The Interface of Legal and Esthetic Considerations[1]

Richard C. Smardon[2/]

Abstract: This paper is an overview of development of legal/policy factors affecting visual resource management. Review of major legal issues, court cases, laws and administrative decisionmaking reveals that the "action" regarding legal and aesthetic issues is currently in the public arena as managed by administrative agencies.

Analysis of key court cases reveals that the courts always go back to the "context" at hand to make a decision, and that existing legislation mentioning and/or providing inclusion of aesthetic or visual resources in environmental planning and decisionmaking creates a "protective net" over much of the Federal and common trust lands and resources. Failure to consider adequately visual resources in many cases could be grounds for citizen suits although legal action is diminishing and more activity lies within agency administrative discretion. Detailed legislation, citing the contextual aesthetic properties and management prescriptions of an individual area, and/or detailed agency inventory, analysis and management are sound strategies.

INTRODUCTION

Purpose

What do "The Old Man in the Mountain,"[3/] "Scenic Hudson,"[4/] "Mineral King,"[5/] "Rainbow Bridge,"[6/] "Walton v. St. Clair,"[7/] East Meadow Creek,"[8/] "Overton Park,"[9/] and "Death Valley Monu-ment"[10/] all have in common? They are all major federal court cases which have been essential to the development of environmental

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[1/] Presented at the National Conference on Applied Techniques for Analysis and Management of the Visual Resource, Incline Village, Nevada, April 23-25, 1979.

[2/] Post Graduate Research Landscape Architect, Department of Landscape Architecture, University of California, Berkeley and Research Cooperator, Land Use and Landscape Planning Methodology Research Unit, Pacific Southwest Forest and Range Experiment Station, Berkeley, CA.

[3/] Appalachian Mountain Club et al. v. Claude S. Brinegar et al., 394 F. Supp. 105 (U.S. Dist. Ct. D.N.H. March 26, 1975).

[4/] 354 F. 2d 608 (2nd Cir. 1965), cert denied, 384 US (1966).

[5/] Sierra Club v. Morton, 92 S. Ct. 1361, 405 US 727 (1972).

[6/] Friends of the Earth v. Armstrong, 485 F. 2d 1 10th cir. 1973).

[7/] Walton v. St. Clair, 313 F. Supp. 1312 (1970).

[8/] Parker v. US, 448 F. 2d 793 (1971) cert den 92 S. Ct. 1252 (1971).

[9/] Citizens to Preserve Overton Park v. Volpe, 401 US 402, 91 S. Ct. 814 (1971).

[10/] Death Valley National Monument et al., v. the Dept. of the Interior et al., Civ. Act No. 76-401 (D.N.D. Cal. filed Feb. 26, 1976).

law and have all developed from controversy arising from agency treatment or non-treatment of aesthetic and environmental values. They are all cases of the "pig in the parlor" or, what is or is not an appropriate action given the context of a highly aesthetic or scenic public environment whose aesthetic qualities are believed to be threatened. The primary purpose of this paper is to explore in detail the "pig in the parlor" question and to gain a structured overview of the ways in which aesthetic values have a substantial legal basis for environmental planning activities.

In doing the above, the author is not solely examining the importance of specific court cases or administrative or legislative programs, but is assessing the likelihood of major trends. For instance, are aesthetic values gaining a greater legal basis for incorporation into environmental planning and decisions? If so, what are the key legal criteria or tests involved? Which mode of law seems best to treat aesthetic value questions? Is it 1) common law/nuisance doctrine, 2) the use of police power, 3) the use of eminent domain, or 4) legislation? Or are there other modes or combinations of modes? Finally, an often ignored question is what constitutes the best marriage of legal treatment as practiced by lawyers and administrators with use of aesthetic analysis and theory as practiced by landscape architects, planners and social scientists?

A substantial review (Smardon 1978) exists which addresses the courts' role in determining the legal basis for addressing questions of environmental aesthetics as well as federal, state and local legislation and controls which have attempted to provide for the consideration of environmental aesthetics in the planning process. We must develop a structure of analysis which is responsive to legal theory and constructs, to aesthetic theory and analysis, and to planning applications. There must be a "meeting of the minds" of the professions involved in these areas if environmental aesthetics is to evolve into an effective part of environmental planning processes.

EVOLUTION OF ENVIRONMENTAL AESTHETICS IN THE LAW

Common Law/Nuisance Doctrine

Let us look briefly at the evolution of aesthetic controls in environmental planning from early common law/nuisance doctrine, to use of the police power and eminent domain, and more recent uses of local, state and federal legislation and programs. The history and development of legal theory pertaining to aesthetic controls in environmental planning is inseparably linked to early activity in nuisance doctrine and use of police powers to control aesthetics primarily in urban environments.

