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Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA

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CONCLUSION

The new Ohio law has brought the landlord-tenant relationship into the twentieth century. The nature of the relationship is now governed by statute instead of common law. By creating rights and duties for both the landlord and tenant, the legislature has established a policy of promoting fit and decent housing. The purpose of this article has not been to criticize this new legislation, but to point out to the court and to the practitioner the possible interpretations of the new Act. 215

ROBERT J. CROYLE

FOUR YEARS OF ENVIRONMENTAL IMPACT STATEMENTS: A REVIEW OF AGENCY ADMINISTRATION OF NEPA

INTRODUCTION

THE FEDERAL GOVERNMENT, through its presence in almost every phase of the nation's activity, is shaping the character of the future. This is perhaps nowhere more true than in the field of environmental concerns where choices about uses of our physical resources are frequently irrevocable. Recognizing this, Congress set out to impose on the federal government a course of "preventive and anticipatory" decision making with respect to the environment. This effort took the form of the National Environmental Policy Act of 1969 (hereinafter NEPA or the Act). 2 The Act officially declares environmental quality to be a national priority and lists as goals for the nation to: 3

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;


3 NEPA § 4331(b).
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;

Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

These goals may reveal a naive optimism but, as has become clear, they do not represent the heart of the bill. The policy of the Act is to make the environment a legitimate and necessary concern of all government officials. No agency of the federal government is to undertake any major action without first understanding the implications of the action for the surrounding physical environment.

Underlying the Act is also the recognition that major public works often proceed at cross purposes and without reference to the wishes of the people who are most affected by them. Thus, it requires, at least insofar as there are environmental values at stake, that agency decision making open itself to input from other federal agencies, from state and local governmental units, and from the public.

NEPA is not simply the statement of a philosophy or an empty exhortation. Section 4332(2)(c) of the Act is an “action forcing” provision, imposing on all agencies of the federal government the duty to include an Environmental Impact Statement (hereinafter EIS) in all recommendations for “major federal actions significantly affecting the quality of the human environment.” The impact report must be a detailed statement discussing unavoidable adverse environmental effects, alternative courses of action, the relationship between the short-term use of the environment and long-term productivity and, finally, any irretrievable commitments of resources. There are no specific sanctions for failure to

4 See notes 114-25 and accompanying text, infra, for discussion of procedural versus substantive rights under NEPA.


5 SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. No. 91-296, 91st Cong., 1st Sess. 8 [hereinafter cited as SENATE REPORT].

6 NEPA § 4332(2)(C).

7 NEPA was modeled after the Employment Act of 1946 which was concerned with the responsibility of the federal government to act to avoid economic dislocations. However, the action-forcing provisions of § 4332(2)(C) have no direct legislative model in their application to all federal actions rather than those of a particular agency. 2 CEQ ANN. REP. 222-23 (1970).

8 NEPA § 4332(2)(C).
comply with the EIS requirement. The drafters appear to have assumed that the Act would be self-enforcing.

This article will focus on the environmental impact statement process of NEPA functions. It will analyze some of the structural weaknesses of the process, some of the interests private parties are using it to protect and, finally, whether or not it is bringing us closer to a realization of the lofty goals the Act sets forth in Section 4331.

THE COUNCIL ON ENVIRONMENTAL QUALITY

NEPA creates in the Executive Office of the President, the Council on Environmental Quality (hereinafter the Council or CEQ). The Council is to serve primarily as an environmental clearinghouse, gathering and disseminating data and making recommendations for national environmental legislation. The statute gives CEQ no specific authority to enforce its policies and, up to now, it has exercised none directly. CEQ nevertheless plays an important part in the EIS process. Executive Order No. 11514 authorized CEQ to issue guidelines for the implementation of the provisions of Section 4332(2). These Guidelines, coupled with expansive interpretations of NEPA by the courts, have created a major evaluation step in almost all administrative decision making. Pursuant to the Guidelines, agencies must follow an elaborate procedure for at least giving formal recognition to potential ecological effects of their actions. CEQ Guidelines are not binding on agencies and on occasion courts have invalidated them as not sufficiently stringent. But as a rule, both administrative bodies and the judiciary rely on them for guidance as to NEPA compliance.

In Greene County Planning Board v. FPC, rejecting the FPC's argument as to when an EIS had to be filed, Judge Kaufman commented:

9 NEPA § 4342.
10 NEPA § 4344.
11 But see Warm Springs Dam Task Force v. Grible, 378 F. Supp. 240 (9th Cir. 1974), aff'd, 417 U.S. 1301 (1974) for a possible developing trend. Justice Douglas, sitting as Circuit Justice for the 9th Circuit, granted a stay of a district court order allowing dam construction to proceed, on the strength of a letter from the CEQ which expressed the opinion that the impact statement prepared was inadequate. This was later affirmed by the whole Court.
13 Prior to the issuance of the Order, it may have been thought that § 4332(2) (C) would be self-effectuating "despite its vague terms and lack of clear procedure..." Comment, The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act, 23 CATH. U.L. REV. 547, 550 (1974) [hereinafter cited as Comment]. The legislative history of the Act does not address the issue of implementation.
16 455 F.2d 412 (2d Cir. 1972).
Although the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies “to foster and promote the improvement of the environmental quality,” NEPA Section 204, 42 U.S.C.A. Section 4344, has misconstrued NEPA.  

NEPA has provoked an extraordinary amount of litigation. In the four years since its passage, there have been over 500 lawsuits based on the Act. CEQ monitors the judicial development closely and attempts to incorporate new interpretations into its Guidelines. In Calvert Cliffs’ Coordinating Committee v. Atomic Energy Commission, the Court held that, at every important stage in decision making, there must be an explicit balancing of environmental values against the commonly used economic values. This holding became a “recommendation” in a memorandum by CEQ to all federal agencies, and it is now included in the revised CEQ Guidelines. One author suggests that where there are conflicting holdings by the courts, as frequently there are, CEQ adopts the most expansive interpretation as its policy. Because of judicial deference to the Guidelines, “[t]he process resembles a feedback loop whereby a new position taken by CEQ induces a corresponding change in the court decisions which in turn produces a further change in CEQ interpretation of NEPA.”

