Como-Falcon v. Dept. of Labor: The Role of Public Hearings and Socio-Economic Impacts in Determining Whether NEPA Requires an EIS

I. INTRODUCTION

Building a power plant,[1] abandoning a military base,[2] and establishing an education center[3] are just a few of the many federal agency actions which affect people's lives and environment. Before they act, all the responsible agencies share a common duty: they must research and consider how their actions will affect the surrounding environment, as required by the National Environmental Policy Act of 1969 ("NEPA").[4]

Congress intended, through NEPA, to formulate and declare a national policy encouraging a productive coexistence between people and their environment.[5] This policy includes using:

1. *See generally* Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979).
2. *See generally* Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).
3. *See generally* Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).
4. 42 U.S.C. §§ 4321-4361 (1976).
5. NEPA gives the federal government a continuing responsibility to:
(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

> all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[6]

NEPA's section 102, the only operational provision of the statute, is aimed at accomplishing these goals by directing that "policy, regulations and laws of the United States are to be interpreted and administered in accordance with policies of the National Environmental Policy Act."[7] Federal agencies are instructed to use a "systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment."[8] They are also compelled to:

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[9]

This action-forcing language of section 102(2)(C) forms the legal basis for suits brought by private citizens, citizen groups and local governments to challenge and enjoin federal actions when they be-

(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) (1976).

6. The Declaration of National Environmental Policy, 42 U.S.C. § 4331(a) (1976). NEPA has been described by some as a new "environmental bill of rights" and by others as merely an "environmental full-disclosure bill." 2 F. GRAD, ENVIRONMENTAL LAW § 9.01 (2d ed. 1978).

7. 42 U.S.C. § 4332(1) (1976).

8. 42 U.S.C. § 4332(2)(A) (1976).

9. 42 U.S.C. § 4332 (1976).

lieve an environmental impact statement ("EIS") is required, but has not been prepared. To succeed in such a suit, the challenger must prove that the proposal is, in the words of the statute, a "major federal action significantly affecting the quality of the human environment."[10]

Disagreements are inevitable over the meaning of such general and indefinite terms as "major" and "significant," but probably the most troublesome judicial task is the interpretation of "human environment." The controversy centers around whether human environment includes only the physical environment, *e.g.*, land, air and water, or whether it also includes social and economic considerations, such as unemployment, lower property values and a change in the character of a neighborhood. Specifically, in making the initial determination of whether to prepare an EIS, should NEPA require an agency to look at only physical effects or should it consider socio-economic effects as well?[11]

A second problem encountered in implementing section 102 is a procedural one: is an agency required to hold a public hearing before making its threshold determination of whether to file an EIS?[12] In suits to force compliance with NEPA, some citizen groups claim a right to a hearing with a formal opportunity to present evidence,[13] although the language of the statute does not expressly provide one.[14] The contention is that the hearing will help

10. *Id.* The Council of Environmental Quality, *see* note 33, *infra*, guidelines break down this phrase into its four components. The challenged action must be (1) a "major" action, (2) a "Federal" action, (3) one with a "significant" effect, and (4) one which involves the "quality of the human environment" to come within NEPA. "Major" and "significant" are intended to limit the affected proposals to those with more than a trivial impact. 40 C.F.R. § 1500.6(e) (1979).

11. This question is separate and distinct from the question of whether socio-economic factors are to be included in an EIS once the decision to prepare one has been made. This second question goes to the sufficiency and completeness of a final EIS.

12. This question should not be confused with whether a public hearing should be held after the publication of a draft EIS and before the preparation of a final EIS. At that point, a hearing would provide the agency with the public's reaction to the plan, any proposed alternatives and comments on the adequacy of the EIS. This comment's discussion deals only with the need for a hearing before any decision on whether to file an EIS has been made.

13. *See* Hanly v. Kleindienst, 471 F.2d 823, 835 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); Nat'l Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302, 1305-06 (E.D. Pa. 1976).

