter of policy, such an extension of NEPA's notion of environmental harm should not be made. To do so would cripple HUD's ability to provide housing for low-income citizens without necessarily protecting the spatial environment,[67] would undermine gains that have been made by those litigating under Title VIII of the Civil Rights Act of 1968, would allow NEPA to be used as an exclusionary tool by those who seek to preserve the homogeneity of their communities[68] and, finally, would confuse NEPA's primarily procedural mandate with the more substantive obligations placed on HUD by federal fair housing legislation.[69] All these social costs are implicit in the *Trinity-Karlen-Strycker's Bay* reasoning; moreover, those costs would have to be borne with little or no benefit for the spatial environment which NEPA was created and designed to protect. As a matter of policy, then, this extension of NEPA's scope, which the Supreme Court sanctioned but did not explicitly discuss in *Strycker's Bay*, cannot be justified.

66. *See* text accompanying notes 42-45 *supra*.
67. *See* text accompanying notes 70-72 *infra*.
68. *See* text accompanying notes 73-83 *infra*.
69. *See* text accompanying notes 84-134 *infra*.

As a preliminary matter of general policy, any extension of NEPA's applicability in regard to HUD activities is, in a certain way, inadvisable. This is so because HUD is in a different position than are other agencies in terms of effectuating national environmental policy through NEPA's procedural provisions. This difference can be simply stated: while in many areas an agency decision not to proceed with a project on environmental grounds will serve to preserve the threatened environment, a HUD decision not to approve a housing development on the basis of potential environmental harm does not preclude a private developer from building instead,[70] in which case protection of the spatial environment may be sacrificed. Especially where, as would be the case with Site 30, HUD cancels a planned low-income development which is then replaced by privately developed housing for higher income levels,[71] not only national environmental policy, but also national housing policy, is thereby frustrated.[72] In an area where a particular need for low-income housing has been established, such as Manhattan's West Side, local imperatives would also be frustrated.

This is not to argue, however, that HUD should not be held to NEPA's mandate of considering environmental impacts and alternatives in all its administrative actions. Rather, it is to demonstrate that federal policies would be particularly well served by according HUD's substantive decisions to build low-income housing, made after weighing all costs to the environment, an extra measure of deference.

Those who would applaud the extension of NEPA to cover claims of tipping based upon an influx of low-income population would argue in response that such deference is inappropriate

70. *See* King v. Harris, 464 F. Supp. 827, 844n (E.D.N.Y. 1979).

71. An excellent example of the operation of this private market for housing where public housing is not constructed may turn out to be Site 30 itself. During the period in which construction of low-income housing on Site 30 was enjoined (from July 1975 to January 1978 and again from December 1978 to January 1980), private developers covetously eyed Site 30, a site that has, due to the successful urban renewal in the surrounding area over two decades, become viewed as potentially profitable for luxury housing. Even with the decision in *Strycker's Bay*, which lifted the injunction against low-income housing for Site 30, the attractiveness of the site for privately developed housing has left the future of Site 30 uncertain. Both the New York City Council and the New York City Planning Commission are divided as to whether to go ahead with low-income housing for the site or, alternatively, to allow the construction of luxury housing at market rates.

72. National housing policy includes the provision of housing for the lower income elements of society. *See, e.g.*, 12 U.S.C. § 1701t (1976); 42 U.S.C. §§ 5301(c), 5306(b)(1)(B) (1978); 42 U.S.C. § 1437f (1976).

where the influx constitutes environmental harm solely because the presence of the newcomers will serve to tip the neighborhood. In such circumstances the private housing market does not cause the environmental damage that the HUD subsidized low-income housing would cause. To accept such an argument, however, would undermine many of the civil rights which have been read into federal fair housing legislation. This is so because the affirmative obligation[73] imposed upon HUD by Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)[74] has been judicially construed to mandate that HUD site public housing so as not to create or perpetuate ghetto concentrations.[75] HUD is thus under a civil rights obligation to pursue balanced, dispersed and integrated housing policies.[76] To hold HUD to such an affirmative duty, and at the same time to arm those in a community who oppose the influx of low-income residents with the argument that the concentration of low-income housing, in itself, violates NEPA is to put HUD in an untenable position. For, in that case, almost any HUD site approval would be vulnerable to attack under either Title VIII by those favoring integration or under NEPA by those favoring exclusion.[77] Certainly, in such circumstances, NEPA and Title VIII would be acting at cross-purposes to one another. It thus comes as no surprise that at least one circuit, in dictum if not in holding, has rejected the application of NEPA to a claim premised solely on the

73. "The Secretary of Housing and Urban Development shall— . . . (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the [anti-discrimination] policies of this subchapter." 42 U.S.C. § 3608(d)(5) (1977).

