COMPLYING WITH NEPA: THE TORTUOUS PATH TO AN ADEQUATE ENVIRONMENTAL IMPACT STATEMENT

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In the National Environmental Policy Act (NEPA),[1] Congress issued a command to the executive branch of the federal government to begin weighing the predictable environmental impact of its actions and legislative proposals. NEPA has been both praised as a major achievement in the development of a federal commitment to resolving our environmental crisis[2] and criticized as establishing an equivocal, if not ineffective, mandate.[3] By volume alone, the litigation it has spawned attests to the Act's impact on the federal government, and in many respects to state governments as well.[4]

The operative provision of NEPA is its reporting procedure.[5] Most of the cases arising under the Act thus deal with alleged failures of compliance with this procedure. The geneses of such litigation are

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1. Act of January 1, 1970, Pub. L. 91-190, 83 Stat. 852 [hereinafter cited as NEPA], *codified*, 42 U.S.C. §§ 4321-47 (1970).

2. *See* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728, 749 (E.D. Ark. 1971); Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 1 ENV. AFFAIRS 299, 300-01 (1971); Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230, 268-69 (1970); Sax, *New Direction in the Law*, in ENVIRONMENTAL LAW 1, 12-13 (C. Hassett ed. 1971).

3. Kitzmiller, *Federal Legislation: What's Happening on Capitol Hill*, in ENVIRONMENTAL LAW 61, 67 (C. Hassett ed. 1971).

4. For an analysis of the relationship between NEPA and federal-state projects and grants, see text & notes 48-52 *infra*.

5. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

readily identifiable—a law couched in generalities, implemented by equally indefinite "Guidelines,"[6] intermingled in an atmosphere of judicial activism, agency foot-dragging and litigant zealousness. The consequences are obvious—across-the-board delays in the implementation of federal programs.[7]

A customary source for unraveling the generalities and ambiguities of a statute is its legislative history. That of NEPA[8] provides little to clarify the intent of Congress regarding the scope, specific procedure and implications of the reporting requirement, other than its action-forcing nature.[9] Congress declared only that the Act is a "statement of national policy for the environment—like other major policy declarations . . . in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation."[10] The Act brings to mind an observation of Justice Frankfurter: "[t]his is one of those cases in which Congress has seen fit not to express itself unequivo-

6. NEPA also created the Council on Environmental Quality (CEQ) in the Executive Office of the President to advise him concerning environmental policy and programs. 42 U.S.C. §§ 4342-47 (1970). By Executive Order No. 11,514, 3 C.F.R. 104 (1970), 42 U.S.C. § 4321 (1970), the CEQ issues "guidelines" relating to matters of compliance with NEPA. 36 Fed. Reg. 7724 (1971), superseding 35 Fed. Reg. 7390 (1970). See text of note 19 *infra*.

7. The enactment of NEPA may not have been intended to cause delay in the implementation of those federal projects to which its action-forcing procedures apply, although this has been its practical result. Delays have become especially crucial in the power industry. Kross, *Preparation of an Environmental Impact Statement*, 44 U. COLO. L. REV. 81, 132 (1972). Congress has responded to the power crisis by permitting the Atomic Energy Commission to circumvent the Act through the issuance of temporary operating licenses to nuclear-powered electrical generating plants in certain power-short areas, Act of June 2, 1972, Pub. L. 92-307. 86 Stat. 191, 42 U.S.C.A. § 2242 (adv. October 1972). For a discussion of NEPA's effect on AEC licensing, see Murphy, *The Natural Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup De Grace?*, 72 COLUM. L. REV. 963 (1972).

8. For a discussion of NEPA's legislative history, see Donovan, *supra* note 2, at 301-08; Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ENV. L. RPTR. 50035, 50036-45 (1971); Yannacone, *National Environmental Policy Act of 1969*, 1 ENV. LAW 8 (1970).

9. Senator Jackson, the principal sponsor of NEPA, opened debate of the NEPA Conference Report with only this to say about the bill's now most utilized feature:

> To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures. Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. It also directs all agencies to assure consideration of the environmental impact of their actions in decision-making. It requires agencies which propose actions to consult with appropriate Federal and State agencies having jurisdiction or expertise in environmental matters and to include any comments made by those agencies which outline the environmental considerations involved with such proposals.
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> Taken together, the provisions of section 102 directs any Federal agency which takes action that it must take into account environmental management and environmental quality considerations.