Personal Injury

The fundamental issue in common law (i.e., rules of law not based on written statues) and/or nuisance doctrine and aesthetics is "recognition of visual annoyance as an element of personal damage.[11/] The classic situation is a landowner's use of his or her property in a manner which offends neighbors' sensitivities or sense of aesthetics, such as operating a landfill or auto grave yard in a residential area. The criteria are subjective and the situations are infinite. Classic examples of visual nuisances which range from auto junkyards to "spite-fences," giant signs, storage tanks and funeral parlors.

In general, common law/nuisance cases have raised the question of whether real property owners could be denied "unsightly" uses of their land. Injunctions were usually sought which would modify or stop this "unsightly use." The usual response of the courts has been not to recognize such situations as constituting a nuisance. Courts feel uncomfortable administering a subjunctive standard relating to taste especially if it affects private property rights. The courts also have not found a useable negative standard relating to visual incongruity of land use or activity. However, courts have recognized personal smell and hearing nuisances.

There seems to be a number of exceptions to the above described situation given the following situations or rules of guidance:

1. The land use or activity would constitute a nuisance to the "normal man, the man of ordinary habits and ordinary sensibilities.[12/]

[11/] Houston Gas and Fuel Co. v. Harlow, 297 S.W. 570 (Tex. Civ. App. 1907); and Leighty, 1971, Aesthetics as a Legal Basis for Environmental Control.

[12/] Gus Blass Dry Goods Co. v. Reinman & Wolfort, 102 Ark. 287, 293, 143 S.W. 1087, 1090 (1912); accord, Cox v. Schlekhter, Ind. App._ _, 262 N.E. 2d 550 (1920); and Stevens v. Rodoport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914).

2. It can be proven that spite or malice was the motivation in obstructing the plaintiff's "right" to a comfortable, unobstructed view.[13]

In the latter case (#2) the emphasis of the courts' concern would be on proving spite or malice rather than any aesthetic damage. Because of the lack of an objective standard for case #1 above, the courts have rarely supported the supposition that "mere unsightliness" constitutes a nuisance. The only notable exception is Parkersburg Builders Material Co v. Barrach,[14] in which the court felt that an injunction would have been appropriate if the auto wrecking operation in question had been located in a predominately "residential" neighborhood. Thus, the court was taking steps to formulate the standard of visual land use congruity or compatibility as perceived by the "common or ordinary man." There has been visual landscape preference and evaluation testing work done which has used the criterion of congruity or compatibility of different land use combinations represented by photographs of actual landscapes or models. This includes landscape preference and evaluation work by Hendrix and Fabos (1975), and Wohwill (1978).

Public Injury

Recent advances in elimination of procedural obstacles to standing to sue on the basis of "public interest" rather than personal damages have provided the basis for class actions for equitable or declaratory relief. Many of the court cases critical to the development of liberalized rules of standing that let individuals or environmental groups gain access to the court system to litigate environmental issues also were cases with major environmental aesthetic issues.[15]

As defined in the Association of Data Proc. Serv. Org. Inc. v. Camp decision,[16] the Administrative Procedures Act[17] allows individuals or groups standing in order to sue for damage to the public aesthetic interest. Thus the plaintiff needs only claim an injury in fact to value ("right," "concern," or "interest") that is protected by law. The Supreme Court has further elaborated that this value may be aesthetic, conservational, or recreational.[18]

All of the above may do more for attainment of standing to sue than for justicability of aesthetic issues on their merits. Public interest litigation thus far has centered on statutory interpretations. An example in point would be the classic case of Scenic Hudson Preservation Conference v. FPC[19] where it was stated:

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[13] See Norton v. Randolf, 176 Ala. 381, 58 So. 283 (1912); Hormsby v. Smith, 191 Ga. 491, 13 S.E. 2nd 20 (1941); Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888); Dunbar v. O'Brien, 117 Neb. 245, 220 M.W. 278 (1928); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Hibbard V. Halliday, 58 Okla. 244, 158 P. 1158 (1916); and Erickson v. Hudson, 70 Wp. 317, 249 r. 2d 523 (1952).

[14] 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937)(concurring opinion).