74. 42 U.S.C. §§ 3601-3619 (1976).

75. "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." Shannon v. HUD, 436 F.2d 809, 821 (3d Cir. 1970); *see also* Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2d Cir. 1973): "Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation . . . "; King v. Harris, 464 F. Supp. 827, 837 (E.D.N.Y. 1979); Blackshear Residents Organization v. Austin, 347 F. Supp. 1138 (W.D. Tex. 1972); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

76. *See also* text accompanying notes 95-108 *infra*.

77. "[I]f fear and opposition in the community is a 'social environmental impact' to be avoided, and if concentration of public housing alone violates federal environmental law, it is hard to think of locating it anywhere that won't be vulnerable to such a lawsuit." J. Douw, *Poor People as Environmental Hazards*, 10 SOCIAL POLICY 29 (1979).

reactions of community residents to an influx of new, poorer residents.[78]

The case of *Nucleus of Chicago Homeowners* v. *Lynn*[79] also undermines any environmental claim premised on the argument that as low-income persons move into a neighborhood, deterioration in the spatial environment will occur directly as a result of that phenomenon alone, irrespective of any tipping claim. Although the plaintiffs in *Trinity I* disavowed the intention of making the claim of direct deterioration, *Trinity I* saw the similarity of plaintiffs' argument to that made in *Nucleus of Chicago*[80] and cited that Seventh Circuit decision in rejecting any notion that low-income persons have, in themselves, a greater propensity to induce neighborhood deterioration than do middle-income residents.[81] Certainly, accepting such an argument would undermine the spirit of the 1970's civil rights gains in fair housing just as blatantly as allowing the use of NEPA as a counterweight to HUD's affirmative obligation under Title VIII undermines the letter of those legal gains.[82] Accepting the view that low-income persons represent environmental harm in and of themselves would, indeed, be to undermine the premise of the entire civil rights movement: that every law abiding individual is to be accorded full civil rights and full dignity regardless of identification by race, ethnic group or income status. Although no court has yet accepted such an argument, allowing NEPA to take cognizance of the income level of an incoming population is not too far removed from doing so, in that it opens NEPA to abuse at the hands of plaintiffs who will seek to use it to avoid both the spirit and the letter of federal civil rights policy.[83]

78. Nucleus of Chicago Homeowners v. Lynn, 524 F.2d 225, 231 (7th Cir. 1975).

79. 524 F.2d 225 (7th Cir. 1975).

80. The complaint in *Nucleus of Chicago* alleged that low-income tenants as a group exhibited a higher propensity toward violent criminal behavior, a disregard for the physical and aesthetic maintenance of both real and personal property and a relatively low commitment to hard work. In contrast, the plaintiffs portrayed themselves, a group of working class and middle class Chicago homeowners, as being characterized by an emphasis on obedience, a respect for lawful authority, a lower propensity toward criminal behavior and a high regard for maintenance of property. *Id.* at 228.

81. Trinity I, 387 F. Supp. 1044, 1065 (S.D.N.Y. 1974).

82. *See* text accompanying notes 73-78 *supra*.

83. This danger is especially acute where, as in the *Trinity-Karlen-Strycker's Bay* case, the plaintiff is not one of the public interest groups which have played a major role in ensuring that NEPA is observed by the federal agencies and that environ-

There is thus an ever-present danger in allowing the introduction of NEPA into the province of low-income housing site dispersal: that environmental claims will be used in an effort to circumvent established civil rights. There are, in addition, other reasons for leaving this entire substantive area in the realm of civil rights, rather than environmental law. Federal fair housing legislation has been construed as being much more substantively oriented than is the essentially procedural mandate of NEPA, so that using the Fair Housing Act as a litigating weapon is correspondingly more effective in achieving substantive results.[84] Similarly, the courts have expressed the view that Congress intended the Fair Housing Act to address substantive issues such as neighborhood stabilization and the siting of public housing, while NEPA was intended to do little more than require consideration of environmental impacts[85] of agency action. Finally, introduction of NEPA's mandate of procedural consideration into an area that is already substantively covered by another body of law would serve only to burden HUD with the repetitive and unnecessary administrative task of considering anew those impacts of a particular site for low-income public housing that have already been considered under existing procedures.[86]