14. NEPA does, however, encourage cooperation between an agency and any interested or affected parties. For example, its declaration states, in part, that "it is the continuing policy of the Federal Government, in cooperation with State and local

the agency understand the potential impacts of its action from the perspective of the affected people. The inference is that once the agency sees the citizens' side, it will recognize its obligation to prepare an EIS.

Como-Falcon Community Coalition, Inc. v. United States Department of Labor ("*Como-Falcon*")[15] is one of the latest citizens' challenge cases which has addressed both the question of whether a public hearing is required and the issue of whether socio-economic impacts trigger an agency's duty to prepare an EIS. The Eighth Circuit rejected both of these claims and held that the Department of Labor need not file an EIS, as its action would not affect the physical environment.

This comment first outlines the facts involved in *Como-Falcon* and discusses the procedural issue of whether NEPA requires a public hearing before an agency makes its initial determination whether to file an EIS. The comment next considers the substantive question of whether socio-economic factors, such as those alleged by the Coalition, are sufficient by themselves to trigger an agency's obligation to prepare an EIS. The final section concludes, based on the public policies involved, that NEPA should not require a hearing before an agency makes an initial environmental assessment and that the best interpretation of "human environment" excludes consideration of socio-economic effects absent an impact on the physical environment.

II. THE FACTUAL BACKGROUND

Como-Falcon Community Coalition, Inc. v. United States Department of Labor[16] is a recent suit brought to force compliance with NEPA section 102(2)(C). The plaintiff, Como-Falcon Community Coalition, Inc., is a nonprofit corporation of residents and property owners.[17] It challenged a United States Department of Labor[18] decision to establish a Job Corps center[19] on a former

governments, and other concerned public and private organizations, to use all practical means and measures" to protect the environment. 42 U.S.C. § 4331(a) (1976).

15. 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

16. *Id.*

17. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342, 343 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). Plaintiff will be referred to as the "Coalition."

18. Hereinafter "Labor."

19. *See* 29 U.S.C. §§ 923-941 (1976). Job Corps centers provide basic education,

college campus located near its members' homes in St. Paul, Minnesota and near-by suburbs.[20] The chosen site, used since 1914 as the campus of Bethel College and Seminary, is adjacent to a middle class residential neighborhood on the north, east and south. To the west lies the Minnesota State Fairgrounds. Also nearby are a park and recreational complex, a small shopping plaza and a major regional shopping center. The Bethel site and surrounding neighborhood are zoned R-4 for single-family dwellings.[21]

On October 17, 1977, Labor informed Minnesota Governor Rudy Perpich of its intent to establish a Job Corps center on the Bethel campus.[22] After meeting with area residents and investigating alternatives, the Governor conditionally[23] approved the plan[24] and Labor determined that an EIS was unnecessary.[25]

On February 1, 1978, the Coalition commenced this action in federal district court in Minnesota seeking injunctive relief on the ground that Labor's proposal was a major federal action significantly affecting the quality of the human environment, requiring an EIS.[26] The effects the Coalition alleged included vehicular and pedestrian congestion; contribution to criminal activity; alteration of

vocational training, work experience and counseling in a structured environment for disadvantaged youths. The proposed center would be residential and coeducational with continual supervision for the 411 corpsmembers provided by a staff of 140. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 852 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

20. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342, 343 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

21. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 852, 853 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

22. *Id.*

23. *Id.* The conditions, negotiated by the Governor's office and Labor, included: establishment of a community advisory council; community representation in selection of the contractor and the screening of potential enrollees; enrollees will be only Minnesota youth; no felons will be admitted to the program; recreation facilities on the campus will be upgraded and made available to the community; and enrollee participation in neighborhood improvement programs. *Id.* at 854, 863.

24. Labor submitted its plan to the Governor, as required by 29 U.S.C. § 925(c). The Coalition challenged the adequacy of the plan in the district court and named the Governor as a defendant on the basis of his reliance on the plan. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 854 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

25. *Id.* at 852.