[15] See Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2nd Cir. 1965), cert. denied, 384 U.S. 941 (1966) (construction of a pump storage hydroelectric project at Storm King Mountain in New York); Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970) (mineral claims in the Boundary Waters Canoe Area); Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189 (W.D. Tenn.), aff'd, 432 F.2d 1307 (6th Cir. 1970), rev'd, 401 U.S. 402 (1971)(highway corridor through a municipal park); Parker v. United States, 309 F. Supp. 593 (D. Colo. 1970) (Forest Service timber sale); Sierra Club v. Hickel, Civil No. 51,464 (N.D. Cal. 1969), order vacated, 433 F.2d 24 (9th Cir. 1970), cert. Granted, 401 U.S. 907 (1971)(commercial recreation development by Walt Disney Productions in Mineral King Valley of the Sequoia Nat'l Forest).

[16] Association of Data Proc. Serv. Org. Inc. v. Camp, 397 U.S. 150, 153-54 (1970).

[17] 5 U.S.C., s. 702.

[18] Sierra Club v. Hickel, 433 F. 2d 24, 32 (9th Cir. 1970), cert. granted sub. nom.; Sierra Club v. Morton, 401 U.S. 907 (1971), quoting Asso. of Data Proc. Serv. Org. Inc. v. Camp.

[19] Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (construction of a pump storage hydroelectric project at Storm King Mountain in New York State).

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas must be held to be included in the class of 'aggrieved' parties under s. 313 (b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.[20/]

So it is important that aesthetic considerations be specifically mentioned within the applicable statutes which bear upon the case at hand, such as the Federal Water Power Act,[21/] as the courts have not usually transcribed aesthetic considerations into case opinions. It is also clear in most states that environmental standards should be established through legislation and should not be the by-product of private litigation.

Few environmental cases have been won on the merits of the adequacy of treatment of aesthetic issues. Notable exceptions include Parker v. United States [22/] and Citizens Committee for the Hudson Valley v. Volpe.[23/] Both of those cases contained environmental issues with aesthetic factors, but each also had particular statutory language which was examined as in Scenic Hudson v. FPC. Citizens to Preserve Overton Park, Inc. v. Volpe [24/] indicated that specific areas such as publicly owned park and recreation lands, wildlife refuges and historic sites may have significant aesthetic values and may be disrupted, by Department of Transportation funded projects, only under extraordinary circumstances. Again, there were specific statutes involved such as section 4(f) of the Transportation Act of 1966.[25/]

[20/] Id. 616.

[21/] 16 U.S.C. s. 803(a) (1964).

[22/] 309 F. Supp. 593 (p. Colo. 1970).

[23/] 302 F. Supp. 1083 (S.D.N.Y. 1969) aff'd, 425 F. 2d 97 (2d Cir.) cert. denied, 400 U.S. 949 (1970).

[24/] 401 U.S. 402 (1971).

[25/] 49 U.S.C.A., s.1653(f), and 23 U.S.C.A. 138.

A procedural problem exists in that groups or publics may not always gain standing to sue concerning recreation and aesthetic 'interests' as Scenic Hudson would indicate. Sierra Club v. Hickel [26/] raised a critical procedural point. This point is that the adverse impact must be direct and immediate in the sense that local residents and users of the area must claim specific "injury." An outside conservation group claiming general concern or interest in the area would not have standing under the Sierra Club v. Hickel test. There have been much discussion and writing about the standing issue in general in regard to its application to environmental cases. Proper treatment of this issue is not possible within the confines of this paper.

The other important points to be gained from Sierra Club vs. Hickel are that the court would 1) be willing to discount the preservation aspects of aesthetic issues when a reasonable amount of planning to treat visual impacts can be demonstrated, and 2) acknowledge that most aesthetic considerations may be a matter of agency discretion. Thus agency procedures and guidelines for aesthetic planning may assume great importance, depending upon the extent to which courts become burdened with environmental aesthetic issues. In cases where the courts examined or interpreted existing specific statutory language, the agency regulations, guidelines, or processes would be accepted as reasonable by virtue of their existence, unless 1) they proved to be "arbitrary or capricious;" or 2) they were contradictory with original statutory language; or 3) they did not fulfill the original statutory language.

Both Leighty (1971:1370) and Broughton (1972:500) agree that despite the few cases dealing with aesthetic merits, private litigation will move toward " public interests" rather than "private injury." Leighty (1971:1370) stresses, however, that there needs to be pre-existing legislative or constitutional declarations of policy to sustain such cases.

