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Consideration of Socioeconomic Effects
Under NEPA and the EC Directive on
Environmental Impact Assessment

Jacquelyn L. Smith†

As environmental awareness rises around the globe, many countries are shifting the focus of their environmental policies to preventive measures. Frequently, such legislation includes environmental assessment of some sort. An environmental impact assessment "attempts to bring together, in a coordinated and public way, all the environmental effects of a development together with the views of those affected in such a manner as to inform the mind of the decision-maker." Environmental assessment legislation does not require decisionmakers to make the environment their top priority, but it does attempt to ensure that environmental concerns are considered along with other relevant factors.²

This Comment examines the provisions of the European Economic Community Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment ("EIA Directive" or "Directive"),³ focusing in particular on whether those performing environmental impact assessments ("EIAs") must consider socioeconomic effects. A similar question arose in the United States under the National Environmental Policy Act of 1969 ("NEPA")⁴ and was answered only after much litigation. The prevailing interpretation of NEPA requires a threshold finding of

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¹ Nigel Haigh, The EEC Directive on Environmental Assessment of Development Projects, 1983 J Planning & Envr L 585, 588. See also, Weinberger v Catholic Action of Hawaii/Pace Educ. Project, 454 US 139, 143 (1981), noting that one of the aims of § 102(2)(C) of the National Environmental Policy Act, 42 USC §§ 4321-70a (1988), is "to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an [environmental impact statement]."


⁴ 42 USC §§ 4321-70a (1988).
"traditional" environmental effects (impacts on the physical environment) to trigger the environmental impact statement ("EIS") requirement. Since NEPA inspired the EIA Directive, an examination of the United States position on socioeconomic effects is valuable for determining what stance the European Community ("EC") should take.

Part I of this Comment describes NEPA's major provisions and shows the evolution and judicial construction of the EIS requirement in the federal courts. Part II explains the EIA Directive's major provisions, briefly describes possible interpretive methods that the European Court of Justice could use in construing the Directive, and examines the text and history of the Directive. Part III argues that, for policy reasons similar to those discussed by United States courts, the Directive's scope must be limited. The Comment concludes that environmental impact assessors in the EC should only consider socioeconomic impacts that are closely related to adverse effects on the physical environment.

I. THE UNITED STATES: THE EVOLUTION OF NEPA

A. Basic Provisions of NEPA

Congress enacted the National Environmental Policy Act to establish the prevention of environmental damage as an important federal goal. The statute has three components: the first proclaims its environmental purpose and policy; the second sets forth the substantive requirement for an EIS; and the third establishes the Council on Environmental Quality ("CEQ").

Congress's purpose in enacting NEPA was [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or elim-
This statement of congressional policy reflects a commitment to environmental protection, but retains quality of life as a central concern:

[I]t is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . 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.\(^9\)

Further goals include ensuring “safe, healthful, productive, and aesthetically and culturally pleasing surroundings”\(^11\) and “preserv[ing] important historic, cultural, and natural aspects of our national heritage.”\(^12\)

In order to achieve these goals, all federal agencies must prepare an environmental impact statement for “legislation and other major Federal actions significantly affecting the quality of the human environment.”\(^13\) The Act, which does not define the phrase “human environment,” proved to be fertile ground for lawsuits, particularly for plaintiffs who claimed agency failure to assess specific effects.\(^14\) Justice Marshall wrote that the vagueness of the statute acted as “a catalyst for development of a 'common law' of NEPA.”\(^15\)

Much litigation surrounded the question of whether Congress intended the phrase “affecting . . . the human environment” to in-

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\(^9\) 42 USC § 4321.

\(^10\) 42 USC § 4331(a).

\(^11\) 42 USC § 4331(b)(2).

\(^12\) 42 USC § 4331(b)(4).

\(^13\) 42 USC § 4332(2)(C).

\(^14\) In fact, NEPA generated over one thousand lawsuits in its first nine years. Grant, 4 Conn J Intl L at 463 (cited in note 2). In NEPA’s first thirteen years, 70 agencies prepared 16,000 EISs, resulting in 1,602 lawsuits. Kennedy, 11 Intl Envir Rptr (BNA) at 257 (cited in note 2).

clude non-ecological impacts. Controversial types of effects include impacts on the quality of urban life, such as increases in vehicular or pedestrian traffic; economic impacts, like rises in unemployment or increases in local tax bases; aesthetic effects, such as landscaping considerations; changes in the character of a community, particularly its racial or class composition; and psychological effects, such as fears of increasing crime rates or possible nuclear disasters. This Comment uses the term "socioeconomic effects" to refer to all of these types of impacts collectively.