26. *Id.* at 854.

the character of the neighborhood; and impacts on commerce, social services, local utilities and police and fire protection.[27] Judge Harry H. MacLaughlin granted a preliminary injunction on February 22. At that time, the Coalition had demonstrated probable success on its claim that Labor's negative assessment was unreasonable. The court found that Labor had either failed to consider the environmental impact of the proposed center on the surrounding neighborhood or failed to develop a reviewable record of environmental effects. After the court imposed the injunction, Labor compiled the administrative record on which it based its original negative assessment of environmental impact and conducted a supplemental study. It affirmed its initial decision that the project did not require an EIS.[28]

The court held a hearing on November 6 and 7, 1978 on the propriety of a permanent injunction. After evaluating the administrative record and plaintiff's allegations, the court dissolved the injunction, holding that although Labor's proposal was a major federal action, the evidence demonstrated no adverse environmental impacts on the human environment and that Labor acted reasonably in determining that an EIS was not needed.[29]

The Coalition appealed, claiming that they were denied a public hearing and a chance to present evidence before Labor concluded that an EIS was unnecessary, and that failing to file an EIS in this case violated NEPA.[30] The Eighth Circuit Court of Appeals held that the district court's finding was not erroneous, but vacated a portion of the district court's opinion and held that the court erred in requiring Labor to reassess its original decision.[31]

III. A PUBLIC HEARING: REQUIRED BEFORE THE INITIAL ENVIRONMENTAL ASSESSMENT?

The Coalition argued that Labor's negative assessment of environmental impact was defective, as Labor did not provide the Coalition with a formal opportunity to present evidence of environ-

27. *Id.* at 860.
28. *Id.* at 852.
29. *Id.*
30. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342, 343 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).
31. *Id.* at 345.

mental effects prior to Labor's determination.[32] It relied on broad statements of policy in NEPA and the Council of Environmental Quality guidelines,[33] as statutory and regulatory authority,[34] which encourage cooperation between the federal government and affected state and local governments and private organizations.[35] The guidelines in effect at that time explicitly gave agencies the responsibility to disseminate information "in order to obtain the views of interested parties," but did not mandate any specific type of procedures.[36]

The Coalition found precedential support in the Second Circuit decision in *Hanly v. Kleindienst ("Hanly")*,[37] a citizen suit to force preparation of an EIS before the General Services Administration built a jail in Manhattan.[38] In *Hanly*, the court noted that "section 102(2)(B) requires that some rudimentary procedures be designed to assure a fair and informed preliminary decision. Otherwise the agency, lacking essential information, might frustrate the purpose of NEPA by a threshold determination that an impact statement is unnecessary."[39] It remanded the case, requiring the General Services Administration to further investigate some aspects of the proposal and to accept evidence from concerned citizens, holding that "before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit rele-

32. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 866 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

33. NEPA established the Council of Environmental Quality (CEQ) to formulate, coordinate and oversee federal environmental efforts. It is part of the Executive Office of the President. 42 U.S.C. §§ 4341-4347 (1976).

The CEQ has neither the power to order an agency to prepare an EIS if it fails to do so nor any express power to reject inadequate statements. NEPA gives the CEQ only broad powers to "review and appraise" various programs, 42 U.S.C. § 4344 (1976), and to receive copies of environmental impact statements. *See*, 2 F. GRAD, ENVIRONMENTAL LAW § 9.01 (2d ed. 1978).

34. Brief for Appellant at 15-17, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

35. 42 U.S.C. § 4331(a) (1976).

36. 40 C.F.R. § 1500.6(e) (1973).

37. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

38. Brief for Appellant at 17, 18, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

39. 471 F.2d 823, 835 (2d Cir. 1972).

vant facts which might bear upon the agency's threshold decision."[40]

The *Como-Falcon* district court similarly relied on *Hanly* to reject the Coalition's claim.[41] In *Hanly*, the Second Circuit noted the lack of statutory and administrative provisions on the subject, and concluded that the necessity of a full-fledged formal hearing would depend greatly on the particular circumstances surrounding the proposed action.[42] It qualified and clarified its holding by explaining that

> [t]he precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data.[43]

The district court in *Como-Falcon* concluded that the public meetings held by Labor in May and October, 1977, coupled with Labor's contacts and negotiations with local government officials, were sufficient to meet the procedural requirements of *Hanly*, although the Coalition did not have a formal opportunity to offer evidence. The court pointed out, however, that more and earlier public participation might have been helpful in calming the residents' fears.[44]