Beyond Public (Personal?) Injury

The test for standing devised in the Mineral King case may be legally and administratively desirable, but it causes some

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[26/] 433 F. 2d 24 (9th CA. 1970), cert. granted sub. nom., Sierra Club v. Morton, 401 U.S. 907 (1971) and Walton v. St. Clair, 313 F. Supp. 1312 (1970).

serious conceptual problems from an environmental aesthetics perspective. The standing test restated is that one who is "injured in fact" also had to prove "injury" by proof of "use" of the area in question.

Stone points out that some natural objects and landscapes are affected differently by common law than other natural objects or landscapes. For instance, rivers, lakes, oceans, dunes, air, streams (surface and subterranean), and beaches are held in common trust under the "public trust doctrine"[27/] for the public to have legal access to, or enjoy certain uses of the area. These common trust resources would be treated differently than natural objects on traditionally private land such as a pond on a farmer's field, or a stand of trees on a suburbanite's lawn. Communal resources notwithstanding, however, Stone maintains that:

> None of the natural objects, whether held in common or situated on private land, has any of the three criteria of a rightholder. They have no standing in their own right, their unique damages do not count in determining outcome, and they are not beneficiaries of awards. (Stone, 1973:16)

Stone laments that even when measures have been taken to conserve natural objects it is for "our benefit" or "our use," an anthropocentric philosophy, and he advocates that the environment gain recognition for its own injuries through use of a guardian appointed solely to represent the interests of the environment. Stone's argument has ecological merit in its implications for the "rights" and "benefits" of the environment, but does little directly for environmental aesthetics. This is because environmental aesthetic values are dependent upon the interaction of man <u>with</u> the environment; we must feel it, see it, experience it, etc.

There has been some use of Stone's arguments. One of these uses is Justice Douglas's dissent to the Supreme Court decision on Mineral King[28/] and a recent court case where the environment has sued in its own behalf, i.e., <u>Death Valley National Monument et al v. The Department of Interior et al</u>.[29/] Aesthetic issues also figure prominently in this case as disfigurement of the desert landforms from mining activities is one of the major issues involved.

Use of the Police Power

A second legal basis for aesthetics is the use of the police power to control aesthetic or visual quality. Use of the police power to control aesthetic quality has been predicted since the 1900's,[30/] but there still remain many problems with the use of police power for aesthetic control. According to Leighty the basic problem is that "police power can be exercised only in the traditionally accepted subject areas of public health, safety, welfare, and morals" (Leighty, 1971:1373).

Most courts until recently have been hesitant to include community appearance under public welfare, or if they did the issue of community appearance was "masked" by other issues dealing with public morals, health, or safety. Recent cases[31/] however, have upheld the direct application of general welfare as a sufficient basis for exercising statewide police regulation concerning aesthetic resource use. Of these

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[27/] Public trust doctrine could be used to achieve environmental protection. See Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E. 2d 114 (1966), discussed in Sax, 1970, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, Mich. Law Rev., 68: 492-509.

[28/] Douglas, April 19, 1972, Sierra Club v. Morton: Minority Opinion.

[29/] Death Valley National Monument et al., v. the Dept. of the Interior et al., Civ. Act. No. 76-401 (D.N.D. Cal. filed Feb. 26, 1976).

[30/] See Henry P. Chandler, 1922, The Attitude of the Law Toward Beauty, American Bar Asso. Journal, 8: 470-474; and Vance G. Ingalls,1937, The Law of Aesthetics, American Bar Asso. Journal, 23: 191-193.

[31/] See City of Phoenix v. Fehler, 90 Ariz. 13, 17, 363 P2d 607, 609-10 (1961); Cromwell v. Ferrier, 19 N.Y. 2d 263, 225 N.E. 2d 749, 279, N.Y.S. 2d 22 (1967); People v. Stover, 12 N.Y. 2d 462, 191 N.E. 2d 272, 240 N.Y.S. 2d 734, appeal dismissed, 375, U.S. 42 (1963); Oregon City v. Hartke, 240 Ore. 35, 400 P. 2d 255 (1965); Bilbar Constr. Co. v. Easttown Imp. Bd. of Adjustment, 395 Pa. 62, 141 2d 85, 856 (1958).

more recent cases Oregon City v. Hartke [32] goes farthest in two ways. First the case indicates that aesthetic values may provide a valid basis for public land use controls in Oregon, whether in condemnation proceedings or otherwise, and second, it suggests that aesthetics alone will support police regulation. However, this is the extreme progressive position and exceeds the general trend across the country.

Despite the apparent trend toward a quality environment for visual purposes, the absence of a clear standard or authority for legislation and other regulations grounded on aesthetics remains problematic for the use of aesthetic police power in most jurisdictions.