B. NEPA in the Federal Courts

Federal courts quickly realized the limitations of textual interpretation as a means of construing a statute "which has been characterized as 'opaque' and 'woefully ambiguous.'" In Hanly v Mitchell ("Hanly I"), one of the earliest and most anomalous NEPA decisions, the Second Circuit argued that the term "environment" did not indicate that NEPA applied only to natural habitats or ecological impacts. Rather,

[NEPA's] aims extend beyond sewage and garbage and even beyond water and air pollution; [t]he act must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass trans-

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16 Note, Psychological Effects at NEPA's Threshold, 83 Colum L Rev 336, 356 (1983) ("almost all litigation on nonecological effects has focused on the treatment to be accorded socioeconomic effects").

17 These categories are based on those found in Daniel R. Mandelker, NEPA Law & Litigation: the National Environmental Policy Act 96-110 (Callaghan, 1984). Examples of effects that fall within these categories also appear in Valerie M. Fogleman, Guide to the National Environmental Policy Act: Interpretations, Applications, and Compliance § 3.6 at 61-63 (Quorum Books, 1990).

18 See, for example, Mandelker, NEPA Law & Litigation §§ 8.37-8.43 at 90 (cited in note 17). Mandelker divides socioeconomic effects, as defined by this Comment, into quality of urban life, inner city decline, growth and development, socioeconomic effects, aesthetic effects, social and economic class and racial effects, and psychological effects. Id. For convenience, this Comment classifies all such effects as socioeconomic. This approach also reflects the attitude of the federal courts which have applied the Supreme Court's reasoning in Metropolitan Edison Co. v People Against Nuclear Energy ("PANE"), 460 US 766 (1983), to effects other than the psychological ones facing the Court. See text at notes 50-55.

19 Hanly v Kleindienst ("Hanly II"), 471 F2d 823, 825 (2d Cir 1972) (footnotes omitted).

20 460 F2d 640 (2d Cir 1972).

21 Id at 647.
portation systems, crime, congestion and even availability of drugs all effect the urban "environment".[22]

Other jurisdictions recognized that, although "human environment" certainly means more than lakes and fields, the term needs outer limits as well. For example, in *Maryland-National Capitol Park and Planning Commission v United States Postal Service,*[23] the D.C. Circuit examined whether an influx of low-income workers resulting from the Postal Service's construction of a bulk mail center constituted a cognizable environmental impact. Judge Leventhal, recognizing the breadth of the Act's language, acknowledged that

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.[24]

Thus, federal courts interpreting the vague language of NEPA rejected definitions of "environment" that raised problems of under- and over-inclusiveness. Some courts turned to legislative history to search for the boundaries that Congress intended. These courts discovered that

Although the legislative history indicates Congressional concern with the "interrelated problems associated with environmental quality," such as socio-economic impact, the basic thrust of the Act is the management of this nation's physical surroundings and natural resources.[25]

In *Breckinridge v Rumsfeld,*[26] the Sixth Circuit relied almost exclusively on legislative history to support its conclusion that socioeconomic factors fall outside of NEPA's intended range. The

[22] Id. Upon remand, the case was again appealed to the Second Circuit. In *Hanly II,* the court restated its earlier position that NEPA covered the "urban environment." 471 F2d 823, 827 (2d Cir 1972) (quoting *Hanly I,* 460 F2d at 647).
[24] Id at 1037.
court quoted Senator Jackson—"[p]robably the most influential figure in the passage of NEPA'"—extensively:

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 or 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.28

The Breckinridge court concluded from the legislative history that NEPA's priorities were first the physical, natural environmental effects and only secondarily the socioeconomic ones. Therefore, in applying the statute, the court distinguished primary (or direct) from secondary (or indirect) effects.29 Other jurisdictions soon followed the Sixth Circuit's ruling that socioeconomic considerations alone were insufficient to trigger NEPA's EIS requirement.30

Some commentators believe that these courts' interpretations of legislative history are flawed. At least one hints that the courts took Senator Jackson's remarks out of a context that belies the courts' interpretations.31 Others point to the "paucity of [legislative history] material" and to the fact that the EIS provision was "the product of a last-minute compromise," concluding that no cohesive congressional intent existed.32

Perhaps recognizing the limitations of textual and legislative history analysis, some federal courts simply relied on policy arguments to justify restricting NEPA's scope to physical effects on the environment. Those courts reasoned that NEPA does not require