In addition to authorizing the establishment of Guidelines of general applicability, Executive Order 11514 requires that each agency develop its own formal environmental clearance procedures designed to fulfill the mandates of NEPA. Calvert Cliffs represented a direct challenge to the Atomic Energy Commission’s rules for NEPA compliance. Judge Wright agreed with the plaintiffs, inter alia, that regulations which permitted the AEC Safety and Licensing Board to decline to review environmental issues at the hearing level unless they were specifically raised, and which prevented consideration of “backfitting” of technological innovations to nuclear plants under construction, were fatally defective. The case was remanded for further rulemaking. Despite the very vague

17 Id. at 421.
19 449 F.2d 1109 (D.C. Cir. 1971) [hereinafter cited as Calvert Cliffs v. AEC].
20 CEQ Memo to Federal Agencies on Procedures for Improving Impact Statements, 3 BNA ENV’T REPORTER 82 (1972) [hereinafter cited as CEQ Memo].
21 40 C.F.R. § 1500.8(a) (4) (1974).
22 Comment, supra note 13, at 566.
23 Comment, supra note 13, at 571.
language of the statute, and the relatively undeveloped state of the CEQ Guidelines at that time, the Court relied on the expression in Section 4332, "to the fullest extent possible," to find that NEPA bound agencies to strict procedural standards.

The CEQ assists agencies on an individual basis in preparing their own rules for implementing NEPA, but the official CEQ Guidelines are the primary model, and agency regulations tend to follow it very closely.

THE ENVIRONMENTAL IMPACT STATEMENT PROCESS

In evaluating NEPA compliance, courts focus both on the adequacy of the information flow that occurred during the preparation of the impact statement, a process-oriented inquiry, and the sufficiency of the statement itself, a content-oriented inquiry. For achieving the purposes of the Act, both are equally important. This section of the paper will examine the information flow process.

Briefly, the CEQ Guidelines set out four distinct stages of environmental assessment for every major project: early notice, draft statement, comment period and final impact statement. Theoretically, only when all of these are completed can an agency review the proposal and make a determination whether to go forward.

Early Notice. The “early notice” system informs the public of the decision to prepare an impact statement as soon as the agency makes it. It is much more likely that intervention at this stage will help to shape the final project than intervention which comes when a dam is two-thirds complete, or a nuclear power plant is constructed and ready to begin operation. Yet regardless of this timely opportunity to participate, courts are unwilling to invoke the doctrine of laches to dismiss an action which is brought well after the date of final project approval. It may be that courts

26 449 F.2d at 1115.
29 Because the Act has some retroactive effect and is applicable to many ongoing projects, agencies may modify the sequence in certain cases. 40 C.F.R. § 1500.13 (1974).
30 40 C.F.R. § 1500.6(e) (1974).
recognize that publication in the Federal Register, the means of early notice the Guidelines suggests, is unlikely to give actual notice to members of the general public, however great their interest.

Ideally, the interagency, interdisciplinary approach urged by the Act should begin with the earliest planning stages of a project. The Office of Management and Budget Circular A-95 allows local, regional and state governmental agencies to review and comment upon many proposed applications for federal assistance. Use of this for environmental objectives could make the early notice system an effective means for soliciting local viewpoints at a meaningful time. However, it has experienced only limited success even in its application to general non-environmental planning problems.

Draft Statement. CEQ suggests that an agency make an effort to discover and discuss at the draft stage all major points of view with respect to an action under consideration. "The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by Section 4332(2)(C)."

This requires consultation with federal agencies who have particular expertise in the relevant subject matter, other specialists, local governmental units which will be affected, pro-environmental organizations and citizens who have expressed an interest in the project. When the draft is complete, the preparing agency has an affirmative duty to circulate the document and to solicit comments from those same groups and from any others who have announced their concern or who may have a contribution to make.

Comment Process. The comment period lasts from 30 to 60 days even though the agency members may have spent years compiling the draft. It may include a public hearing. There are frequently general statutory requirements for hearings, and where that is the case, the hearing must address itself to environmental as well as non-environmental concerns. Participants should be given the opportunity to cross-examine agency officials and applicants for the federal assistance on the basis of the draft EIS. If there is no general provision for a hearing, the agency

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34 40 C.F.R. § 1500.8(c) (1974).
35 40 C.F.R. § 1500.3 (1974).
36 OMB Circular A-95: A Neglected Environmental Assessment Tool Provides an Early Pressure Point, 4 Env't L. Reptr. 50043, 50044 (1974).
37 CEQ Memo, supra note 20.
38 40 C.F.R. § 1500.7(a) (1974).
39 The recommendation that comments be solicited from environmentalist groups marks a major stride forward from Sierra Club v. Morton, 405 U.S. 727 (1970), where the issue was whether such a group could show a sufficient interest to support a claim of standing.
40 40 C.F.R. § 1500.9 (1974).
41 Greene County Planning Bd. v. Fed. Power Comm'n, 455 F.2d 412, 423 (2d. Cir. 1972), cert. denied, 409 U.S. 849 (1972) [hereinafter cited as Greene County v. FPC].
should make an independent determination as to whether environmental issues warrant a hearing. Relevant considerations are: the size of the project, the level of public interest, the likelihood that members of the public will be able to make significant contributions at a hearing, the extent to which the public has already had an opportunity to participate. 42

Although any administrative agency within the federal government can be called upon 43 to comment on another agency's draft statement, the Environmental Protection Agency (EPA) is required to by law whenever a proposal may have an impact on an area within its scope of authority. 44 In practice, the EPA comments on virtually all EIS's. 45 It does not have a veto power over agency projects on which it comments but, if EPA finds a proposed action unsatisfactory from an environmental standpoint or determines that an EIS is so inadequate that meaningful comment is not possible, it must report its findings to the CEQ and to the public. 46

A few other agencies, because of their particular fields of expertise, are asked to comment on large numbers of the draft statements. The Department of Interior, for example, reviews hundreds of proposed actions affecting land use and fish and wildlife values. 47 Although CEQ is the overseer of NEPA, it has only a minor role in the comment process. Agencies must file copies of every EIS with the Council. CEQ selects a very small number of statements for actual review and its purpose is to discover structural weaknesses in the preparation process and promulgate improved Guidelines to deal with those weaknesses. CEQ comments directly only on particularly troublesome or controversial projects. 48

Final Impact Statement. All written comments submitted to the principal agency become part of the final environmental impact statement (FES) and, to the extent that the draft does not adequately address issues raised in the comments, the agency must review and modify the statement. 49 Frequently dispute in litigation centers around whether an agency sufficiently answered in the final EIS objections raised by commenting parties. 50 After the agency completes the final report and distributes it to those who participated in the comment process, it must wait 30 days before action on an approved project begins. This allows a period for final review. If, after submitting comments on the FES, there is a