Eminent Domain and Scenic Easements

The use of eminent domain is closely related to the use of police power for aesthetic purposes. Instead of regulating the use without compensation for public purposes, eminent domain takes the title of the land in fee (in total) or partially in the form of an easement for public purposes. As with the use of police power, there are prominent constitutional issues involved with the use of eminent domain for aesthetic purposes such as conflict with Fifth and Fourteenth Amendments.

A direct illustration of the use of eminent domain for aesthetic purposes under state law is found in Kamrowski v. State.[33] This case dealt with a legislative program in Wisconsin for the condemnation of scenic easements along the Mississippi River to preserve natural, undeveloped views for passing motorists. The condemned area would continue to be used for agricultural production but could not be used for more intensive purposes such as residential or commercial. The scenic easement program was challenged on the basis that "public enjoyment of the scenic beauty of certain land is not a public use of such land...."[34] The court held that aesthetics may provide the dominant objective for a condemnation proceeding using support from an earlier case [35] which had declared that "enjoyment of scenic beauty is a legal right."[36] What is even more interesting is the definition of the public use in a purely aesthetic vein by the court:

> "The learned trial judge succinctly answered plaintiff's claim that occupancy by the public is essential in order to have public use by saying in the instant case, 'the occupancy is visual.' The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of the rights in land which have been taken in the form of a scenic easement...[37]

The court ruled in favor of the scenic easement program. This concept of "visual occupancy" for scenic easements also corresponds closely with visual analytical tools being developed to define visual corridors and viewsheds.[38] Thus delineating viewsheds could lead to delineating areas of legal public "visual occupancy" which could be protected and maintained.

Federal, State, and Local Aesthetic Legislation and Programs

There is an ever increasing amount of legislation and resultant programs at the federal and state level which directly or indirectly call for aesthetic considerations (See Smardon 1978). Since most trends seem to point toward the need for existing statutory language to insure consideration of aesthetic values in environmental planning; this is the major vehicle for ensuring adequate consideration of aesthetic values. In questions involving issues of standing, use of police power and eminent domain, courts generally look to existing legislation as an indication of public policy support and sensitivity to environmental aesthetics.

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[32] 240 Ore. 35, 400 P. 2d 255 (1965).

[33] 31 Wis. 2d 256, 142 N.W. 2d 793 (1966).

[34] Id. at 261, 142 N.W.2d at 795.

[35] Muench v. Public Serv. Comm'n, 261 Wisc. 492, 53 N.W.2d 514 (1952).

[36] Id. at 511-12, 53 N.W.2d at 522.

[37] 31 Wisc. 2d 256, 265, 142 N.W. 2d. 793, 797 (1966).

[38] For landscape analytic approaches to delineate "visual occupancy" or viewshed see; Michael R. Travis, Gary G. Elsner, Wayne D. Iverson, and Christine G. Johnson, 1975, VIEWIT: Computation of Seen Areas, Slope and Aspect for Land Use Planning, Pac. S.W. For, and Range Exp. Stn., Berkeley, Calif., USDA For. Serv. Gen. Tech. Report PSW-11, 70p.

What we find are A) broad (in scope) Federal and state legislative acts dealing with programs such as land use planning[39] or coastal zone planning[40] that directly include aesthetic considerations in their language, B) broad acts that contain indirect langauage[41] in relation to aesthetics, and C) specific legislation affecting specific agencies. Agency specific legislation can be subdivided into scenic corridor[42] protection and mandates for management of specific isolated land or water areas.[43]

[39] See Hawaii Land Use Law PP187, 961, Hawaii Rev. Stats. s. 205 et seq. (1968); Vermont Act 250, 1970, 10 Vermont Stats. s.s. 6001-6091 (Supp. 1970); Maine title 38, Maine Rev. Stats. s.s. 401-488 (Supp. 1970): Oregon Rev. Stats. Ch. 197,s.s. 215.505 -.535; and Appalachian Regional Development Act, 1965, Pub. 1. No. 91-148, 83 Stat. 360.

[40] See Coastal Zone Management Act of 1972, 16 U.S.C., s. 1451 et seq.; Tahoe Regional Planning Compact, 1969, Pub. L. No. 91-148, 83 Stat. 360; California Coastal Act of 1976, Calif. Resources Code, Div. 20, Art. 6, s. 30251; and Delaware Coastal Zone Act, Ch. 70, Title 7, Del. Code Anno. s.s. 7001 et seq (1968).