27 Note, 83 Colum L Rev at 343 (cited in note 16).
29 Id at 866. The court also concluded that prior NEPA cases had in fact reflected this dichotomy: "Although factors other than the physical environment have been considered, this has only been done when there existed a primary impact on the physical environment." Id, citing Chelsea Neighborhood Ass'n's v United States Postal Serv., 516 F2d 378, 388 (2d Cir 1975); Minnesota Pub. Interest Research Group v Butz, 498 F2d 1314, 1322 (8th Cir 1974); Maryland-National Capitol Park & Planning Comm'n v United States Post Ofc., 487 F2d 1029, 1037-38 (DC Cir 1973); and Hanly I, 460 F2d 640, 647 (2d Cir 1972).
30 See, for example, Image of Greater San Antonio, Tex. v Brown, 570 F2d 517 (5th Cir 1978); Como-Falcon Community Coalition, Inc. v United States Dept. of Labor, 609 F2d 342 (8th Cir 1979), cert den, 446 US 936 (1980); Township of Dover v United States Postal Serv., 429 F Supp 295 (D NJ 1977); National Ass'n. of Government Employees v Rumsfeld, 418 F Supp 1302 (E D Pa 1976).
31 Note, 83 Colum L Rev at 356 (cited in note 16) ("[t]aken in isolation, [Jackson's remarks] could lead to a narrow conception of NEPA").
federal agencies to assess non-quantifiable effects, such as aesthetic, cultural, or psychological impacts, because such factors are unassessable. In *Maryland-National Capitol Park and Planning Commission v United States Postal Service*, the plaintiffs alleged that the Postal Service failed to assess not only the impact of an influx of low-income workers, but also the new bulk mail center's aesthetic impact. The court admitted that NEPA explicitly includes aesthetic effects but realized that requiring agencies to assess aesthetic effects in the absence of a primary ecological impact would force them to attempt to quantify highly subjective factors arising in any significant federal project.

In *Goodman Group, Inc. v Dishroom*, the Ninth Circuit followed the D.C. Circuit's decision in *Maryland-National*, acknowledging the confusion that NEPA poses in its treatment of social, economic, aesthetic, and cultural effects. The court also noted that the primary-effect-on-the-physical-environment threshold "serves [] to confine scarce resources for EIS preparation to those cases where they are most needed . . . ." Thus, consideration of the burden placed on federal agencies by an overinclusive interpretation, of textual ambiguity, and of possible legislative emphasis on the physical environment led the federal appellate courts to restrict the scope of NEPA.

C. NEPA in the Supreme Court

The only Supreme Court decision addressing the question of whether NEPA requires assessment of socioeconomic effects is *Metropolitan Edison Co. v People Against Nuclear Energy ("PANE"). The Court, making textual, historical, and policy arguments, held that the Nuclear Regulatory Commission need not consider the potential psychological effects of its decision to reopen the nuclear power plant at Three Mile Island, concluding that "[i]f a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply."
Justice Rehnquist, writing for a unanimous Court, noted that NEPA's language expressly covers effects on human health and conceded that psychological effects fall within that category. However, he argued that a literal reading of NEPA is misleading. Like the lower federal courts, Rehnquist concluded that "[t]he theme of [the EIS requirement] is sounded by the adjective 'environmental'. . . . [T]he context of the statute shows that Congress was talking about the physical environment—the world around us, so to speak."

The Court also cited legislative history to support its conclusion that the statute was primarily intended to help protect the physical environment:

[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.

After reviewing the textual and historical evidence of legislative focus on "air, land and water," the Court adopted a requirement of "a reasonably close causal relationship between a change in the physical environment and the effect at issue." This nexus requirement adopts and tightens the lower courts' primary-secondary effects dichotomy. After PANE, only those secondary effects sufficiently linked to a primary impact are cognizable under NEPA.

The Court justified this narrow interpretation of NEPA's scope with several policy arguments. First, broadly understood, "adverse environmental effects" could include almost any consequence of a governmental action that one might fairly label "adverse". Such a reading would place an enormous burden on federal agencies, forcing them to prepare EIS's for a much wider range of their activities. Second, in a case like PANE, requiring an EIS for psychological impacts would force an agency to spend

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40 Id at 771.
41 Id at 772.
44 Id at 774.
45 Id at 772.
46 Shilton, 20 Envir L at 560-61 (cited in note 32).
its limited resources to hire experts in psychology or to acquire knowledge of psychology itself, when such expertise is irrelevant to the duties delegated to it by Congress. The Court emphasized that the "political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." The PANE Court's decision that psychological effects are not cognizable unless closely related to a direct effect on the physical environment validated the lower courts' distinction between primary and secondary effects. Although courts might have interpreted the PANE holding narrowly to apply only to psychological effects, they have instead cited the PANE dicta frequently in cases concerning nonpsychological socioeconomic impacts. Examples of nonpsychological socioeconomic impacts include a new plastic container's susceptibility to tampering, possible disruption of telephone communications, a local government's deprivation of potentially significant tax revenues, and the economic effects of amending milk price support systems. Thus, after much litigation, federal courts have concluded that socioeconomic concerns, unless closely tied to changes in the physical environment, are not the type of environmental effects that Congress intended impact assessments consider.