The court of appeals, while upholding the district court's decision, declined to accept the Second Circuit *Hanly* rule; it went only so far as to state that at times it may be advisable for an agency to hold a public hearing to gather public opinion.[45] Then, in reviewing an agency's initial determination under the reasonableness test,[46] a court may consider whether citizens had an op-

40. *Id.* at 836. Chief Judge Friendly dissented, pointing out that by requiring an agency to go through many procedures before deciding whether an EIS is necessary, the threshold determination that a proposal does not require an EIS becomes "a kind of mini-impact statement. The preparation of such a statement under the conditions laid down by the majority is unduly burdensome when the action is truly minor or insignificant." *Id.* at 837.

41. 465 F. Supp. 850, 866-67 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

42. 471 F.2d 823, 836 (2d Cir. 1972).

43. *Id.*

44. 465 F. Supp. 850, 866-67 (D. Minn. 1978) *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

45. 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

46. The Eighth Circuit follows the rule it enunciated in Minnesota Public Inter-

portunity to state their views before a decision was made.[47]

Because NEPA lacks any explicit requirement of opportunities for public participation,[48] the circuit court was unwilling to legislate such a requirement by judicial decision.[49] It relied on *Jicarilla Apache Tribe of Indians v. Morton*, [50] where the plaintiffs challenged the construction of electric-generating facilities, alleging that NEPA required public adversary hearings in the preparation of a final EIS.[51] The Ninth Circuit declined to mandate hearings because that "would be to substitute our judgment for that of Congress."[52] It viewed NEPA's legislative history as indicating a Congressional desire for greater agency responsiveness, but rejected the claim on the ground that no express provision required administrative hearings.[53] The *Como-Falcon* court considered this language and analysis persuasive.[54]

IV. Socio-Economic Impacts: Enough to Require an EIS?

A. *Possible Judicial Approaches*

With little guidance from either the statutory language or the legislative history, courts must decide if an agency should consider socio-economic effects in deciding whether to issue an EIS.[55] They

est Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974) (en banc), that the standard of review of an agency's initial determination not to file an EIS is reasonableness. The court reasoned that because of NEPA's concern for environmental disclosure, an agency's discretion on whether an EIS is required must be exercised only within narrow bounds.

47. 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

48. *See* note 14 and accompanying text *supra*.

49. 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

50. 471 F.2d 1275 (9th Cir. 1973).

51. *Id.* at 1284. The *Como-Falcon* court did not distinguish between the situation in *Jicarilla*, where a hearing was requested subsequent to circulation of a draft EIS and prior to the final EIS, and the *Como-Falcon* situation, where the Coalition requested a hearing prior to the determination of whether NEPA required an EIS in this case.

52. *Id.* at 1286.

53. *Id.*

54. 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

55. As an EIS is required only when the federal action will "affect the quality of the human environment," the question of whether socio-economic impacts are sufficient to trigger the obligation to prepare an EIS is a question of statutory interpretation: does the term "human environment" include social and economic characteris-

have developed three approaches: socio-economic impacts alone are sufficient to require an EIS;[56] primary socio-economic impacts, only when coupled with their secondary impacts on the physical environment, trigger an agency's obligation to prepare an EIS;[57] or only impacts on the natural or physical environment act to compel an agency to file an EIS.[58]

McDowell v. Schlesinger ("*McDowell*")[59] illustrates the first approach. In this case a plan to transfer an Air Force unit from a base in Missouri to another in Illinois was challenged.[60] Plaintiffs, civilian employees on the base, their union and Jackson County, Missouri, alleged that this action would cause significant social and economic impacts in the area, requiring an EIS under NEPA. Salaries would be lost, the tax base would be decreased, and the transferred employees might be unable to adequately house and educate their families near the new base.[61] The defendants, the Defense Department and the United States Air Force, contended that "social and economic impacts resulting from federal action, as contrasted to direct impacts on the ecology, do not fall within NEPA's ambit."[62]

The court considered the Council on Environmental Quality guidelines, NEPA's declaration of policy and the Defense Department's internal regulations[63] before concluding that an EIS was required.[64] It foresaw significant impacts to the area including problems relating to law enforcement, fire protection, public utilities and community growth patterns.[65] The court reasoned that "the sweep of NEPA is extraordinarily broad. NEPA mandates that *any*

tics? If it does, then any socio-economic impact would affect the human environment and require an EIS.

56. McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Or. 1971).

57. City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976); S.W. Neighborhood Assembly v. Eckard, 445 F. Supp. 1195 (D.D.C. 1978).

58. Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978); Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); National Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302 (E.D. Pa. 1976).

59. 404 F. Supp. 221 (W.D. Mo. 1975).

60. *Id.* at 224, 225.

61. *Id.* at 242, 243.

62. *Id.* at 244.

63. *Id.* at 244-46.

64. *Id.* at 255.

65. *Id.* at 254.

and all types of potential environmental impacts be considered by the agency involved. . . . Further, the environmental considerations mandated by NEPA to be considered by federal agencies include both the direct and indirect effects of federal action."[66]

Although many plaintiffs have argued the expansive meaning of "human environment" given in *McDowell*, courts have often rejected this interpretation.[67] One of the alternative positions, that socio-economic impacts with secondary impacts on the physical environment trigger the duty to prepare an EIS, is outlined in *City of Rochester v. United States Postal Service* ("*City of Rochester*").[68] There, the plaintiff City challenged the construction of a postal facility in a Rochester suburb and the consequent transfer of 1400 postal service employees from the inner city facility to the suburban facility, alleging that the action required an EIS under NEPA.[69] The district court dismissed the suit on several grounds, one of which was that the claims of injury were not environmental, but were all social and economic.[70]

The court of appeals reversed and required preparation of an EIS.[71] It reasoned that the socio-economic effects, like the loss of jobs in the city and the resulting flight to the suburbs, would have a significant impact on the physical environment by contributing to urban decay and increasing traffic and air pollution. According to the Second Circuit, because of the physical effects on the area, the socio-economic injuries triggered the Postal Service's obligation to prepare an EIS.[72]

The Sixth Circuit follows the third approach, requiring impacts on the physical environment before an agency must prepare an EIS, as enunciated in *Breckinridge v. Rumsfeld*.[73] In that suit, similar in its facts to *McDowell* and *City of Rochester*,[74] the district court enjoined the closing of the Lexington-Bluegrass Army Depot

66. *Id.* at 244 (emphasis by the court).

67. Image of Greater San Antonio v. Brown, 570 F.2d 517, 522 (5th Cir. 1978); Breckinridge v. Rumsfeld, 537 F.2d 864, 865 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); National Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302, 1305-06 (E.D. Pa. 1976).

68. 541 F.2d 967 (2d Cir. 1976).

69. *Id.* at 970, 973.

70. *Id.* at 971.

71. *Id.* at 978.

72. *Id.* at 973, 974.

73. 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

74. *See* notes 59 to 72 and accompanying text *supra*.

until the United States Army could prepare an EIS.[75] The closing would have eliminated 2,630 civilian jobs and caused social and economic hardship in the area.[76]

The court of appeals, relying primarily on NEPA's legislative history, reversed.[77] It quoted Senator Jackson's remarks from the Senate floor:[78]

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence of the health of mankind. That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth. . . . An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principal 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.[79]

The court concluded that Congress did not intend NEPA to be used to promote full employment or to prevent changes in federal personnel; NEPA, in the court's view, was designed to protect natural resources.[80] Without a showing of a permanent commitment of natural resources or the degradation of an environmental asset, and with proving only short-term economic disruptions, the human environment would not be affected. Although factors other than the physical environment can and have been considered, the court said, this should be done only when a primary impact on the physical environment exists.[81] The court specifically declined to follow the *McDowell* reasoning.[82]

B. *The Como-Falcon Approach*

The Coalition sought to force Labor to comply with NEPA by filing an EIS before establishing a Job Corps center at the Bethel College campus site.[83] It foresaw several injuries which it alleged