Before proceeding to a discussion of the relative substantive effect of NEPA and the Fair Housing Act, it is worthwhile to look at the general inter-relationship between NEPA and federal fair housing legislation by reference to the "tenor" of these enactments,[87] to

mental goals are factored into governmental decision-making. At least one eminent commentator, Judge John Oakes of the United States Court of Appeals for the Second Circuit, has advocated creative, socially responsible judicial activism in pursuit of the nation's substantive environmental goals where the judiciary is guided by the efforts of public interest environmental groups as litigants. Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U. L. REV. 498, 517 (1977). Where the party asserting a NEPA claim is a private litigant, however, Judge Oakes indicates that perhaps the role of the courts should be more circumspect. *Id.* at 517. This attitude of circumspection would seem particularly appropriate where the NEPA claim is one that is at risk of treading on established federal rights in the housing context, since housing is an area where insularity, ethnic provincialism, racism and a desire to protect what is often one's most substantial economic investment could lead to particularly virulent efforts to use NEPA to undermine federal civil rights.

84. *See* text accompanying notes 95-134 *infra*.

85. This note has already argued that the environmental impacts of which NEPA was intended to require consideration are limited to impacts on the spatial environment. *See* text accompanying notes 48-54 *supra*.

86. *See* text accompanying notes 148-154 *infra*.

87. "[T]he strength and comparative weight of conflicting national policies may

the basic Congressional purposes which these statutes embody. NEPA Section 101 provides the initial guide to this inter-relationship.[88] That section states explicitly that the goals of national environmental policy[89] are to be sought by the federal government using all practicable means "consistent with other essential considerations of national policy."[90] While this in no way requires the subordination of environmental goals to others to which the federal government is committed, it does demand that NEPA not eclipse the requirements of other essential statutory goals. This is especially true in the case of national housing policy, of which the Fair Housing Act is a part. The provision of a "decent home and a suitable living environment for every American family"[91] has not only taken its place in the galaxy of exalted federal goals, but has been subsequently reaffirmed as occupying the "highest priority" within that galaxy.[92] Since HUD's affirmative obligation under Title VIII to pursue balanced, integrated public housing thus has priority status over HUD's NEPA obligations,[93] HUD should resolve any contradictions between the two sets of obligations in favor of the former. Given the priority of fair housing goals, the preferable approach to resolution of an easily forseeable area of conflict between the two statutes[94] should be removal of the entire substantive area from NEPA's cognizance. This approach recommends itself particularly where the substantive area, dispersal in the siting of public housing, is, as demonstrated below, more effectively dealt

be gauged at least roughly from the tenor of Congressional enactments." McDonald, *The Relationship Between Substantive and Procedural Review Under NEPA: A Case Study of SCRAP v. U.S.*, 4 ENVT'L AFFAIRS 157 (1975).

88. The legislative history of Section 101 states that the Section is intended to be so used. "A statement of environmental policy is more than a statement of what we believe as a people and as a nation. It establishes priorities and gives expression to our national goals and aspirations. It provides a statutory foundation to which administrators may refer for guidance in making decisions which find environmental values in conflict with other values." 115 Cong. Rec. 40416 (1969).

89. The goals of national environmental policy are expressed in 42 U.S.C. §§ 4331(b)(1)-(b)(6) (1976).

90. 42 U.S.C. § 4332(b) (1978).

91. This was the national housing goal put forth in the 1949 Housing Act, 42 U.S.C. § 1441 (1976).

92. 12 U.S.C. § 1701t (1976).

93. Although NEPA was enacted a year after the Housing and Urban Development Act of 1968, which includes the provision codified as 12 U.S.C. § 1701t, the provision according national housing goals such priority remains part of federal law today, a decade after the passage of NEPA.

94. *See* text accompanying notes 76-77 *supra*.

with through resort to the Fair Housing Act.