42 40 C.F.R. § 1500.7(d) (4) (1974).
43 3 CEQ ANN. REP. 237 (1972).
44 Among the statutes which provide for EPA to comment on draft EISes are the Clean Air Act, 42 U.S.C. § 1857 et seq. (1955), and the Noise Control Act, 42 U.S.C. § 4901 et seq. (1972).
46 40 C.F.R. § 1500.9(b) (1974).
47 40 C.F.R. § 1500.9 (1974).
48 Id.
49 40 C.F.R. § 1500.10(a) (1974).
discovery of significant new information or a judicial order necessitates
further modifications, CEQ generally will not require recirculation of
the impact study.\textsuperscript{51} Unless an agency is refusing to file an EIS, judicial
inquiry into NEPA compliance must await the agency's final determination
to proceed with the project in question.\textsuperscript{52}

The foregoing discussion has assumed that an environmental impact
statement is required. Frequently, this is the issue in dispute. NEPA
applies to "major Federal actions significantly affecting the quality
of the human environment."\textsuperscript{53} That phrase has resolved itself into four
distinct threshold questions: Is the project a major action? Is it federal
in nature? Will it have a significant effect? Does it involve the quality
of the human environment?

If an agency decides that the answer to all of these is negative, it
need not prepare an impact statement. However, to ensure that appropriate
consideration is given to the policies of NEPA and to provide a reviewable
record should anyone challenge the preliminary determination, courts
have required a formal "negative declaration" stating the reasons why
the agency is not undertaking an environmental study.\textsuperscript{54} It is unlikely that
such a step was foreseen by the drafters of NEPA. But in their attempt to
force compliance "to the fullest extent possible," judges have found
support for it in Section 4332(b),\textsuperscript{55} which directs agencies to: "Identify
and develop methods and procedures, . . . which will insure that
presently unquantified environmental amenities and values may be
given appropriate consideration in decision making along with economic
and technical considerations."

To allow meaningful review, the negative declaration must be detailed
and specific to the peculiar demands of the use and site under
consideration. It is, in effect, a scaled-down EIS. In \textit{Hanly v. Mitchell},\textsuperscript{56}
the General Services Administration (GSA) decided that an EIS was not
required for a Metropolitan Correction Center in lower Manhattan.
GSA's negative impact statement discussed plans for heat, water, and
garbage and sewage disposal. The court held that the document was
inadequate and remanded the case to GSA twice to consider, \textit{inter alia},
the impact of a prison on the families who lived in the neighborhood, the
likelihood of riots and disturbances, the possibility of increased crime and
drug availability, and the parking arrangements for visitors. The court's

\textsuperscript{51} 3 CEQ ANN. REP. 238-39 (1972).
\textsuperscript{52} Greene County v. FPC, 455 F.2d 412, 423 (2d Cir. 1972), \textit{cert. denied}, 409 U.S.
849 (1972).
\textsuperscript{53} NEPA § 4332(2) (C).
\textsuperscript{54} \textit{E.g.}, Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1094
(D.C. Cir. 1973) [hereinafter cited as SIPI v. AEC].
\textsuperscript{55} See Hanly v. Kleindienst, 471 F.2d 823, 835 (2d Cir. 1972).
\textsuperscript{56} 460 F.2d 640 (2d Cir. 1972), \textit{cert. denied}, 409 U.S. 990 (1972).
rulings were not that an EIS was necessary, but only that prior to making a threshold determination, GSA had to consider a broad range of relevant factors and had to give the public an opportunity to submit information which might bear on the agency's decision.

Where it is conceded that an action is a "major federal action significantly affecting the quality of the human environment," one of several limited exceptions may operate to exclude it from the scope of NEPA. Courts exempt actions where there is a valid claim of national security, emergency or legislative stipulation.

In a rapid series of decisions during the eleventh hour controversy over nuclear testing near Amchitka Island, Alaska, the Fifth Circuit ruled that the impact statement prepared by the AEC was deficient, that presidential approval does not negate an agency's obligation to comply with NEPA and that executive privilege would not be recognized to prevent discovery of the documents used to prepare the EIS. But when faced with the final request to enjoin the blast, the court refused. Although the AEC had not met its duties under NEPA, the court acceded to the important interests of national security urged by the government. The Supreme Court affirmed.

During the recent Middle East oil embargo, the Federal Energy Office (FEO), with congressional authorization, imposed regulations governing the allocation of crude oil among refiners. Gulf Oil Company argued that the allocation scheme was invalid because FEO inaugurated it without preparing an EIS. The Temporary Emergency Court of Appeals held that in circumstances such as critical oil shortage the need for immediate action takes precedence over NEPA. The "emergency" exception also applies to temporary actions such as an interim rate increase.

If the legislature explicitly so stipulates, an agency action may be excused from the requirements of NEPA. Administrative officials often argue that when Congress approves appropriations bills for individual projects or programs, it is tacitly agreeing that the action is consistent with the policies of NEPA. Courts reject this theory of "repeal by implication." In the Gillham Dam case, Judge Eisele responded to that argument by saying: "It is more reasonable to assume that the Congress in making annual appropriations for such projects, assumes that the

57 The Second Circuit later ruled that the negative impact statement was adequate, and that construction could proceed without the preparation of a full EIS. Hanly v. Kleindienst, 484 F.2d 448 (2d Cir. 1973).
58 Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 463 F.2d 788, 463 F.2d 796 (5th Cir. 1971).
61 See Port of New York Authority v. ICC, 451 F.2d 783 (2d Cir. 1971).
responsible agencies are complying with all applicable laws."\(^{62}\)

On the other hand, where congressional intent is clear, "even severely circumscribed judicial review is both inapposite and unnecessary."\(^{63}\) In the \textit{Alaska Pipeline} case,\(^{64}\) NEPA claims were rendered moot by a statute which specified that the six-volume EIS prepared by the Department of the Interior shall be deemed sufficient under NEPA.\(^{65}\)

A fourth and very different kind of exception\(^{66}\) to NEPA applicability, is federal revenue sharing.\(^{67}\) One justification offered for the exemption is the absence of sufficient "federal action." This is not entirely persuasive. The Office of Revenue Sharing retains full veto power over proposals; it supplies, restricts and oversees the allocation of funds and it conducts periodic audits and investigations.\(^{68}\) Some authors\(^{69}\) suggest that \textit{Ely v. Velde},\(^{70}\) which held that NEPA applies to a block grant program of the Law Enforcement Assistance Administration, lends support to the application of NEPA to revenue sharing. The court in \textit{Ely} distinguished the two: "A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached. The state voluntarily requested federal participation in the center and in this manner obtained construction funds conditioned upon compliance with NEPA..."\(^{71}\) While this distinction is not compelling, it seems likely that courts will continue to accept the exemption out of respect for the "no strings" philosophy of unrestricted grants. And if states continue at the current rate to pass their own NEPA's, the exception will have minimal impact on the policy of the Act.\(^{72}\) Courts have carefully limited all of these exceptions and they probably do not represent a significant retreat from the standard of fullest possible compliance.