75. Breckinridge v. Rumsfeld, 537 F.2d 864, 865 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).
76. *Id.*
77. *Id.* at 866, 867.
78. *Id.* at 866.
79. 115 CONG. REC. 40416 (1969).
80. 537 F.2d 864, 865 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).
81. *Id.* at 866.
82. *Id.* at 867 n.1.
83. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465

were impacts on the human environment sufficient to compel preparation of an EIS: vehicular and pedestrian congestion; increased demand for such services as fire and police protection, public transportation, legal services, emergency health care and utilities; increased criminal activity; a loss in residential property values; and a substantial alteration of the residential character of the neighborhood.[84]

Labor argued that the Coalition's allegations pertained only to the racial, cultural, and financial backgrounds of the prospective enrollees.[85] It contended that such "people pollution,"[86] caused by poor, predominantly minority students living on a college campus within a white, middle class neighborhood, is not an environmental impact within NEPA.[87]

The district court seemed to agree with Labor that merely injecting low-income people into a wealthier community is not an adverse environmental impact. It understood the intent of Congress to be that sociological or economic effects alone do not require preparing an EIS.[88] Yet the court found the Coalition's concern for freedom from traffic congestion and criminal activity and preservation of the neighborhood's character to be "legitimate elements of the 'human environment' which federal decisionmakers must consider in determining the necessity" of an EIS.[89] It labelled the Co-

F. Supp. 850, 852 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

84. *Id.* at 865, 866.

85. *Id.* at 857 n.2.

86. "People pollution" is a term used by Judge Leventhal in Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973), a suit to enjoin construction of a bulk mail facility until an EIS was prepared. In rejecting the claim, Judge Leventhal wrote:

> The "over-riding" issue underlying MNCPC's recommended rejection of this project was "social and economic" and as we observed, rooted in the prospective loss of real and personal property taxation. A secondary, and related factor, was the prospect of an influx of low-income workers into the County. Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environment," if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.

87. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 857 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

88. *Id.*

89. *Id.* at 858.

alition's allegations "substantial claims of environmental harm" and "legitimate environmental concerns."[90]

Having dispensed with the question of whether the Coalition's claims were within NEPA, the district court proceeded to consider whether Labor had acted reasonably in concluding that each environmental impact would be insignificant or could be sufficiently minimized. It analyzed each alleged injury separately and in detail,[91] finding that Labor had examined all relevant factors and reasonably determined that the Job Corps center would not significantly affect the human environment.[92] It denied the Coalition's request for an injunction.[93]

On appeal, the Coalition continued to argue that the alleged impacts on the environment required an EIS.[94] Labor contended that the agency action would not affect the physical environment, and that the Coalition complained of only purely socio-economic impacts. These impacts alone, it asserted, do not require an EIS.[95]

The court of appeals agreed with Labor. It affirmed the district court decision, but vacated the portion of its opinion which evaluated Labor's analysis.[96] Its holding was clear:

> The social and economic factors raised by the Coalition's complaint are not encompassed within the provisions of NEPA, and under the circumstances of this case, need not have been consi-

90. *Id.* at 860. The court noted that other courts have considered impacts on an urban environment to be within NEPA. It classified such environmental concerns into four categories: (1) health and public safety; (2) impacts on social services; (3) alteration of an area's character; and (4) impacts on the community's development policy, which might contribute to urban blight and decay. These catagories, the court said, illustrate the breadth of the term "human environment." *Id.* at 859.

91. *Id.* at 860-66. It analyzed six injuries: vehicular and pedestrian congestion; impact on local utilities; impact on community social services; contribution to criminal activity; police and fire protection; and alteration of the character of the neighborhood.

92. *Id.* at 867.

93. *Id.* at 868.

94. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342, 344 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

95. No new buildings will rise, and no old ones will be demolished. Existing buildings will to various degrees be renovated. No new traffic patterns will be established or major traffic arteries changed. An existing educational facility will continue in educational use.