[41] See Michigan Environmental Protection Act, Mich. Comp. Laws Anno. s.s. 691.1201 -1207 (Supp. 1971); The Fish and Wildlife Coordination Act, 16 U.S.C. s.s. 661-66 (1970); and the Multiple use Sustained Yield Act of 1960, 16 U.S.C. s.s. 528, 31 (1970).

[42] See Highway Beautification Act of 1965, 23 U.S.C. s. 131 (dealing with billboards), s. 1361 (dealing with junkyards), and s. 319 (dealing with landscaping) (1965); the National Wild and Scenic Rivers Act, 16 U.S.C. s.s. 1241-1249 (1968).

[43] See for example; 16 U.S.C. s. 460q-3 (Whiskeytown-Shasta-Trinity National Recreation Area in California); 16 U.S.C. s. 460r-4 (Mount Rodgers National Recreation Area in Virginia); 16 U.S.C. s. 460y-5 (King Range National Conservation Area in California); 16 U.S.C. s. 460p-4 (Spruce Knob-Senecca Rocks National Recreation Area in West Virginia); the National Historic Landmarks Preservation Act, 42 U.S.C., s. 1500d-1 and associated HUD acquisition program, 16 U.S.C. ss. 426-430 (1970).

Probably the National Environmental Policy Act[44] affecting Federal agency actions and statewide mini-NEPAs has had more potential for affecting aesthetic considerations than any other statute. This is because NEPA acts as a wide ranging net which catches many other applicable federal statutes in the process of assessing the environmental impacts of projects and activities. A Federal agency not only has to comply with NEPA itself, but many other interconnected Federal statutes as well as executive memoranda and Federal regulations.

Critical court cases in relation to NEPA and aesthetics are reviewed by Anderson (1973:29-44) and the Environmental Law Recorder. Most of the significant court cases dealing with NEPA and aesthetics are those which address the issue of standing as previously discussed in this paper. According to Anderson the standing test developed in Sierra Club v. Morton [45] has presented no insurmountable barriers to environmental groups in attaining standing to sue on aesthetic and environmental grounds under NEPA. For instance the plaintiffs in West Virginia HighlandsConservancy v. Island Creek Coal Co.[46] successfully claimed injury under "aesthetic, conservational, or recreational interests." Other NEPA cases with similar rationales of "use" to gain standing include the Cross-Florida Barge Canal Case[47], Brooks v. Volpe [48], and Kalur v. Resor.[49]

In other NEPA cases groups gained standing under "aesthetic, recreational, or conservational interests" by combining the

[44] 42 U.S.C. s. 4321 et seq.

[45] Sierra Club v. Morton, 92 S. Ct. 1361, 405 US 727 (1972).

[46] 441 F.2d 232, 1 ELR 20160 (4th Cir. 1971).

[47] Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F. Supp. 878, 1 ELR 20079 (D.D.C. 1971).

[48] 319 F. Supp. 90, 1 ELR 20045 (W.D. Wash. 1970), 329 F. Supp. 118, 1 ELR 20286 N.D. Wash. 1971), rev'd, 450 F.2d 1193, 2 ELR 20139 (9th Cir.), 350 F. Supp. 269, 2 ELR 20704 N.D. Wash.), 350 F. Supp. 287 N.D. Wash.).

[49] 335 F. Supp. at 1, 1 ELR 20637 (D.D.C. 1971).

criterion of "use" with neighborhood proximity.[50] Lower court decisions handed down after Sierra Club v. Morton had no problems with standing as long as they included the specificity of "use" dictated by Sierra. Thus the Sierra Club v. Morton test as used in NEPA cases has not proven to be an impossible hurdle to jump in order to gain standing by alleging injury to "aesthetic, recreational, or conservational interests."

Review of Major Progressions and Trends

We can summarize the evolution of aesthetic value treatment by the legal system into a number of significant trends.

1. A shift in emphasis from private action affecting private property (common nuisance) to local public action regulating private property (zoning and architectural controls); public action taking private property (eminent domain); and public action regulating public agency actions and public property (Federal and State Legislation) with some regulation and taking of common trust property (coastal zone, rivers, etc.).
2. A gradual shift of the courts' desires and abilities to face issues with environmental aesthetic values. This shift evolves from not facing the issues, to fictionalizing or masking aesthetics under other issues, and eventually to admitting a procedural right to address aesthetic injury in the anthropocentric sense of the present human user.
3. Both trend 1 and 2 above are dependent upon a highly erratic legal pendulum swinging from conservative to liberal decisions in linear time sequence.