The Fair Housing Act is the preferable vehicle for enforcing HUD's obligation to achieve balanced public housing through dispersal of sites because HUD's mandate under the Fair Housing Act[95] is oriented more towards achievement of the substantive goal of dispersal than is HUD's mandate under NEPA, which requires only the procedural consideration of environmental impacts. A decade of case law has made clear that the nature of HUD's dispersal obligation under the Fair Housing Act is both substantive and procedural, with some cases emphasizing HUD's achievement of the substantive goal of dispersal and others emphasizing that HUD's procedures must take dispersal into account. In *Shannon v. HUD*,[96] the Third Circuit indicated that HUD's mandate as to dispersal of public housing requires both achievement of the substantive end of integrated housing[97] and procedures which take racial factors into account so as to facilitate the achievement of that end.[98] Since *Shannon*, which phrased its holding not in terms of a substantive requirement but rather in terms of a procedural directive that HUD must consider the factor of racial and socio-economic integration in its approval of site selection,[99] the relationship between these two elements has remained somewhat unclear.

95. 42 U.S.C. § 3608(e)(5) (Supp. II 1978).

96. 436 F.2d 809 (3d Cir. 1970). *Shannon* involved an urban renewal plan for a designated area of Philadelphia which had been amended due to certain unforseen events. The plaintiffs sought an injunction both because the proposed changes would have the substantive effect of increasing the already high concentration of low-income black residents in the urban renewal area and because the procedures adopted by HUD for reviewing and approving the changes considered only land use factors and not factors bearing on racial concentration. *Id.* at 811-12.

97. "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." *Id.* at 821.

98. "Here [HUD] concentrated on land use factors and made no investigation or determination of the social factors involved in the choice of type of housing which it approved. Whether such exclusive concentration on land use factors was originally permitted under the Housing Act of 1949, since 1964 such limited consideration has been prohibited. . . . Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible." *Id.* at 819-20.

99. "We hold . . . that the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." *Id.* at 821.

Blackshear Residents Organization v. Housing Authority of the City of Austin[100] also left unclear the precise relationship between HUD's substantive and procedural obligations under the Fair Housing Act. While *Blackshear* talked at length of HUD's obligation to consider factors bearing on racial concentration in approving a public housing site,[101] the court's statement of its holding left uncertain whether it had enjoined HUD's substantive decision, its procedures, or both.[102] Other cases around the same time as *Blackshear* failed to speak directly to the issue of HUD's obligations because the suits were directed not at HUD, but at the local officials responsible for local housing policy.[103] Similarly, two cases which have definitely emphasized HUD's procedural obligations under the Fair Housing Act have done so in procedural settings which precluded them from fully reaching the issue of the extent ot which HUD is under a corresponding substantive mandate to disperse public housing.[104]

100. 347 F. Supp. 1138 (W.D. Tex. 1971).

101. "It is obvious that neither the Housing Authority nor HUD ever used any 'institutionalized method' to gather the racial and economic data necessary for any meaningful determination as to whether the site was within an 'area of racial concentration'. . . ." *Id.* at 1147.

102. *Id.* at 1148.

103. In Crow v. Brown, 332 F. Supp. 382, 392-93 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972), the need for local county officials to cease either any action or any inaction on their parts that resulted in the substantive end of perpetuating racial concentration was stated in strong language. HUD, however, was found not to have violated any of its statutory duties. *Id.* at 395.

Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), was more equivocal in terms of emphasizing either procedural or substantive compliance. Not only was *Banks* not speaking directly to HUD's obligations, but its findings of violations by the Cuyahoga Metropolitan Housing Authority (Cleveland) left uncertain whether it had found a violation of the Fair Housing Act or a violation of the Fourteenth Amendment, or both.

See also Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), *enforced in* 304 F. Supp. 736, *aff'd*, 436 F.2d 306 (7th Cir. 1970).

104. In Croskey Street Concerned Citizens v. Romney, 335 F. Supp. 1251 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972), the court refused to enjoin HUD from approving the siting of public housing in an area of racial concentration. The court held that HUD's site selection program and procedures satisfied the 1968 Fair Housing Act and that it was within HUD's discretion, under those procedures, to weigh all relevant factors and to approve the project site. 335 F. Supp. at 1256-57. The court in *Croskey Street*, however, was only ruling on the issue of whether the plaintiffs were entitled to a preliminary injunction. The district court opinion specifically left open the possibility that the plaintiffs could prevail at a final hearing if they could show that the effect of HUD's policies had been "to maintain or increase racial segregation in housing in Philadelphia." *Id.* at 1258.