\(^{63}\) EDF \textit{v. Corps}, 492 F.2d 1123, 1141 (5th Cir. 1974).


\(^{66}\) Another exception to note only in passing applies to the District of Columbia. Because of the special status of Washington, certain activities may require federal approval. However, they are, by nature, municipal activities and the EIS requirements are waived. \textit{See} Tolman Laundry \textit{v. Washington}, 6 ERC 1264 (D.C. Super. 1974).

\(^{67}\) 40 C.F.R. § 1500.5(a) (2) (1974).


\(^{69}\) F. ANDERSON, NEPA IN THE COURTS 60-61 (1973) [hereinafter cited as ANDERSON].

\(^{70}\) 451 F.2d 1130 (4th Cir. 1971).

\(^{71}\) 497 F.2d at 256.

\(^{72}\) \textit{See} 4 CEQ ANN. REP. 248 (1973). The CEQ notes that 15 states and the Commonwealth of Puerto Rico have enacted their own versions of NEPA.
PROGRAM IMPACT STATEMENTS

The impact statement process applies to every "recommendation or report on proposals for legislation and other major federal actions..."73 However, the impact statement process outlined above is best suited to evaluating individual actions which frequently are part of, and assume the value of, much larger programs. In that context, the principal agency or applicant for federal assistance tentatively selects the course of action and a site. Environmental analysts can then isolate the particular kinds of effects the action will generate in the particular location. The need for speculation is diminished and citizen participation is maximized. Agency officials can easily identify the segment of the public whose input they should seek and, because of the immediacy of the threat or benefit of the proposed action, there is more likely to be a high level of public interest.

If an agency delays environmental evaluation until it has before it an application for an offshore oil lease or a funding request for the final segment of a highway, it defeats the policy of NEPA to choose courses of action that are least detrimental to the natural environment. By that point, the agency has made the major program decisions and only minor adjustments in the plans of the particular project are possible. Whether consciously or through oversight, the agency has avoided serious consideration of alternative approaches. To remedy this, there has been some progress toward program impact studies whereby an agency begins environmental evaluations at the earliest possible stages.

_Calvert Cliffs_ invalidated the Atomic Energy Commission's regulations for implementation of NEPA because they postponed consideration of certain crucial environmental issues with respect to nuclear power plants from the construction permit stage to the operating license proceedings. Judge Wright noted that:

Compliance to the fullest extent possible would seem to demand that environmental issues be considered at every important stage in the decision making concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.74

Two years later, Judge Wright recognized that, for effective balancing of environmental factors, impact studies may be required at the research stage, long before the agency considers an application for a particular action.

To wait until a technology attains the stage of commercial feasibility before considering the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly

73 NEPA § 4332(2)(C).
74 449 F.2d at 1118.
frustrate meaningful consideration and balancing of environmental costs against economic and other benefits.\textsuperscript{75}

The Court was unconvinced by the AEC's position that the liquid metal fast breeder reactor program that the plaintiffs were challenging was in such incipient stages that any EIS would be purely speculative. To support its request for funding, the Commission had prepared an elaborate cost-benefit analysis involving projections for the development of the technology and the Nation's energy needs through and beyond the year 2000. The analysis notably lacked any discussion of ecological dangers.

The Court set out several criteria by which agencies should judge when an EIS is required:\textsuperscript{76}
1. Does the agency know enough about the program to make an evaluation meaningful?
2. Is the agency restricting consideration of other alternatives because of the development of this program?
3. Is the agency making any irretrievable commitments of resources, financial or otherwise?
4. How significant are the anticipated effects of the overall program?

The CEQ Guidelines now require that an agency establish a formal procedure for deciding what acts necessitate an environmental evaluation of a given program.\textsuperscript{77} When an agency concludes that an EIS is not yet necessary but will be at a later date, it must file a "negative declaration" stating the reasons for its determination.\textsuperscript{78}

The problem of timely evaluation is not limited to the field of research and development. If the federal government is considering a major highway building program or strip mining legislation, some NEPA studies should begin at that time to decide whether those answers to transportation or energy needs are consistent with environmental values and whether the agency can structure the program in ways that will minimize adverse effects.

If the agency or Congress authorizes the broad policy objectives with full knowledge of the general kinds of impacts the program will have, later individual project statements need not reexamine those issues.\textsuperscript{79} At each successive stage in the decision making, the EIS should focus increasingly on impacts which the program statement did not anticipate\textsuperscript{80} or which are peculiar to the individual project in question. This "tiering" of impact statements is a step toward compliance with NEPA's mandate to "Study,

\textsuperscript{75} SIPI v. AEC, 481 F.2d 1074, 1089 (D.C. Cir. 1973).
\textsuperscript{76} Id. at 1094-98.
\textsuperscript{77} 40 C.F.R. § 1500.6(c) (1974).
\textsuperscript{78} 40 C.F.R. § 1500.6(d) (2) (1974).
\textsuperscript{79} Id.
\textsuperscript{80} See Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).
develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning appropriate uses of available resources."  

The primary risk that tiering introduces into the EIS process is that, at the early stages of evaluation, some risks may seem too remote to merit attention. Later in the process, those conducting project evaluations will assume that previous discussion on those same issues was sufficient. In addition, it is more difficult to define standards of adequacy for an EIS at the program level.  

Multi-agency actions also may require modifications of NEPA processes. If several federal agencies contribute to the planning and execution of a single project, the Council on Environmental Quality recommends that they conduct a single environmental assessment. This can be done on a joint basis or through the selection of a "lead" agency, usually the agency with the greatest overall involvement or the greatest environmental expertise. In either case, all participating agencies contribute to the final product.  