DISCUSSION OF INHERENT PHILOSOPHICAL ISSUES AND EXTRA-LEGAL FACTORS

The following section of the paper is an effort to put the previous legal discussion in a distinctly non-legal perspective. Given the evolution of aesthetic value treatment by the legal system, some major philosophical questions and concepts must be discussed.

Role of Theory and Information

There is a need for more appropriate use of environmental aesthetic theory and methodology, but let us look at how the legal profession has utilized existing theories and methods. A number of lessons can be learned from actual experiences regarding the use of different methods or theories to assess environmental aesthetic values in legal contexts.

An interesting case is the Hells Canyon dams[51] applications. The Presiding Examiner William C. Levy, after noting the requirements of Section 102(2)(C) of NEPA[52] for full treatment and documentation of environmental problems, said of the scenic value of the Canyon:

> Finally, it must be recognized that we can not measure directly in dollars or quantifiable economic terms for purposes of any meaningful comparisons changing environmental scenic values, esthetics, or the loss to future generations of the existing river and its present or prospective uses or values.[53]

Dr. Luna Leopold proposed a method (Leopold and Marchand 1968) to quantify the aesthetic values of the Hells Canyon area in contrast to other riverscapes, but the hearing examiner rejected his attempt saying:

> Dr. Leopold's mathematical formulation of aesthetic values has little application to the choice between a river and a lake and the high 'uniqueness' factor assigned to undesirable as well as desirable features limits its usefulness in license proceedings. The 'unique characteristics of the canyon - narrow valley floors, high adjacent mountains, availability of distant vistas, and little or no urbanization' - exclude the river itself and will continue with or without the proposed development. The surrounding landscape will remain relatively as attractive, unique, and exceptional after development as before.

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[50] See Nolop v. Volpe, 333 F. Supp. 1364, 1 ELR 20617 (D.S.Dak. 1971); La Raza Unida v. Volpe, 337 F. Supp. 221, 1 ELR 20642 (N.D. Cal. 1971); ___F. Supp. ___, 2 ELR 20691 (N.D. Cal. 1972); and Anderson, 1973, p. 31.

[51] Presiding Examiners Initial Decision on Remand, in Pacific Northwest Power Company, Project No. 2243, and Washington Public Power Supply System, Project No. 2273, 1 ELR 30017 (1971).

[52] 42 U.S.C. s. 4332(2)(C) (1970).

[53] 1 ELR 30026-27 (1971).

> However, there will be a substantial increase over present usage.[54/]

Regardless of whether one agrees with the examiner's reasoning, he was stating that the quantitative method proposed did not address the issue at hand and was not appropriate given the legal and administrative context of the situation.

Let us switch from quantitative assessment of aesthetic attributes to the opposite pole, i.e., qualitative assessment. A number of expert witnesses were called upon to testify on the aesthetic attributes of Storm King mountain during the historic court case of Scenic Hudsonv. F.P.C.[55/] The testi-mony that Sive, counsel for the plaintiffs, thought was most strikingly eloquent (and hence effective) was Professor Scully's:

> It rises like a brown bear out of the river, a dome of living granite, swelling with animal power. It is not picturesque in the softer sense of the word but awesome, a primitive embodiment of the energies of the earth. It makes the character of wild nature physically visible in monumental form. As such it strongly reminds me of some of the natural formations which marked sacred sites in Greece and signal the presence of the Gods; it recalls Lerna in Argolis, for example, where Herakles fought the Hydra, and various sites of Artemis and Aphrodite where the mother of the beasts rises savagely out of the water. While Breakneck Ridge across the river resembles the winged hill of tilted strata that looms into the gulf of Corinth near Calydon.[56/]

Sive's strategy in using testimony such as this was to persuade the court that the aesthetic qualities of Storm King were so great that any diminishing of these qualities would leave society without these values (1970:1186-7). The second part of the strategy was to establish the uniqueness of Storm King at a par equal to landscapes such as national parks and monuments which would then be recognized as beyond any claims for use for power development or other industrial purposes. Thus we have between Leopold and Scully a complete range of type of information or method from highly quantitative to highly qualitative. Which is more appropriate?

The information or method must be appropriate to the context at hand. In keeping with many of the legal contextual tests and rules used in environmental aesthetics cases, there should be a contextual theory for use of environmental aesthetic information and methods. Such a theory has been proposed by Pepper (1937), an aesthetics philosopher. Pepper's contextualistic theory combines and allows for both qualitative and quantitative approaches to aesthetic appraisal.