In Jones v. Tully, 378 F. Supp. 286 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 961 (2d Cir.

More recently, however, the Eastern District of New York has very definitely focused on HUD's obligation to achieve the substantive goal as a matter independent of the procedures HUD may employ. In *King v. Harris*,[105] Judge Costantino enjoined HUD's use of federal funds for construction of a low-income housing tower where the tower was planned for an area that already contained a high proportion of low-income residents. While noting that HUD's site selection procedures complied with its Fair Housing Act obligations,[106] Judge Costantino issued the injunction against HUD by looking to the substantive end of dispersal and to the "heavy burden on HUD to further national housing policy by avoiding the concentration of minority or low-income families in the same community."[107]

Considering all these cases, with *King* as the most recent ruling on the issue, it seems clear that HUD is, to some substantial degree, under an obligation to insure that its approvals of sites for public housing do result in a dispersal of low-income residents. Since HUD is also under a procedural obligation, one can conclude that HUD is, at the very least, required as a matter of general policy[108] both to consider the dispersal factor and to succeed in avoiding the approval of sites that would result in a concentration of one race or of low-income persons. Whether or not HUD's substantive obligation is stronger than its procedural one, it can cer-

1975), the fact that HUD had investigated, weighed and balanced all relevant factors before approving the site for a low- and moderate-income project was held sufficient to prevent issuance of an injunction against HUD's approval. The court held only, however, that HUD's approval was neither arbitrary nor capricious and would thus be affirmed according to the provisions of the Administrative Procedure Act. *Id.* at 292.

105. 464 F. Supp. 827 (E.D.N.Y. 1979).

106. *Id.* at 837.

107. *Id.* Judge Costantino found that the burden emanated not only from the Fair Housing Act, but also, either independently or in combination with the Fair Housing Act, from three other federal statutes as well. These other statutes are the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5317 (1974), specifically § 5301(c)(6), the Section 8 Housing Assistance Payments program, 42 U.S.C. § 1437(f) and, with a direct citation to *Karlen v. Harris*, NEPA, 42 U.S.C. §§ 4321-4347 (1976).

108. HUD could conceivably approve of the siting of public housing in a concentrated area without violating the Fair Housing Act so long as HUD's procedures were adequate under the Act and so long as such a siting decision did not represent an overall local policy of perpetuating concentrations but rather represented a well-justified exception to an overall general policy of dispersal. *See* Croskey Street Concerned Citizens v. Romney, 335 F. Supp. 1251, 1257 (E.D. Pa. 1971), *aff'd*, 459 F.2d 109 (3d Cir. 1972).

tainly be demonstrated, especially in view of the Supreme Court's recent per curiam opinion in *Strycker's Bay*, that HUD's obligations under the Fair Housing Act are more substantive than HUD's obligations under NEPA.

The primarily procedural nature of administrative agency obligations under NEPA has been apparent since the first major decision concerning the scope of judicial review under that Act, *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*.[109] *Calvert Cliffs* was very careful to distinguish between procedural and substantive review and to avoid evaluating the AEC's procedural compliance by reference to its substantive decision.[110] Judge Wright, who wrote the opinion, noted that NEPA Section 101, which sets forth NEPA's substantive goals, requires agencies to "use all practical means consistent with other essential considerations of national policy"[111] in order to comply, while NEPA Section 102, which details NEPA procedures, requires compliance "to the fullest extent possible."[112] *Calvert Cliffs* thus held that procedural compliance, strict and inflexible, is the focus of NEPA and that NEPA's substantive policy is a flexible one, with allowance for agency discretion.[113]

Since *Calvert Cliffs*, the procedural focus of the obligations imposed by NEPA has been evidenced by the numerous court decisions which have emphasized compliance with Section 102 procedural requirements rather than achievement of Section 101 substantive goals.[114] Certain decisions have expressed this procedural focus very explicitly: "The question for judicial review is not whether the proposed project has merit as an agency program but whether the requirements of NEPA have been met in the decision-making process creating the program. The focus of the Court must be on the decision-making process . . . ."[115] Less explicit formulations of the scope of judicial review under NEPA have implied a similar procedural focus to the agency's statutory mandate. Con-