Frederick Anderson of the Environmental Law Institute criticizes the composite EIS approach because it excuses an agency from the obligation to focus directly on the effects of its own activities. While this may be so, the absence of a single study evaluating the cumulative impacts of a multi-faceted program presents an even greater likelihood that the policies of NEPA will be thwarted. Separate actions within the general scheme may not be sufficiently major to require an impact statement themselves even though the project as a whole will significantly affect the quality of the human environment. Furthermore, when each agency prepares its statement alone, no one official is in a position to make an accurate cost-benefit analysis of the whole program. To ensure that each agency has adequately balanced environmental concerns with respect to its actions and that the lead agency has considered the cumulative effects, CEQ should specially scrutinize multi-agency plans.

81 NEPA § 4332(2)(D). See also ANDERSON, supra note 69, at 290-92.
83 40 C.F.R. § 1500.7(b) (1974).
84 3 CEQ ANN. REP. 234-36 (1972).
85 40 C.F.R. § 1500.7(b) (1974). The paucity of cases in which there are several defendant agencies may indicate that this is not a widely used practice. But see Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D.N.M. 1971), aff'd, 452 F.2d 1233 (10th Cir. 1971), vacated 409 U.S. 1021 (1972).
86 ANDERSON, supra note 69, at 199-200. Anderson's position is supported by the reasoning in Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), and in Greene County v. FPC, 455 F.2d 412 (2d Cir. 1972), which prohibit an agency from relying on compliance with the environmental regulations of another agency or the impact studies conducted by the applicant. Both cases hold that the principal agency must conduct an independent review.
87 Warm Springs v. Gribble, 378 F.2d 240 (9th Cir. 1974), suggests that at least in the litigated cases, a formal expression of opposition by CEQ carries substantial weight.
Courts, the CEQ and environmental specialists unanimously insist that an environmental statement must be more than a "post hoc rationalization" for a predetermined course of action. Yet that seems to be inescapably the nature of a project EIS. The EIS is not a general inquiry into various possible solutions to a given problem. Rather, it is a justification for the agency's choice. It serves as an advocacy tool. Pursuant to Section 4332(2)(C)(iii), the impact statement must mention alternative approaches. Treatment of those is frequently only cursory and the focus remains on the preferred action. As a practical matter, the agency may be choosing between the main proposal and not acting at all. If there is an urgent need or political pressure, then even inaction is not a real choice. Environmental impact studies for legislation, research and development, and broad federal programs offer at least a limited guarantee that responsible agencies will do some balancing of environmental factors prior to selecting the lead proposal over other viable alternatives.

The character of the administrative agency system is a further obstacle to effective consideration of alternatives. Federal agencies have narrow, usually well-defined fields of responsibility and expertise. To perpetuate their existence, they must have a major program or industry to regulate. Each agency has a vested interest in developing and continuing the programs within the scope of its authority. Addressing an attempt by the Department of the Interior to execute a lease for offshore drilling, the court in National Resources Defense Council v. Morton held that an agency must consider all reasonable alternatives, including those outside what it has the power to adopt. If agencies are vying with each other for influence, they are likely to evade this obligation whenever possible. But willingness to comply is only one part of the problem. One agency may be unaware of alternate approaches that other agencies could pursue. More likely, they will lack the information they would need to balance the costs and benefits of the solutions that are not within its competence against the known consequences of its own proposal. As was noted above, a situation may demand immediate action and, if the

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88 See Greene County v. FPC, 455 F.2d 412, 424-25 (2d Cir. 1972). See also SIPI v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).
89 4 CEQ ANN. REP. 234 (1973).
90 See EDF v. Corps, 492 F.2d 1123 (5th Cir. 1974).
92 See Murphy, supra note 32, at 980-81.
94 It now appears in the CEQ Guidelines, 40 C.F.R. § 1500.8(a)(4) (1974).
95 The comment phase of the EIS process is imperfectly suited to gathering sufficient data about the solutions other agencies might pursue.
principal agency decides that another department can achieve the same objectives with less detriment to the environment, it has no means to implement the other plan. It can only decide not to act.

**AGENCY ADMINISTRATION OF NEPA**

Agency resistance to NEPA goes much deeper than the problem of adequate consideration of alternatives. Federal regulatory agencies are primarily concerned with economic expansion. Congress sought to impose on them what it described as an equally important duty to protect the environment. But the ecological concerns remain foreign and secondary, particularly when they appear to be inconsistent with the agencies' broader mandates. Noncompliance ranges from deliberate concealment of known serious impacts to simple miscalculation of the magnitudes of effects.

The Atomic Energy Commission is among the most criticized agencies for its reluctance to comply. In *Calvert Cliffs*, the Court of Appeals for the District of Columbia said of the AEC's proposed regulations: “We believe that the Commission's cramped interpretation of NEPA makes a mockery of the Act.” Later, the same court found that the AEC could have “no rational basis” for its determination that it was not yet required to prepare an EIS for a research program which AEC had funded for more than $200 million. That opinion very nearly accused the AEC of outright bad faith violations of the law.

Despite these and numerous other lawsuits, it appears that the AEC continues to hedge and dissemble in order to win approval of its projects. A recent newspaper report indicates that for the last 10 years the Commission has purposefully concealed information about the dangers of nuclear power plants for which it has issued both construction and operation permits. Many of the efforts of concealment occurred in the context of EIS studies. Dr. Glenn Seaborg, former head of the AEC, said that the agency wished to avoid the public “misunderstanding” and the adverse reactions the studies might provoke. This suppression of data is a direct contravention of the policy of the Act which Judge Eisele described in the *Gillham Dam* case:

At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then

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97 See Yarington, *supra* note 18, at 293. “There exists a natural, in fact, healthy bias on the part of most action-oriented federal agencies in favor of doing what they were established to do...”
98 449 F.2d 1109, 1117 (D.C. Cir. 1971).
100 See, e.g., *Union of Concerned Scientists v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974); *SIPi v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (5th Cir. 1971); *Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).
existing decision making responsibilities or take away any then existing freedom of decision making, but it certainly intended to make such decision making more responsive and more responsible. It would be less troublesome if we could assume that the AEC is alone in flouting NEPA goals. However, there is substantial evidence to the contrary.

The Center for Science in the Public Interest (CSPI) investigated impact statements prepared for highway construction by the Department of Transportation which is, by a significant margin, the largest single source of impact studies. Their results show that, although many of the EIS's are legally insufficient, the Department regularly approves the projects. Among the findings of CSPI are: 13% of the statements did not mention air pollution; 34% did not consider community disruption; 54% did not consider the impact on nearby property values; 86% failed to discuss mass transit alternatives; 30% denied that there would be any adverse effects.