II. THE EUROPEAN ECONOMIC COMMUNITY: THE ENVIRONMENTAL IMPACT ASSESSMENT DIRECTIVE

A. Basic Provisions

The primary goal of the European Economic Community ("EC") is to establish free trade among Member States. The EC

47 PANE, 460 US at 776.
48 Id at 777.
49 Note, 33 Am U L Rev at 554 (cited in note 8) ("[w]ith the PANE opinion, the Supreme Court gave authoritative weight to the majority view of NEPA's coverage."). However, the Supreme Court has not directly addressed the question of cognizability of socioeconomic effects. Thus the lower courts and commentators that cite PANE often rely on its dicta.
50 See, for example, Mall Properties, Inc. v Marsh, 672 F Supp 561, 570 (D Mass 1987), later proceeding 841 F2d 440 (1st Cir 1988), cert den as New Haven v Marsh, 488 US 848 (1988) ("[PANE] makes it evident that effects unrelated to changes in the physical environment may not be considered under NEPA"); Olmsted Citizens for a Better Community v United States, 793 F2d 201, 206 (8th Cir 1986) (interpreting PANE broadly).
51 Glass Packaging Institute v Regan, 737 F2d 1083 (DC Cir 1984).
54 Mulroy Dairy Farms v Block, 569 F Supp 256 (N D NY 1983).
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the 1970s, and, therefore, the Treaty establishing the EC contained no provisions for regulating the environment.\textsuperscript{54} Once the EC recognized that environmental concerns affect local economies, it realized that differences in Member State environmental policies could "create unfavourable competitive conditions."\textsuperscript{57}

Since the early 1970s, the EC has enacted several environmental "action programmes" and a mass of environmental legislation.\textsuperscript{58} In the environmental field, most EC legislation takes the form of directives, which prescribe particular ends, but leave the precise means of implementation to the discretion of the individual Member States.\textsuperscript{59}

The EIA Directive, although inspired by NEPA,\textsuperscript{60} is substantially different in its focus and structure. Whereas NEPA applies only to "legislation and other major Federal actions,"\textsuperscript{61} the Directive applies to "public and private projects which are likely to have significant effects on the environment."\textsuperscript{62} Under the Directive, the developer of a project provides information to the appropriate authority responsible for giving "development consent" for such activities.\textsuperscript{63} Assessments make environmental effects a significant, but not determinative, factor in licensing decisions.\textsuperscript{64}

Two annexes list the specific types of projects falling within the scope of the Directive. Under Article 4 of the Directive, Annex

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\textsuperscript{54} However, the legal basis for EC environmental legislation was at first found in the EEC Treaty, despite the fact that it did not even contain the word "environment." See Stanley P. Johnson and Guy Corcelle, \textit{The Environmental Policy of the European Communities} 1 (Graham & Trotman, 1989) (basis for environmental legislation found in Articles 2 and 36 of the EEC Treaty). In 1987, as part of the EC's fourth environmental program, the Treaty was amended to solidify the EC's jurisdiction over environmental policy. Comment, 1990 BYU L Rev at 1766 (cited in note 55). The four successive environmental programs the EC has adopted are little more than broad statements of environmental goals. Id at 1763-68.


\textsuperscript{58} The action programs are printed at 1973 OJ C112:1; 1977 OJ C139:1; 1983 OJ C46:1; 1987 OJ C328:1. For a good overview of the evolution of the EC's environmental policy, see Johnson & Corcelle, \textit{The Environmental Policy of the European Communities} (cited in note 56).

\textsuperscript{59} Comment, 1990 BYU L Rev at 1763 (cited in note 55). See also, EEC, Art 189(3). EC legislation takes one of three forms: regulations, decisions, or directives. Regulations become part of the Member States' laws without any additional action by the Member State. Decisions are also binding without further action, but are "generally limited to non-routine legislative matters." Comment, 1990 BYU L Rev at 1763.

\textsuperscript{60} Nigel Haigh, \textit{Environmental Assessment—The EC Directive}, 1987 J Planning & Envir L 4.

\textsuperscript{61} NEPA, 42 USC § 4332(2)(C).


\textsuperscript{63} Id, arts 1, 5, and 8, 1985 OJ at L175:41-42.

\textsuperscript{64} Grant, 4 Conn J Intl L at 467 (cited in note 2).
I projects, such as nuclear power reactors and chemical treatment facilities, presumptively have significant effects on the environment. Therefore, the Directive makes environmental assessment of such projects mandatory.

On the other hand, Annex II projects, which range from coal extraction to hotel complexes, must be assessed only "where Member States consider that their characteristics so require." Article 4 of the Directive gives Member States the discretion to "specify certain types of projects as being subject to an assessment or establish the criteria and/or thresholds necessary to determine" which Annex II projects will require an EIA.

Article 3 of the Directive specifies that EIAs will identify, describe and assess . . . the direct and indirect effects of a project on the following factors:

- *human beings*, fauna and flora,
- soil, water, air, climate and the landscape,
- the inter-action between the factors mentioned in the first and second indents, [and]
- *material assets and the cultural heritage."