109. 449 F.2d 1109 (D.C. Cir. 1971).
110. *Id.* at 1114.
111. 42 U.S.C. § 4331(b) (1976).
112. 42 U.S.C. § 4332 (1976).
113. Calvert Cliffs, 449 F.2d 1109, 1112 (D.C. Cir. 1971).
114. *See, e.g.*, Hiram Clarke Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).
115. Westside Property Owners v. Schlesinger, 415 F. Supp. 1298, 1303 (D. Ariz. 1976). *See also* Concerned About Trident v. Schlesinger, 400 F. Supp. 454, 480 (D.D.C. 1975).

siderations of environmental factors and alternatives in agency decision-making has been held to be the the maximum demanded of federal agencies by NEPA.[116] Similarly, a "sufficient look"[117] at environmental consequences of a proposed action that results in a "full disclosure"[118] of matters relevant to decision-making on environmental issues has been held to satisfy NEPA. Indeed, what is often cited as determinative with regard to NEPA compliance is whether the consideration of environmental factors is sufficiently inclusive to permit a balancing of environmental costs and benefits,[119] which in itself goes only to agency decisional processes. Important in judging the sufficiency of environmental consideration for these purposes is whether the agency's inquiry was conducted objectively[120] and in good faith[121] and used as the basis for a decision rather than as a justification for a decision already made.

Any of these judicial standards for insuring that agencies comply with NEPA's procedural requirements can also afford courts the opportunity to oversee, to the extent that they construe their own role expansively, agency compliance with the substantive goals expressed in NEPA Section 101.[122] Generally, however, the standard of judicial review of agency action established by the Administrative Procedure Act (APA)[123] has been applied to environmental issues involving NEPA,[124] so that substantive agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[125] Despite this deferen-

116. Sierra Club v. Morton, 510 F.2d 813, 825 (5th Cir. 1975); Environmental Defense Fund v. Armstrong, 352 F. Supp. 50, 57 (N.D. Cal. 1972).

117. Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority, 576 F.2d 573, 576 (5th Cir. 1978).

118. McDonald, *supra* note 87.

119. Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977); Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).

120. Save Our Sycamore, 576 F.2d 573, 576 (5th Cir. 1978).

121. *Id.*

122. *See* SCRAP v. United States, 371 F. Supp. 1291 (D.D.C. 1974).

123. 5 U.S.C. § 706 (1978).

124. Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975); Town of Groton v. Laird, 353 F. Supp. 344, 349 (D. Conn. 1972). There are, however, certain instances where the standard of substantive judicial review under NEPA is even broader than that specified by the APA. Where a court is reviewing an agency decision not to file an environmental impact statement it has been held that, rather than the court reviewing the content of such a statement, more rigorous judicial scrutiny is appropriate. Save Our Ten Acres v. Kreger, 472 F.2d 463, 465-66 (5th Cir. 1973).

125. 5 U.S.C. § 706(2)(A) (1976).

tial standard of judicial review of substantive agency action, a certain momentum has been generated in the case law for the idea of judicially enforceable substantive rights under NEPA,[126] and that notion has attracted a following among the commentators.[127] A majority of the Circuits has come to recognize some limited notion of judicially enforceable substantive rights under NEPA,[128] yet have adhered to either the deferential standard enunciated in the APA or to a substantially similar, equally deferential standard.[129]

Whatever support has been generated for the explicit recognition of judicially enforceable substantive rights under NEPA will now, however, have to be reconsidered in light of *Strycker's Bay Neighborhood Council v. Karlen*.[130] The per curiam summary opinion in *Strycker's Bay* was specifically concerned with the issue of the scope of substantive judicial review under NEPA. *Strycker's Bay*, in reversing the Second Circuit's *Karlen*[131] decision, spelled out the very limited role of the courts in overseeing agency compliance with NEPA's substantive goals. Citing its own opinions in *Vermont Yankee* and *Kleppe*, the Supreme Court in *Strycker's Bay* wrote that the duties conferred on federal agencies by NEPA are "essentially procedural,"[132] and that, therefore, ". . . once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences."[133] In flatly asserting that NEPA "requires no more" than such consideration,[134] *Strycker's Bay* made it patently clear that NEPA confers overwhelmingly, if not exclusively, procedural as opposed to substantive duties and that, therefore, NEPA would be an ineffective tool for pursuing the substantive end of dispersed sites for low-income housing.

126. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289, 298 (8th Cir. 1972).

127. Note, *Substantive Review Under the National Environmental Policy Act of 1969: EDF v. Corps of Engineers*, 3 ECOL. L.Q. 173 (1973); Wharton, *Judicially Enforceable Substantive Rights Under NEPA*, 10 U.S.F. L. REV. 415 (1975-6).

128. Wharton, *Judicially Enforceable Substantive Rights Under NEPA*, 10 U.S.F. L. REV. 415, 435 (1975-6).

129. This other deferential standard has been, for example, phrased as a test of whether the agency committed a clear error of judgment. Conservation Council of North Carolina v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973).

130. ___ U.S. ___, 100 S. Ct. 497 (1980).

131. 590 F.2d 39 (2d Cir. 1978).

132. ___ U.S. ___, 100 S. Ct. 497, 500 (1980).

133. *Id.*

134. *Id.*

The relative facility of assuring HUD compliance with Congress' policy of dispersal of low-income housing sites through the Fair Housing Act rather than through NEPA can also be seen through a brief comparison of the reasoning employed in *Karlen*[135] with that employed in *King v. Harris*.[136] In holding that NEPA required HUD to disperse low-income housing sites so as to avoid tipping the neighborhood,[137] *Karlen* revealed its own inherent confusion regarding the relationship between NEPA and the Fair Housing Act on the issue of low-income housing site dispersal. *Karlen* ostensibly based its decision on environmental grounds, referring to "the integration contemplated by NEPA"[138] and to "environmental factors, such as crowding low-income housing into a concentrated area."[139] When it came to documenting its notion of the "Congressional purpose of racial and economic integration,"[140] however, *Karlen* cited only the Fair Housing Act and another Second Circuit decision, *Otero v. New York City Housing Authority*,[141] in which the NEPA issue was not raised at all.[142] Indeed, *Karlen* expressly stated that it reinstituted the injunction as to Site 30 so as to fulfill its conception of Congressional purpose,[143] referring to the immediately preceding quotation from *Otero*. The *Karlen* result, therefore, as presented in the opinion itself, is to mandate HUD compliance with NEPA in order to achieve the purpose of the Fair Housing Act.

The *King* decision, resting primarily on the Fair Housing Act and other enactments which view balanced housing as a civil right rather than an environmental right,[144] avoided the pitfalls of confusion into which *Karlen* fell. *King* also cited *Otero* in support of its view that HUD is required to disperse the sites of low-income housing,[145] but did not use NEPA compliance to enforce the goals of fair housing legislation. While *King* did mention NEPA, it did so with a specific citation to *Karlen*[146] and it did so while also re-

135. 590 F.2d 39 (2d Cir. 1978).
136. 464 F. Supp. 827 (E.D.N.Y. 1979).
137. *See* text accompanying notes 29-30 *supra*.
138. Karlen, 590 F.2d 39, 43 (2d Cir. 1978).
139. *Id.* at 44.
140. *Id.* at 45.
141. 484 F.2d 1122 (2d Cir. 1973).
142. Karlen, 590 F.2d 39, 45 (2d Cir. 1978).
143. *Id.*
144. *See* note 107 *supra*.
145. King, 464 F. Supp. 827, 833 (E.D.N.Y. 1979).
146. *Id.* at 837n, 844n.

fraining from discussing NEPA as a grounds for mandating low-income housing site dispersal.[147]

Even accepting that NEPA is an unsatisfactory means for enforcing the substantive policy of dispersal of low-income housing sites, it could still be argued that NEPA cognizance of the issue of dispersal will, at least, mandate that HUD procedurally consider the effects of its site approvals on the concentration of persons of one race or of low-income. Imposing the administrative burden of such consideration through NEPA, however, would merely be to impose a repetitive task on HUD, for the criteria by which HUD determines whether or not to approve the location of low-income housing[148] already mandate that HUD consider the concentration/dispersal factor.[149] There are eight criteria by which HUD officers evaluate applications for low-rent public housing assistance, one of which is the extent to which the proposed site provides an "improved location for low(er) income families."[150] The HUD regulations, moreover, state that one of the objectives of this locational criterion is "[t]o avoid concentrating subsidized housing in any one section of a metropolitan area or town."[151]