Another possible approach is to utilize environmental psychology testing methods to ascertain the agreement levels of meanings of legal terms and criteria. Such an approach has been proposed for visual management of the Wild and Scenic Rivers (Smardon 1977); the California Coastal Zone (Wohwill 1978); and the Clean Air Act Amendments of 1977 (Craik 1979). In summary, environmental aesthetic information or theory application should not be done in isolation from the legal context, but in a complementary fashion.

Substantive vs Procedural Emphasis

Most of the issues discussed concerning aesthetics and the law have been procedural rather than substantive. This is probably as it should be. We do find judges trying to develop substantive tests and concepts concerning environmental aesthetics, such as "visual occupancy," "sensitivities of the average man," etc. We also find that legislation, such as the National Forest Management Act[57/] and the Federal Land Policy and Management Act,[58/] is becoming more specific as to how aesthetics is to be considered in environmental planning activities. This may mean that courts may get into more substantive issues if they do "fact finding" to see if agencies have done what the laws and regulations say they should be doing. This potential trend in substantive involvement by the legislatures

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[54/] 1 ELR 30026-27 (1971).

[55/] Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).(Licensing for proposed pump storage power plant at Storm King New York).

[56/] Record at 4888-89, In re Consolidated Edison Co. of New York, Inc. Project No. 2338 (F.P.C. 1967).

[57/] 16 U.S.C. s. 600 et seq. (1976).

[58/] 43 U.S.C. s. 1701 et seq. (1976).

and the courts may be problematic in that agency operational flexibility may be impaired or constrained. It also puts an impetus on the agencies to stay "one step ahead" by doing their homework in developing sound administrative procedures and substantive methods.

SUMMARY, FUTURE IMPLICATIONS AND DIRECTIONS

In summary public regulation and control through legislative mandate for the public environment and, on a more limited extent, for the private environment seem to be the most hopeful prescription for environmental aesthetics. In assessing the roles of the different actors in environmental aesthetic control a number of conclusions could be drawn.

Judges, legislatures and administrative agencies need to make better use of existing aesthetic theory and information so that theoretically compatible approaches are developed for environmental aesthetic protection. Many of the legal tests are of a contextual nature (Smardon 1978) and there is a corresponding contextual theory of aesthetics (Pepper 1937). Both could reinforce each other. Legal professionals need to work with landscape architects, planners, and social scientists and vice-versa. There needs to be a "meeting of the minds" over environmental aesthetics. If this happens better theory will be provided for legal test foundations, there will be a more orderly and rapid evolution of aesthetics and law, and methodologists will be confronted with more realistic environmental aesthetic questions and dilemmas.

LITERATURE CITED

Anderson, F. R.
1973. NEPA in the courts: a legal analysis of the National Environmental Policy Act, The Johns Hopkins University Press, 324 p.

Broughton, R.
1972. Aesthetics and environmental law: decisions and values. Land and Water Law Rev. 7(2):451-500.

Craik, K. H.
1979. The place of perceived environmental quality indices (PEQIS) in atmospheric visibility monitoring and preservation. Presented at Workshop on Visibility Values, Colorado State University, Fort Collins, Colorado, January 29 - Feb. 1, 1979, 7 p.

Hendrix, W., and J. Gy Fabos
1975. Visual land use compatibility as a significant contributor to visual resource quality.Inter. J. of Environ. Studies 1:1-8.

Leighty, I.
1971. Aesthetics as a legal basis for environmental control.Wayne Law Rev. 17:1347-1396.

Leopold, L. B., and M. O. Marchand
1968. On the quantitative inventory of the riverscape. Water Resour. Res. 4(4): 700-717.

Pepper, S. C.
1937. Aesthetic quality: a contextualistic theory of beauty. Charles Scribner's Sons, New York, 255 p.

Sive, D.
1970. Securing, examining, and cross examining expert witnesses in environmental cases. Mich. Law Rev. 68:1175-1198.

Smardon, R. C.
1978. Law and aesthetics or where is the pig in the parlor? A legal/policy overview of legal factors influence on visual landscape policy. Department of Landscape Architecture, University of California, Berkeley, 155 p.

Smardon, R. C.
1977. Research strategy for assessing visual impact from management and development activities on wild and scenic rivers. Pre-conference Proc. Scenic Rivers Symposium, Louisiana State University, Baton Rouge, pp. 79-85.

Stone, C. D.
1973. Should trees have standing? Toward legal rights for natural objects. William Kaufman, Inc., Los Altos, CA, 103 p.

Wohwill, J. F.
1978. What belongs where: research on fittingness of man-made structures in natural settings. Landscape Research 3(3): 3-5, 23.