The vagueness of the EIA Directive raises the question of how broadly to interpret "environmental effects." As in NEPA, the language of the Directive leaves much room for debate: What does the Directive mean by "material assets and the cultural heritage?" Do any and all effects on "human beings" require EIAs?

Clarification of these vague standards is particularly important in light of recent controversies surrounding implementation of...
the EIA Directive. On October 17, 1991, EC Environment Commissioner, Carlo Ripa de Meana, sent letters to ten of the twelve Member States, alleging that they improperly implemented the Directive.\textsuperscript{72} If the Commissioner cannot persuade the Member States to implement the Directive to his satisfaction, he may commence proceedings against them in the European Court of Justice, where the question of the cognizability of socioeconomic impacts might arise.\textsuperscript{73} Since the spotlight is now on the EIA Directive, clarifying its scope takes on added importance.

B. Interpretive Method of the European Court of Justice

The European Court of Justice ("ECJ"), like United States courts, realizes the limitations of literal readings of texts and tends to rely heavily on contextual interpretation.\textsuperscript{74} The ECJ is more policy-oriented than its United States counterparts, however, and it frequently uses an interpretive method, often called a teleological approach, which construes Community legislation according to its context and objectives.\textsuperscript{75} Under this approach, the ECJ "interprets[s] texts on the basis of what it thinks they should be trying to achieve: it moulds the law according to what it regards as the needs of the Community."\textsuperscript{76} Teleological interpretation, in its extreme form, becomes judicial legislation. This, too, is favored by the ECJ.\textsuperscript{77}

This predilection for policy arguments makes the European Court of Justice less amenable to legislative intent arguments.\textsuperscript{78}


\textsuperscript{73} Only one case dealing with the EIA Directive has been reported so far. See Browne v An Bord Pleannala, 1990:1 CMLR 3 (Irish High Court 1989) (Directive is not directly binding on parties that are not "emanations of the state"). Another European case, Case 187/87, Saarland v Minister of Industry, 1988 ECR 5013, 1989:1 CMLR 529, simply mentions the Directive in passing. The lack of litigation regarding the Directive is not surprising since the Member States had until July 3, 1988, to implement it. Council Dir 85/337, art 12(1), 1985 OJ at L175:43 (cited in note 3).

\textsuperscript{74} The ECJ "looks at the words used and considers their meaning in the context of the instrument as a whole. In doing this, it tries to give the provision an interpretation which fits in with the general scheme of the instrument. . . . " T. C. Hartley, The Foundations of European Community Law 58 (Clarendon Press, 1981). See also, L. Neville Brown, ed, The Court of Justice of the European Communities 271-2 (Sweet & Maxwell, 1989). Note that Justice Rehnquist also used a contextual interpretation of NEPA in PANE. See text at notes 36-37.

\textsuperscript{75} Brown, ed, The Court of Justice at 286 (cited in note 74).

\textsuperscript{76} Hartley, The Foundations of European Community Law at 59 (cited in note 74).

\textsuperscript{77} Id.

\textsuperscript{78} Id at 58. "Interpretations based on the original situation would in no way be in keeping with a Community law oriented towards the future." Id at 59, n 54, citing H. Kutscher,
Another reason why the ECJ "makes little attempt to establish the actual subjective intention of the authors of the text"\textsuperscript{79} is that EC legislation is often the result of "hard bargaining."\textsuperscript{80} Realizing that often no community intent underlies EC legislation, the ECJ considers the role of authors of treaties or legislation as limited to the enactment of the text.\textsuperscript{81} After the authors enact a piece of legislation, the ECJ becomes "the custodian of their common will."\textsuperscript{82} Drafters' intent becomes irrelevant: discerning the meaning of a text requires only the enacted language and the interpretive powers of the judiciary. Thus, while legislative history arguments seemed to persuade United States courts construing the scope of NEPA, similar arguments based on the drafting history of the Directive are unlikely to succeed in the EC.

C. Statutory Analysis

Applying the ECJ's contextual interpretive method to the EIA Directive helps to clarify its generally vague provisions. On its face, Article 4 of the Directive appears to give Member States complete discretion to establish criteria for determining which Annex II projects require EIAs. Were this reading correct, each Member State could determine whether socioeconomic impacts should be assessed for Annex II projects. However, Article 4 must be read in conjunction with Article 2, which sets out the Member States' primary duty under the Directive:

\begin{quote}
Member States shall adopt all measures necessary to ensure that . . . projects likely to have significant effects on the environment by virtue . . . of their nature, size or location are made subject to an assessment. . . .
\end{quote}