Brief for Appellee at 6, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

96. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

dered by the Department in its determination of whether to file an EIS. We think the rule is well settled that:

> When an action will have a primary impact on the natural environment, secondary socio-economic effects may also be considered. . . . *But when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency's obligation to prepare an EIS.*[97]

As support, the court looked to the Seventh Circuit decision in a factually similar case, *Nucleus of Chicago Homeowners Association v. Lynn*,[98] a suit to enjoin the building of low-income housing in predominantly white neighborhoods. The plaintiff citizens group charged the Department of Housing and Urban Development, the building authority, with violating NEPA by failing to prepare an EIS.[99] The court rejected the claim, indicating that neither the social characteristics of low-income public housing tenants nor the fears of the neighbors of prospective tenants were impacts cognizable under NEPA.[100] The court agreed with the Court of Appeals for the District of Columbia[101] that "[c]oncerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on 'environment,' if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress."[102]

97. *Id.* at 345 (emphasis added by the court), quoting from Image of Greater San Antonio v. Brown, 570 F.2d 517, 522 (5th Cir. 1978) (Air Force decision to eliminate positions at Kelly Air Base does not require preparation of an EIS). The basis for the Fifth Circuit's decision was its interpretation of NEPA's purposes: "NEPA was enacted in recognition of the effect that man's activities—his technological advances, industrial expansion, resource exploitation, and urban development—have on the 'natural environment.' 42 U.S.C. section 4331. The primary concern was with the physical resources of the nation."

98. 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

99. *Id.* at 228.

100. *Id.* at 231.

101. Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029, 1037 (D.C. Cir. 1973). The Sixth Circuit has also quoted this language with approval. Breckinridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

102. Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 231 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1977).

V. CONCLUSION

In arguing the need for a public hearing, the Coalition seems to have read too much into and relied too heavily on the *Hanly* language. The Second Circuit clarified its *Hanly* position in *Cross-South Ferry Services, Inc. v. United States*,[103] a NEPA challenge to an EIS prepared for an approved ferry route, by noting that a hearing is not ordinarily required, although it may often be advisable.[104] The court found no legal right to a hearing.[105] The Tenth Circuit, in *Scenic Rivers Association of Oklahoma v. Lynn*,[106] a NEPA challenge to a proposed housing development, seems to agree. It considered the question of whether a public hearing is to be held to be within the agency's discretion.[107]

By following these decisions, the Eighth Circuit has taken a position which balances the competing public policies well. While public input can be desirable and even essential, such procedures are expensive and time consuming. Requiring a public hearing with formal presentations of evidence before any federal agency can proceed with any action would force most projects into a standstill. The often slow workings of the federal bureaucracy would be impossibly and impracticably burdened to the point where a few disgruntled citizens could forestall the most trivial, as well as the most immediately necessary, proposals. Although NEPA encourages public participation,[108] this stalling mechanism could not have been within Congress' purpose in enacting NEPA. Had Congress wanted to require public hearings, it could have written them into the Act.

In arguing the need for an EIS, the Coalition failed to urge the court to accept a definition allowing either purely socio-economic impacts or primary socio-economic impacts with their secondary physical impacts to trigger the agency obligation to prepare an EIS, although the Eighth Circuit had not defined "human environment" prior to *Como-Falcon*. The district court, however, must have accepted one of those alternative definitions or else it would

103. 573 F.2d 725 (2d Cir. 1978).

104. *Id.* at 731.

105. *Id.* at 732 n.4.

106. 520 F.2d 240 (10th Cir. 1975), *rev'd on other grounds, sub nom.*, Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976).

107. *Id.* at 246.

108. *See* note 14 and accompanying text *supra*.

not even have needed to consider the effects alleged by the Coalition. The Coalition, then, lost on the facts while presumably winning the legal argument at the district level and then failed to argue which law should apply at the appellate level. It attacked only the court's conclusion,[109] with a brief replete with quotations from depositions and the trial transcript, detailing possible social and economic impacts.[110]

Labor's position on the legal issue was clear on appeal: all the effects alleged by the Coalition were social or economic, and socio-economic impacts alone do not require an EIS.[111] The court of appeals agreed.[112] It vacated the portion of the district court opinion premised on its overly inclusive definition of human environment.[113] The change in legal definition, however, did not change the decision; an EIS was not required.[114]

The Eighth Circuit decision in *Como-Falcon* may become the accepted interpretation of human environment for several reasons.[115] First, the Missouri district court which decided *McDowell*,[116] once the leading case holding that socio-economic factors are sufficient to trigger the need for an EIS, is now governed by the *Como-Falcon* rule.