For several years, the Environmental Protection Agency (EPA) argued that it was not bound by the procedural restrictions of NEPA. Courts agreed on the theory that there was "little need in requiring a NEPA statement from an agency whose raison d'etre is protection of the environment and whose decision [making] is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework." In fiscal 1974, Congress earmarked $5 million of EPA funds for the preparation of impact statements. This persuaded EPA to conduct environmental studies on a "voluntary basis" for certain of its major regulatory actions. Following that announcement, Region X Director John Burd reported that during fiscal 1975, because of limited resources, EPA would write EIS's for only 5% of its major construction grant projects under the Federal Water Pollution Control Act.

The Interstate Commerce Commission (ICC) may finally be ready to accept its duties under NEPA. After four setbacks in court, the ICC is changing its procedures and increasing the number of environ-

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103 In 1971, DOT accounted for 66% of all EISes; in 1972, the figure was 49%; and through June 30, 1973, DOT was preparing 40% of the total number of statements. (The downward trend is due in part to increased reliance on program EISes.) 4 CEQ ANN. REP. 244-45 (1973).
104 For a summary of the CSPI report, see Morgenthaler, On the Road Again: Certification Acceptance Forces NEPA to Adapt, 4 ENV'T Rptr. 50023, 50026 n. 29 (1974).
mental assessments it conducts. From 1970 through 1973, the ICC submitted two impact statements to CEQ. During the first eight months of 1974, it submitted eight.\(^{109}\)

Zabel v. Tabb\(^{110}\) provides a different perspective on agency use of NEPA. In Zabel, the Corps of Engineers relied on the Act to justify its decision not to issue a dredge and fill permit. The EIS process and a public hearing revealed widespread opposition to the plan but the applicants urged that the Corps could only refuse to proceed for environmental reasons. This is the only case this writer discovered wherein NEPA was used as an affirmative defense.

Agencies can also undermine the Act by insufficient impact evaluation. Failure to analyze secondary impacts such as changes in land use patterns in the surrounding area or increased traffic a new project will precipitate is probably the most common form of noncompliance.\(^{111}\) EPA recently announced that it is curbing its grants to localities for sewer mains because the program had been encouraging unsound patterns of community growth.\(^{112}\) The program got underway in 1972 and EPA approved negative impact declarations for several sites. Localities, anxious to obtain the federal subsidies, began building sewage facilities which, in some instances, anticipate expectable population increases for the next 2,000 years. Because EPA did not require land use and energy impact evaluations as part of the grant award process, communities have been planning for low density, urban fringe development despite the fact that the cause of energy conservation might be better served by high density, urban living patterns. EPA obligated itself to more than $3.4 billion in grants before it discovered this problem. Had the agency prepared a program EIS before funding individual projects, it might have foreseen that such infrastructure improvements would induce changes in land development and it could have regulated award grants to provide for more desirable patterns.

Administrative decision making remains a low visibility process and, if an agency seeks to avoid the requirements of NEPA, purposefully or through negligence, it can do so with impunity for long periods of time. Judicial intervention tends to come late, frequently after the agency has made most of the critical determinations. It is not rare that a court-ordered EIS can do no more than consider ways to minimize the harms of a program

\(^{109}\) Comment, Harlem Valley Transportation Ass'n v. Stafford: One More Decision Tells the ICC to Stop Dragging Its Feet on NEPA Compliance, 4 ENV'T L. REPTR. 10141 (1974).

\(^{110}\) 430 F.2d 199 (5th Cir. 1970).


to which the agency is all but irrevocably committed. Thus, agency recalcitrance stands as the single most potent obstacle to the success of NEPA.\footnote{EDF v. Corps, 325 F. Supp. 749 (E.D. Ark. 1971).}

**Procedural vs. Substantive Review Under NEPA**

In spite of the problems of timeliness, judicial review is an integral part of the operation of NEPA. Courts and commentators are now wrestling with whether the Act allows substantive as well as procedural review.\footnote{EDF v. Corps, 492 F.2d 1123 (5th Cir. 1974), provides a recent listing of which circuits permit substantive review.} Substantive review permits a plaintiff to ask not only, “Did the agency go through all the appropriate steps in assessing the environmental impact of its proposal?” but also, “Is the finished product, the final EIS, an adequate evaluation?”

The courts that do allow inquiry into substantive issues rely on the standard for review that the Supreme Court set in *Citizens to Preserve Overton Park v. Volpe*.\footnote{401 U.S. 402 (1970).} The statute in question in *Overton Park*, the Federal-Aid Highway Act,\footnote{23 U.S.C. § 101 et seq. (1958).} has an impact statement requirement similar to that of NEPA. It provides, in pertinent part,

> Any State highway department which submits plans for a Federal-Aid highway project... going through any city... shall certify to the Secretary that it has had a public hearing... and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the Community.\footnote{Id. at § 128(a).}

In response to a challenge for noncompliance with that provision, Justice Marshall said that the reviewing court must determine: whether the Secretary acted within the scope of his authority, whether his determination was arbitrary, capricious and an abuse of discretion or otherwise not in accordance with the law, whether the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.\footnote{401 U.S. at 416.}

Under this “substantial inquiry” test,\footnote{1974 BNA ENV'T RPRTR. 39.} the scope of review is very narrow. The plaintiff must establish that “the actual balance of costs and benefits that the agency struck was arbitrary or clearly gave insufficient weight to environmental values.”\footnote{Calvert Cliffs v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).} If the court so finds, as it did in *Overton Park*, it remands to the agency for further decision making.\footnote{Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1970).} It does not have the authority to order the abandonment of
a project even if it believes that modification cannot bring the project into compliance with Section 4331 policies.