The Directive thus requires that any criteria or thresholds proposed by Member States must still ensure that appropriate environmental effects are assessed. Further, the Directive contemplates that thresholds will be determined by the characteristics of the project—its "nature, size, or location"—rather than by the

\begin{footnotes}
\textsuperscript{79} Hartley, The Foundations of European Community Law at 58 (cited in note 74).
\textsuperscript{80} Brown, The Court of Justice at 279 (cited in note 74).
\textsuperscript{81} Id at 277.
\textsuperscript{82} Id, quoting Robert Lecourt, former President of the European Court of Justice, Geneva Lectures, Le juge devant le Marche Commun (1970).
\end{footnotes}
types of effects likely to occur.\textsuperscript{84} Indeed, for some Annex II projects, "thresholds are built into the description."\textsuperscript{88} Stated another way, the Directive raises two separate questions: Does a particular project require an EIA? If so, what effects must be assessed? Thus, regardless of the particular Article 4(2) criteria they establish, Member States must still determine whether socioeconomic effects are to be assessed.\textsuperscript{88}

The ECJ often uses legislative preambles to assist it in interpreting Community laws.\textsuperscript{87} The EIA Directive's preamble refers to environmental action programs of 1973, 1977, and 1983, that "stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source. . . ."\textsuperscript{88} It also lists as "one of the Community's objectives . . . protection of the environment and the quality of life."\textsuperscript{89} The goals of environmental assessment as stated in the Preamble are

\begin{itemize}
  \item to protect human health,
  \item to contribute by means of a better environment to the quality of life,
  \item to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.\textsuperscript{90}
\end{itemize}

Thus, the language of the Preamble reflects a fundamental concern for ecological impact and human health. However, vague terms like "quality of life" and Article 3's "direct and indirect effects [on] human beings [and on] material assets and the cultural heritage" still leave room for the argument that developers and licensing authorities must consider socioeconomic impacts.

The only other section of the Directive that indicates what types of effects are to be considered is Annex III, which sets out

\begin{itemize}
  \item \textsuperscript{84} Id.
  \item \textsuperscript{88} Grant, 4 Conn J Intl L at 465 (cited in note 2). For example, airport runways of less than 2100 meters fall within Annex II, not Annex I. Council Dir 85/337, annex II(10)(d), 1985 OJ at L175:46 (cited in note 3).
  \item \textsuperscript{88} The Commissioner's actions also might imply that Member States do not enjoy total discretion to control what projects are to be assessed. Among the charges levelled against the United Kingdom is the allegation that "UK legislation gives too much discretion to the competent authorities to decide whether for Annex II projects an assessment should be required." Commission of the European Communities, \textit{Opening of Infringement Proceedings Against the United Kingdom in Respect of the Implementation of Directive 85/337/EEC on Environmental Impact Assessment RAPID} (Oct 17, 1991) (LEXIS, Europe Library, Allnws File).
  \item \textsuperscript{87} Brown, ed, \textit{The Court of Justice} at 279 (cited in note 74).
  \item \textsuperscript{89} Council Dir 85/337, preamble, 1985 OJ at L175:40 (cited in note 3).
  \item \textsuperscript{90} Id.
\end{itemize}
the information developers must provide to licensing authorities. The description of the project should include estimates of "expected residues and emissions (water, air, and soil pollution, noise, vibration, light, heat, radiation, etc.)." This language suggests that the Directive's primary concern is pollution prevention. However, Annex III, section 3, contains a much broader list of "aspects of the environment likely to be significantly affected." These include "population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape, and the inter-relationship between the above factors." Thus, section 3 expands the first section's focus, suggesting that perhaps more than physical effects fall within the Directive's scope.

The language of Annex III also provides some assistance. The Annex helps clarify what the Directive's drafters meant by "material assets," which otherwise could be interpreted extremely broadly. The words "architectural and archaeological heritage" suggest that the EC might have meant the built-up environment characterized by some type of cultural, historical, or aesthetic value. Annex III does not contemplate the assessment of effects on, for example, cars or coins.

While Article 3 requires assessment of effects on "human beings," the "aspects of the environment likely to be affected" listed in Annex III do not include human beings, but do include "population." The distinction between "human beings" and "population" has never been clarified. Effects on human health are clearly cognizable under the Preamble, but do such effects include increasing crime rates or changes in a community's demography? "Human beings" and "population" have different connotations, but because these distinctions can cut many ways, a comparison of their meanings fails to clarify what effects fall within the scope of the Directive. Contextual analysis of the language of the Directive thus offers relatively little assistance in determining what environmental effects should be assessed.

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93 Id.
D. Drafting History

The ECJ disfavors arguments based on drafters' intent. However, since some evidence of the evolution of the EIA Directive is available, an examination of the changes from earlier drafts and opinions may shed light on possible interpretations of the Directive. Unfortunately, this approach is of limited help in determining whether EIAs must include socioeconomic effects.

In 1980, the EC Commission published a draft version of the Directive ("Draft Directive"), its twenty-first such version. In the Draft Directive, Article 3 provides that EIAs:

shall consider the effects of projects on
• water, air, soil, climate, flora, fauna and their interrelationships;
• the built-up environment, including the architectural heritage, and the landscape.