These regulations require HUD officials to consider the objective of avoiding such a concentration in that the responsible official must rate each proposed project by looking to, among other criteria, the project's location. Projects are accorded a rating of "superior" if located in an area that "contains little or no federally-subsidized housing."[152] A rating of "adequate" is given if the location is in an area that is either undeveloped or developed with

147. *Id.* at 844n: "Since this court has found numerous other bases for enjoining HUD's action, an extended discussion of this basis [NEPA] for issuing an injunction is unnecessary."

148. 24 C.F.R. §§ 200.700-710 (1979).

149. It is noteworthy, in light of the discussion of dispersal of low-income housing sites as an issue of fair housing/civil rights law rather than environmental law, that the mandate under these regulations that HUD consider such dispersal was issued in implementation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3608 (Supp. II 1978). *See* 24 C.F.R. § 200.705 (1979). NEPA is not cited as a statute pursuant to which these project selection criteria were issued.

150. 24 C.F.R. §§ 200.710(1)-(8) (1979). The other seven criteria are: the need for low(er) income housing, the minority housing opportunities provided thereby, the relationship to orderly growth and development, the relationship of the proposed project to the physical environment, the ability to complete the project, the project's potential for creating minority employment and, finally, the project's provison for sound housing management.

151. 24 C.F.R. § 200.710(3) (1979).

152. *Id.*

some federally-subsidized housing so long as the project will not establish the character of the area as one of subsidized housing.[153] By way of contrast, a rating of "poor" is accorded a project that is to be located in a "federally-subsidized housing area."[154] Once a HUD official has evaluated any given project by reference to these standards, HUD certainly will have considered the issue of dispersal of low-income housing sites. To require HUD to do so again to comply with NEPA would, therefore, constitute a wasteful administrative burden and would only serve to generate additional reams of documentation that would serve no purpose in terms of effectuating Congress' policy of dispersal.

V. CONCLUSION

This note has attempted to demonstrate the inadvisability of judicially interpreting NEPA so broadly as to require that HUD mandate site dispersal for the low-income public housing which it approves. It has been shown that existing precedents as to the scope of NEPA applicability do not support such a broad interpretation, for inherent in the *Strycker's Bay* view of NEPA's breadth is the notion that NEPA does take cognizance of such non-spatial environmental impacts as the perceptions which residents of an urban area have of new incoming residents. It has also been argued that to extend NEPA to cover site dispersal for low-income housing is to undermine HUD's affirmative action obligation under the Fair Housing Act and thus to put NEPA at the disposal of those who seek to perpetuate exclusionary housing practices rather than create balanced urban living environments. Finally, it has been argued that NEPA's essentially procedural mandate of consideration only would make NEPA an ineffective tool for achieving site dispersal and would also merely add repetitive burdens to HUD's administrative task.

Judicial restraint in applying NEPA is clearly all that is required to avoid these problems. Such restraint must be considered unlikely, however, in light of the Supreme Court's implicit acceptance of NEPA's application to questions of low-income housing site dispersal. Certain legislative and administrative changes would, as a result, be advisable. Congressional amendments to the affirma-

153. *Id.*
154. *Id.*

tive action provision of the Fair Housing Act[155] and to the appropriate provisions of the Housing and Community Development Act[156] could, for example, make explicit Congress' intention that such housing/civil rights statutes be the only expression of Congress' policy of dispersing low-income public housing sites. Perhaps even more importantly, the problem of NEPA being used as an exclusionary tool could be dealt with through regulations of the Council on Environmental Quality which would exclude from NEPA's cognizance the kind of non-spatial environmental impact alleged in *Trinity-Karlen-Strycker's Bay*. It appears that such legislative and administrative actions will be necessary to prevent the confusion between environmental rights and civil rights, and thus the dilution of the latter, that is sure to result from the Supreme Court's summary treatment of *Strycker's Bay*.

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155. 42 U.S.C. § 3608(d) (Supp. II 1978).
156. 42 U.S.C. §§ 5301(a)(1), 5301(c)(6) (1976 & Supp. II 1978).