Many commentators argue that NEPA's future success rides on the availability of substantive judicial review. In light of the restricted review allowed, this position is unwarranted. The subject matter of an EIS is often very technical, beyond the comprehension of most lawyers and judges. It is quite common for there to be serious, good faith dispute among experts about the effects of a particular kind of action. Finally, the EIS may require a balancing between incomparables such as housing for the poor and the destruction of aqulife in a nearby river as a result of the pollution such housing will cause. Under these circumstances, it is necessary that an agency have a broad range of discretion. On the other hand, only the most wide-ranging review would permit a court to determine whether an agency is in accord with the policies of NEPA, except in cases of blatant noncompliance. The complexity of these factors makes it easy for an agency that wishes to avoid substantive compliance. It can confuse the issues even further by including extraneous technical data and by bolstering its position with additional expert opinions. In part, writing an EIS that will survive judicial scrutiny is an art; agency personnel can be expected to improve with practice. In summary, the “substantial inquiry” test is too meagre a device to combat all the varieties of mere pro forma acquiescence to NEPA. But regardless of the limited scope of review, plaintiffs have seized upon NEPA and attempted to expand its meaning in all directions.

**PLAINTIFFS IN NEPA LITIGATION**

A review of the more than 500 suits that have been filed under NEPA since its inception suggests that complainants are using it to protect a much wider range of interests than those for which Congress originally intended. Plaintiffs in NEPA suits fall into four major categories: national groups organized for the protection of the environment; private individuals and neighborhood groups that have banded together to oppose a particular action because they fear its effect on their property values; businesses with an identifiable economic interest in the outcome of the litigation, and state and local governmental units seeking to protect the interests of their citizens. These categories are, at best, rough generalizations. The

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126 102 CEQ Monitor 135 (May 1974).

127 See Anderson, *supra* note 69, Appendix B.
pairing of plaintiffs and motives may be interchanged in some cases and, many times, plaintiffs will have mixed motives. Nevertheless, they do point out a pattern in the litigation.

It is not surprising that large, nationally known conservationist organizations initiate much of the NEPA litigation. The environmental impact statement process is calculated to alert such groups, if not the general public, to projects in which they are likely to take an interest. The CEQ Guidelines institutionalize the participation of "relevant conservation commissions."128 Courts have also helped to ensure a major role for them by their holdings with respect to standing, attorneys' fees and, to a lesser degree, burden of proof.

In Sierra Club v. Morton,129 the Supreme Court ruled that a person seeking review of agency action on environmental grounds must be able to show some injury to himself or a member of the group he represents. This was not a substantial burden but it was lightened even further by SCRAP v. United States130 which permits standing where the injury alleged is to the public at large. It now seems unlikely that any court will deny standing to an environmentalist association.131

The cost of litigation can pose a significant barrier to the pursuit of the important public interests embodied in NEPA. To encourage environmental groups to advance their claims, courts rely on the "private attorneys general" doctrine to award fees and costs, generally to a prevailing party. In Wilderness Society v. Morton,132 the court awarded fees even though, strictly speaking, the plaintiffs did not prevail. The NEPA claims were never finally resolved by the court because of congressional intervention.133 However, the court recognized that the plaintiff's lawsuit served "as the catalyst to ensure that the Department of Interior drafted an impact statement and that the statement was thorough and complete."134

In Wilderness Society, only half the fees were recoverable because 28 U.S.C. Section 2412 prohibits the assessment of fees against the federal government or any agency thereof unless otherwise specifically provided. This statutory prohibition will be a complete bar to recovery where the government is the only defendant. In the instant case, Alyeska, the permit applicant for the Trans-Alaska Pipeline System, had intervened

131 4 CEQ ANN. RPT. 241 (1973.) For a more extensive discussion of standing in NEPA cases, see ANDERSON, supra note 69, at 26.
133 The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652 (1973), indicates that the impact statement prepared by the Department of Interior shall be deemed sufficient under NEPA.
134 495 F.2d at 1034,
and actively participated in the litigation as a real party in interest. The court found that it was fair to assess Alyeska for half of the cost of the attorneys’ fee.

Cases which explicitly address the problem of burden of proof are few and conflicting. Several decisions have recognized that the agencies have the "labor, public resources and expertise to make the proper environmental assessment and to support it by a preponderance of the evidence." They have held that the plaintiff asserting environmental interests need only make a prima facie showing of noncompliance with NEPA before the burden shifts to the defending agency.

Some argue that the courts have been far too generous in their treatment of organizations such as the Sierra Club. The result has been the serious delay of important national programs. In *Environmental Defense Fund v. Corps of Engineers*, a major flood control effort was two-thirds complete when the court granted injunctive relief pending an environmental impact statement. The court noted that annual spring flooding caused widespread destruction of life and property. Later in the opinion the court discussed more extensively the claim advanced by the plaintiffs that the project would change one of the few remaining locations for stream fishing into a more common flat water fishing site.

Individuals and local citizens groups who sue under NEPA are not always as public-spirited in their motives as conservationists and courts may subject their claims to closer scrutiny. In *Nucleus of Chicago Homeowners Ass’n v. Lynn*, a coalition of community organizations and individuals claimed that a proposed low income, federally subsidized housing would significantly affect the quality of the environment so as to require the Department of Housing and Urban Development to file an EIS. The plaintiffs argued that, as a class, tenants of low income housing have a high propensity for anti-social behavior and that their presence would have a deleterious effect on the neighborhood. The court held

137 See Murphy, supra note 32, at 993.
140 The plaintiffs allege that they are members of the "middle class and/or working class" which emphasizes obedience and respect for lawful authority, has a much lower propensity toward criminal behavior and acts of physical violence, and possesses a high regard for the physical and aesthetic improvement of real and personal property. The plaintiffs further allege that "as a statistical whole" tenants of public housing possess a higher propensity toward criminal behavior and acts of violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work. Therefore, so the plaintiffs insist, the construction of public housing will increase the hazards of criminal acts, physical violence, and an aesthetic and economic decline in the immediate vicinity of the sites. The plaintiffs maintain that these factors will have a direct adverse impact upon the physical safety of the
that the evidence did not support the proposition that prospective tenants would significantly affect the environment. In its opinion, the court noted that, "[e]nvironmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons *per se*." The relevant inquiry is whether actions resulting from the economic and social characteristics will affect the environment and, on that issue, plaintiffs' sociological predictions were not persuasive.

The legislative history of NEPA does not resolve the issue of whether social impacts of particular groups of people are within the scope of the statute. Undesirable land use patterns and urban congestion are among the concerns of NEPA. The primary and, arguably, exclusive focus of the Act is ecological, not sociological. Senator Jackson stated that the policy of the bill is to strive "to achieve a standard of excellence in man's relationship to his physical surroundings."

Industrial plaintiffs have begun to rely on NEPA to protect their economic interests. The threshold problem in these cases is standing. A corporation's competitive position is not within the ambit of NEPA protection. If a business enterprise establishes that there is a public interest as well, courts generally allow the case to go forward on the merits even when it is clear that the pecuniary motive dominates.