The final version of the Directive adds "human beings" to the first set of factors and substitutes "material assets and the cultural heritage" for the draft's second set of factors. Furthermore, the final Directive completely omits a second subsection to Article 3, which read "(2) The effects on these resources shall be assessed by reference to the need to protect and improve human health and living conditions as well as to preserve the long term productive capacities of the resources."

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86 See text at notes 74-82.
87 The European Commission and Council publish neither their debates nor most of their working documents. However, available materials include a draft directive on environmental assessments, the Economic and Social Committee's and the European Parliament's responses to that draft, written questions to the Commission concerning the Directive, a subsequent amendment, and secondary reports of possible future amendments. Some commentators view the preamble to EC legislation as part of the document's history. See, for example, Brown, ed, The Court of Justice at 279 (cited in note 74). However, since the EEC Treaty requires the Council to set forth in a preamble its reasons for adopting the legislation, preambles are actually evidence of the intent of the enacting Council. EEC, Art 190. This Comment treats the Directive's preamble as part of an enacted text, similar to Congress's official statements of purpose and policy, NEPA, 42 USC §§ 4321, 4331 (1988), and not as a preparatory document or extraneous explanation.
The Commission submitted the Draft Directive to both the Economic and Social Committee and the European Parliament for comments. The Committee's opinion was that the Draft Directive "lays down the common principles on which the assessment should be based, viz. protection of human health, the safeguard of living conditions and preservation of natural resources." The Committee noted its concern that

"Even when read in conjunction with Annex [III] ... certain expressions, such as "significant effects" and "substantial changes," may give rise to difficulties of interpretation and result in dispute that could cause harmful delays in the determination of planning applications." The Committee also urged that Article 3 more clearly make "man ... the point of departure for the assessment of the effects of projects ..." The amendments suggested by the European Parliament propose that the Directive define "environment" as "the physical human environment." This language resembles United States courts' narrow reading of NEPA more than the broad language of the Draft or final Directive.

Since the Directive's adoption, the Commission has proposed only one amendment to the final Directive; this proposed amendment would merely require EIAs for projects likely to affect a "special protection area," such as a conservation site. Other sources have reported the possibility of future amendments to broaden the Directive's scope. However, the Commission in 1990 indicated that the only amendment under consideration related to agricultural projects.

The Directive's drafting history is too sketchy and inconclusive to clarify what is meant by the final, enacted text. Typical of

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103 Id at 10.
104 Id.
107 See, for example, Measure Aims to Strengthen Enforcement of EC Directive on Environmental Assessment, 14 Intl Envir Rptr (BNA) 46 (Jan 30, 1991).
108 Answer to Written Question No 1503/90 by Mr. Gianfranco Amendola, et al. to the Commission of the European Communities, 1990 OJ C312:42.
the European Commission and Council, the drafting history is
manifestly incomplete. Their debates are secret, and, thus, the
most direct route to the real intent of the drafters, assuming such
community intent exists, is blocked.

The drafting documents and other governmental bodies' opin-
ions also leave many questions unanswered. For example, the final
text substitutes "human beings" for the omitted subsection of Ar-
ticle 3, but the Directive does not indicate why. Is the enacted lan-
guage broader or narrower than the words it replaced, or their
equivalent? Does the change reflect the Committee's suggestion
that man be the "point of departure?" Similarly, what does the
switch from "built-up environment" to "material assets and the
cultural heritage" mean? Was it an attempt to define "environ-
ment" as "the physical human environment," as the European
Parliament desired? The drafting history of the Directive reveals
nothing about the drafters' intended scope.

III. NARROWING THE SCOPE OF THE EIA DIRECTIVE

Because the Directive's language and drafting history fail to
clarify the sorts of environmental effects the Commission intended
EIS's to consider, policy arguments must help define the Direc-
tive's scope. As noted above, the ECJ is much more willing than
the United States Supreme Court to base its decisions on policy in
order to resolve textual ambiguities.

Clearly, the broadest reading of "environment," even with the
qualifiers "human beings" and "material assets and the cultural
heritage," would place a draconian burden on developers and deci-
sionmakers, as the United States Supreme Court realized in
PANE. Nearly any project, especially ones such as those listed
in the two Annexes, will produce some effect on people and places.
Such an interpretation would realize the Economic and Social
Committee's fear of "harmful delays in the determination of plan-
ning applications." In addition, allowing non-environmental con-
cerns to creep into decisionmaking under the banner of environ-
mentalism unnecessarily complicates the task of licensing. The EC
may also desire to exclude effects that are difficult to quantify, as

110 Id at 59. See Part II B of this Comment. See also, Brown, The Court of Justice at
290 (cited in note 74).
112 Economic and Social Committee, Opinion on the Proposal for a Council Directive,
these, too, may be unduly burdensome to developers and authorities. Efficiency and manageability require some limitation on the scope of applicability.