115 CONG. REC. 40,416 (Dec. 20, 1969).

10. S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969).

cally. It has preferred to use general language and thereby required the judiciary to apply this general language to a specific problem."[11]

This article will analyze the process that accompanies compliance with the reporting requirement of NEPA by examining the issues that federal administrators have encountered in their attempts to conform with the Act's mandate. Because the federal courts are the ultimate arbiters of these issues, the article will focus primarily upon principles developed in NEPA cases. First, the circumstances which cause NEPA to be applicable to a given project will be reviewed. Noted are attempts by federal agencies to partially or totally avoid the burdens imposed by the Act by the "non-retroactivity" and "exempt program" arguments. Then, the procedural and substantive preparation of an impact statement will be investigated. Finally, the adequacy of the statement and the availability of injunctive relief to litigants[12] will be considered, and problems of the scope of review in such cases will be discussed.

APPLICABILITY OF NEPA

As might be expected with any general law thrust into a hot political area such as the environment, NEPA quickly began its "shakedown phase" in the courts. Just as quickly, the agencies began to arm themselves with theories calculated to delay compliance with the law, hoping instead to ease themselves into the situation or avoid the applicability of the law altogether. As can be seen by examining the court decisions, such hopes were not to be realized.

"Retroactivity"—Applicability to Ongoing Projects

Federal projects are often immense undertakings, involving several phases over many years. When NEPA was signed into law on January 1, 1970, there were numerous ongoing federal projects in various stages of planning and construction, many having significant en-

11. Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 260 (1956) (construing the Wherry Military Housing Act of 1949).

Courts that have referred to the Act's legislative history have generally done so in support of decisions holding against the agency involved. See Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971); Named Individual Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971). *But see* Port of New York Authority v. United States, 451 F.2d 783, 788-90 (2nd Cir. 1971). In light of the skimpy legislative history, it is possible that courts are often following an inclination to be "environmentally aware," rather than implementing a clear congressional policy.

12. Besides environmental groups and citizen associations, NEPA litigants have included individuals, Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971), small businessmen, Pizitz v. Volpe, 4 E.R.C. 1195 (M.D. Ala. May 1, 1972), *aff'd*, 4 E.R.C. 1401 (5th Cir. July 11, 1972), *modified*, 4 E.R.C. 1672 (5th Cir. Oct. 18, 1972), and even major corporations, Lever Bros. v. FTC, 325 F. Supp. 371 (D. Me. 1971).

vironmental impacts. Because NEPA does not on its face provide an answer, a recurring issue has been whether the Act is applicable to projects begun prior to 1970.[13] The issue is not truly one of technical retroactivity, but of present applicability of the law's reporting requirement to ongoing major federal actions.[14]

Although several early cases held to the contrary,[15] there is no longer any doubt that NEPA is applicable to most previously authorized and funded, but uncompleted, federal activities.[16] Thus, the reporting requirement must be met up to some point past which, it must be assumed, Congress did not intend to require compliance.[17]

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13. *See* Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971).

14. *See, e.g.*, Pennsylvania Env. Council v. Bartlett, 454 F.2d 613, 624 (3d Cir. 1971); Natural Resources Defense Council v. Grant, 3 E.R.C. 1883 (E.D.N.C. Mar. 15, 1972); Morningside-Lennox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971).

15. *See* Elliot v. Volpe, 328 F. Supp. 831 (D. Mass. 1971) (with respect to design of interstate highway, NEPA did not authorize federal officers to review or modify basic action, which was approved prior to effective date of statute and which was contained in joint plans or programs of federal and state governments); Brooks v. Volpe, 319 F. Supp. 90 (W.D. Wash. 1970), *rev'd*, 460 F.2d 1193 (9th Cir. 1972); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970) (where Congress in 1967 authorized appropriation of funds for power transmission line, and money had been appropriated for almost all phases of project by January 1, 1970, Act did not apply to project in which new 230 KV line was planned beside existing 115 KV line).