*National Helium Corp. v. Morton* involved the cancellation of purchase contracts for helium by the Department of Interior. Although government contractors have standing to sue, the court also recognized National Helium Corporation as a private attorney general for purposes of the NEPA claims. The interests of the business coincided with the public interest in possible irreparable harm resulting from the escape of helium into the atmosphere.

In *Chemical Leaman Tank Lines v. United States*, a trucking company challenged an Interstate Commerce Commission regulation which eased licensing proceedings for carriers of recyclable material which was currently being discarded. Despite both the plaintiff's economic motive and the ICC's pro-environmental aim, the district court permitted...
standing. The industry and the public shared a stake in evaluating the potential environmental drawbacks of higher levels of pollution, highway congestion and depletion of the national fuel supply which might result from increased truck traffic.

In a more restrictive holding on standing, the District Court of Maryland dismissed a suit by a hospital seeking to bar approval of the construction of another hospital in the immediate vicinity, concluding that a plaintiff corporation "cannot assert an injury to its aesthetic enjoyment of the environment." 147

The last identifiable group of NEPA plaintiffs is that of state and local governmental units. Recognizing the traditional dominance of these bodies in land use areas, the Act sought to make them an integral part of decision making in the NEPA scheme. 148 Several of them have pursued the interests of their citizens through the administrative process into the courts. 149 In City of New York v. United States, 150 the city sought to annul an ICC order allowing abandonment of a Brooklyn railroad line. They successfully argued that the action required an impact study of the economic and physical deterioration that would occur in the local community as a result of the loss of jobs and loss of business for the railroad users, suppliers and customers. In Scenic Hudson Preservation Conference v. FPC, 151 New York intervened to argue that the EIS prepared for a proposed power plant did not adequately assess the danger to a nearby aqueduct that is a major source of the city's water supply. These aims are more consistent with NEPA goals.

NEPA set very ambitious procedural and substantive goals for itself. It is not clear that it will succeed in accomplishing them. However, if parties exploit the Act as a vehicle for obtaining judicial review of all government actions with which they are dissatisfied for any reason, they will overburden it and obscure its primary aims. Because of the broad language of the Act and a general sympathy with its philosophy, courts have been hesitant to restrict its application. The bulk of litigation and the varieties of relief sought suggest a problem that looks far beyond NEPA to the need for a more open and responsive administrative process that allows greater opportunities for the expression of local and individual preferences in every sphere of government activity.

148 NEPA § 4332(2) (C), (F).
151 453 F.2d 463 (2d Cir. 1971).
CONCLUSION

As indicated throughout this paper, the National Environmental Policy Act of 1969 has distinct procedural and substantive goals. The procedural aims, as courts have interpreted them, are quite specific and strictly enforceable. The substantive goals, on the other hand, are ambitious sounding but vague and not readily susceptible of enforcement. If we are interested principally in absolute qualitative improvement in our physical surroundings, NEPA is not the most appropriate solution.

The environmental impact statement process is a cumbersome procedural machine and there is little to suggest that it is producing drastic changes in agency programs and attitudes. The Council on Environmental Quality in its Fourth Annual Report listed a number of projects that agencies have abandoned as a result of NEPA studies. That they were able to list them may be the best indication that such abandonment is the rare exception. There are numerous litigated cases, as well, in which project review goes up and down through the courts at various stages in the EIS process, perhaps as many as three or four times over several years. In the end, the court finds that the agency has not been guilty of an abuse of discretion in its approval of the project in substantially the same form as originally planned.

The mere requirement of evaluating environmental impact may have some beneficial side effects that are difficult to detect from outside an agency. In fulfilling the rituals of preparing an EIS, enumerating alternatives and reviewing suggestions of ways to minimize adverse effects, agencies may be discovering and adopting modifications of their projects. However, there is no positive evidence of this.

Minimum quality standards, nondegradation regulations and absolute prohibition of certain harmful substances and activities are more direct


The Storm King hydroelectric plant has been in litigation since 1965. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom., Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 348 U.S. 941 (1966); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 404 U.S. 926 (1972); Scenic Hudson Preservation Conference v. FPC, 499 F.2d 127 (2d Cir. 1974). The Hudson River Fisherman's Association (HRFA) has become the plaintiff's successor in interest and the litigation continues. Hudson River Fisherman's Ass'n v. FPC, 498 F.2d 827 (2d Cir. 1974). The NEPA claims were added in 1971. Currently, the FPC is conducting further hearings on the potential harm to fish. New York Times, Nov. 12, 1974, at 35, col. 7. There is no indication that Consolidated Edison has made any significant alterations in its original plans.
methods for achieving an improved environment.\textsuperscript{155} They set out much clearer standards than NEPA and limit the range of discretion of recalcitrant agencies. However, they are not without their flaws.\textsuperscript{156} They may involve unwarranted assumptions about the state of knowledge of pollutants and environmental impacts.\textsuperscript{157} Because of their concreteness, they tend to stifle the kind of research and case-by-case analyses that agencies should be conducting under NEPA. But the primary drawback in the absolute standard approach is that it fails to recognize that difficult environmental questions involve serious competition among important conflicting values. A single, inflexible rule cannot answer those questions.

Congress did not establish the protection of our natural habitat as our foremost national priority. Only an environmental crisis of much greater proportions than the one we face now could provoke that determination. It is premature to abandon it and yet no radical reforms present themselves either. Many have suggested a veto power for the CEQ. That assumes that CEQ can acquire an adequate understanding of agency processes and goals to make a responsible judgment about when a veto is appropriate. It may also represent an over-valuation of our concern for the environment. We generally do not accord any single agency the weight a veto power entails.

The present structure of NEPA is ideal for according the environment the attention it deserves. What is lacking are incentives for enforcement within the agencies. It is necessary to create for agencies the same vested interest in the environment as they have in their main field of concern. Earmarking agency funds to be used only for NEPA-related purposes, making special environmental study grants available for major programs and providing separate funding for environmental staffing might help to create that vested interest. These suggestions require a reaffirmation by Congress—in the form of additional appropriations—that they still believe in the goals they set out in NEPA.

Theoretically, EIS procedures are suited to encouraging rational balancing and that, in itself, seems like a minimal burden to impose on agencies. But NEPA is not working in several important respects as this paper has illustrated. Congress should reevaluate NEPA and determine national priorities.

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