Further, as the PANE court noted, assessing some types of effects requires particular expertise in, for example, psychology or sociology.\textsuperscript{113} Developers are even less likely than federal agencies to have such abilities or to be able to acquire them, and local licensing bodies are probably unaccustomed to considering such information. Moreover, the Directive makes clear that developers need not obtain such technical knowledge.\textsuperscript{114} The scope of cognizable impacts must be narrowed to take into account the limited expertise of developers and licensing authorities.

Allowing the inclusion of still other types of impacts runs the risk of admitting social or political choices of national importance into what are often local licensing decisions. Decisions that should be left to national or supranational political processes, such as whether to use nuclear power, might be preempted at the local licensing level, as opponents pressure authorities to require information from developers and to consider any and all possible effects of nuclear projects. Decisionmakers must hear opposing viewpoints, but some debates are more appropriately conducted in the national legislature, not the local planning authority's office. The Directive, like NEPA, seeks to protect the physical environment. Those with non-environmental objections to a particular development should not be able to use the Directive as a means of delaying the project. The scope of the Directive must be narrowed in some way to ameliorate these problems.

A strict textual interpretation of the Directive might prohibit using the United States federal courts' distinction between primary and secondary impacts. Article 3 requires assessment of direct and indirect effects, and Annex III mandates that developers' descriptions of the effects of their projects include "direct effects and any indirect, secondary . . . effects of the project."\textsuperscript{115} However, defining "environment" narrowly will not displace the provisions of Article 3 and Annex III. Instead, under such an interpretation, Article 3 and Annex III might require assessments for only

\textsuperscript{113} PANE, 460 US at 776.

\textsuperscript{114} Article 5(2) and Annex III set forth the types of information the developer must provide. Although these lists require a great deal from developers, Article 5(1)(b) and Annex III(7) provide some relief. Annex III(7) allows developers to indicate "technical deficiencies or lack of know-how" when providing information to authorities, and Article 5(1)(b) directs Member States to take into account "current knowledge and methods of assessment."

those projects that affect the physical environment directly or indirectly. This interpretation permits a restriction on the Directive's scope like that created by the United States Supreme Court in PANE for NEPA.

Further, application of the ECJ's teleological approach also leads to a conclusion that the Directive's focus must be narrowed. As discussed in Part II, the statutory language and drafting history of the Directive display a primary concern for ecological impacts. Focusing the assessment requirement on physical, environmental impact thus comports with the general tenor of the Directive.

Once local authorities determine that an EIA is needed, a broader range of impacts should also be assessed. However, the EC should follow the United States Supreme Court's nexus requirement: the Directive should not sweep into the decisionmaking effects that are not closely linked to a physical environmental impact. Such effects will rarely be "significant" and will thus fall outside the Directive's range of application. If the effects do not satisfy the nexus requirement but are still "significant," the licensing authorities should address them independently, rather than under the Directive. The Directive was not intended to restrict what the authorities can consider; rather, its purpose was to clarify one type of factor they must consider.

The [EIA] Directive does not cut across the right of Member States to exercise political, social, and economic judgments in their broadest sense; its effect is limited to increasing the significance of environmental effects in the decision-making process.

Application of these limitations will clarify the developers' tasks under the Directive. Difficult questions will remain, but clearer requirements will reduce the number of potential claims of insufficient assessments. A focus on the physical environment, covering ecological effects, impacts on the built-up environment with special significance, and damage to human health will effectuate the Directive's goals of protecting the environment and improving the quality of human life.

116 See text at notes 75-77.
117 See Parts II C-D of this Comment.
118 This will place little additional financial burden on developers and licensing authorities, since "the costs involved in impact assessments generally constitute a very small percentage of the total cost of a project, of the order of 0.25% to 0.75%." Johnson & Corcelle, Environmental Policy of the European Communities at 255 (cited in note 56).
119 Grant, 4 Conn J Intl L at 467 (cited in note 2).
The EC Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment was modeled after the United States' National Environmental Policy Act. Despite significant differences between the two statutes, an analysis of the evolution of what "environmental effects" have been considered by United States courts as sufficient to trigger NEPA's EIS requirement is valuable for Member States and developers interpreting the Directive. In the face of ambiguous statutory language and inconclusive drafting history, interpreters of the Directive should look to the policy arguments made by United States courts.

These ambiguities suggest that the EC should seriously consider amending the Directive so that Member States will not attempt to use it as a panacea to force decisionmakers to consider all social problems in their licensing or land-use planning decisions. Local decisionmakers must consider factors other than the impact on the physical environment. However, the Directive, like NEPA, will be more efficient and truer to its original purpose if interpreted narrowly. The Directive should not deter construction and economic development, nor should it let projects go forward without prior consideration of their effects on those aspects of our environment that are too often overlooked.