109. Brief for Appellant at 39, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

110. *Id.* at 29-36. Much of this testimony related to crime problems near Job Corps centers in other states.

111. Brief for Appellee at 6, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

112. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342, 346 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

113. *Id.* at 345.

114. *Id.*

115. Several circuits already follow this approach of requiring an impact on the physical environment to trigger an agency's obligation to prepare an EIS, including the Fifth, Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978); the Sixth, Breckinridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); the Seventh, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); and the District of Columbia, Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973). *See also* National Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302 (E.D. Pa. 1976).

116. *See* note 59 and accompanying text *supra*. The court in Image of Greater San Antonio v. Brown, 570 F.2d 517, 523 n.8 (5th Cir. 1978), noted that "[t]o the extent it holds that socio-economic effects standing alone can trigger NEPA, *McDowell* itself stands alone."

Secondly, the Council on Environmental Quality has issued regulations[117] which define human environment consistently with the *Como-Falcon* decision. They state:

> "Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.[118]

These guidelines did not govern the *Como-Falcon* case, as they did not become effective until July 30, 1979,[119] significantly after Labor's negative assessment.[120] The only mention of the guidelines during the case was a cursory footnote in Labor's appellate brief.[121]

Finally, NEPA's legislative history points toward a physical view of environment.[122] When NEPA was enacted in 1969, the prevailing environmental concerns focused on air, water and land. The Senate Report on the bill reflected this in stating that "[t]o provide a basis for advancing the public interest, a congressional statement is required of the evolving national objectives of managing our physical surroundings, our land, air, water, open space, and other natural resources and environmental amenities."[123] The bill's sponsor, Senator Jackson, stressed these same physical concerns on the Senate floor.[124]

117. 40 C.F.R. § 1508.14 (1979). The guidelines were promulgated pursuant to Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). The guidelines may not settle this question because courts have treated them as advisory only. They are useful, however, in interpreting NEPA. *See* Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973).

118. 40 C.F.R. § 1508.14 (1979).

119. 40 C.F.R. § 1508 (1979).

120. Labor made its first negative assessment on Nov. 3, 1977, and its negative reassessment prior to the Nov. 6, 1978 trial date. Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850, 852 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

121. Brief for Appellee at 6, Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

122. *See* note 97 *supra*.

123. S. REP. NO. 296, 91st Cong., 1st Sess. 6 (1969).

124. *See* note 79 and accompanying text *supra*.

Nothing in NEPA's legislative history appears intended to deal with such plaintiffs' complaints as unemployment,[125] burdened public utilities, low-income neighbors, or a lack of law enforcement and fire protection,[126] and public policy requires that the statute not be read to apply to these challenges. If every socio-economic impact obliged federal agencies to prepare an EIS, federal action would be greatly hampered. Clearly a statute aimed at minimizing damage to people's surroundings should not be used to postpone or prevent such a broad range of agency actions for basically non-environmental reasons. It would amount to a citizen veto power over agency proposals. In the interests of protecting the environment, an EIS should be encouraged in the uncertain cases, as a decision not to prepare one ends the environmental inquiries in many cases.[127] Yet using NEPA to stop low-income persons from moving into a wealthier neighborhood[128] or to prevent disadvantaged youths from receiving vocational training in a middle-class area[129] is to perpetuate social segregation and elitism, a perversion of the statute's purposes. It cannot be allowed.

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125. *See generally* National Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302 (E.D. Pa. 1976).

126. *See generally* Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

127. *See* Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1320 (8th Cir. 1974) (en banc).

128. *See generally* Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975).

129. *See generally* Como-Falcon Community Coalition, Inc. v. United States Dep't of Labor, 465 F. Supp. 850 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).