16. *See, e.g.*, Jicarilla Apache Tribe v. Morton, 4 E.R.C. 1933 (9th Cir. Jan. 2, (1973); Environmental Defense Fund v. TVA, 4 E.R.C. 1933 (6th Cir. Dec. 14, 1972); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972) (although interstate highway project was in progress prior to effective date of NEPA, since project was ongoing after effective date of Act and necessary plans, specifications and estimates for proposed project had not been approved and construction contracts had not been awarded, it was proper to halt further work on highway project and to require a statement on environmental impact as required by Act); Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971) (where NEPA was passed after close of hearing but before decision of Federal Power Commission as to issuing of license for proposed pumped storage project, applicability of such Act to proceeding was clear); Named Individual Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971) (environmental impact statement required since federal funding of two "end segments" of expressway was authorized after January 1, 1970); City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972); United States v. 247.37 Acres, 3 E.R.C. 1098 (S.D. Ohio Sept. 9, 1971) and 3 ERC 1696 (S.D. Ohio Jan. 24, 1972). *But see* Environmental Law Fund v. Volpe, 340 F. Supp. 1328 (N.D. Cal. 1972) (where state highway department submitted environmental fact sheet which, although not elaborate enough to satisfy NEPA, did indicate that state had attempted to take into account environmental factors, only possible harm to environment was supposed danger of excavation by "waste and borrow" method, and there was a significant chance that state would lose approximately $10.8 million in federal funds if there were further delays, such statement was not "practicable" for highway project on which design approval was received before effective date of Act); Citizens to Preserve Overton Pk. v. Volpe, 3 E.R.C. 1510 (W.D. Tenn. Jan. 5, 1972).

17. The Third Circuit has taken what it describes as a "flexible" approach to judging this critical point, denying the applicability of NEPA where the individual situation warranted, *e.g.*, Transcontinental Gas v. Hackensack Dev. Comm., 464 F.2d 1358 (3d Cir. 1972) (where natural gas company transmitted its application for certification in December of 1969 and FPC certificate was issued March 12, 1970, at which time neither FPC nor Council on Environmental Quality had promulgated any guidelines, failure of FPC to prepare impact statement with respect to expansion of existing natural gas facility did not invalidate issuance of certificate), or when final federal approval had been given, *e.g.*, Concerned Citizens v. Volpe, 459 F.2d 332 (3d Cir. 1972). The other circuits, especially in highway cases, seem more prone to intervene even during construction, Brooks v. Volpe, 460 F.2d 1193 (9th Cir. 1972), unless the project

The issue of retroactivity is referred to only once in the Council on Environmental Quality Guidelines. Section 11 provides: "[t]o the maximum extent practicable the section 102(2)(C) procedure should be applied to . . . projects or programs initiated prior to . . . January 1, 1970. Where it is not practicable to reassess the *basic course of action* it is still important that *further incremental major actions* be shaped so as to minimize adverse environmental consequences."[18] This general language is not accompanied by any parameters for judging whether it is yet practicable to reassess the "basic course of action" for the challenged project. The language suggests, however, that ongoing projects or programs involving "incremental major actions" will require an impact statement of somewhat reduced scope. Thus, the Act may be partially inapplicable depending upon the degree of completion of projects commenced prior to January 1, 1970. This question is one of many which remain to be answered as the courts apply the general language of the Act and the Guidelines to specific situations.[19]

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is almost completed. Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972) (when at the time NEPA became effective, 16 of 20 miles of disputed highway had been completed and right-of-way for remaining four miles had been acquired, Congress did not intend that at such point construction should halt, environmental impact study should be made and highway possibly rerouted). The courts appear to be applying NEPA whenever there is a possibility that some changes could be made for the better, even though much work has already been done. *Compare* cases involving continuing programs rather than projects, Sierra Club v. Mason, 4 E.R.C. 1686 (D. Conn. Oct. 31, 1972) (impact statement required even though aim of dredging project was to maintain harbor constructed before NEPA's effective date); Lee v. Resor, 348 F. Supp. 389 (M.D. Fla. 1972) (spraying of herbicide on water hyacinths by Corps of Engineers pursuant to project begun 20 years prior to NEPA required impact statement, although spraying was allowed to continue while statement was being prepared).

18. Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment, Guidelines, § 11, 36 Fed. Reg. 7724, 7727 (emphasis added) [hereinafter referred to as Guidelines].

19. The enforcement of NEPA began with Exec. Order No. 11,514, 3 C.F.R. 526 (1970), 42 U.S.C. § 4321 (1971). The Council on Environmental Quality (CEQ) was therein ordered to issue "Guidelines" to the federal agencies for the preparation of section 102(2)(C) statements. *Id.* at § 3(h).

CEQ issued Interim Guidelines on April 30, 1970, 35 Fed. Reg. 7390 (1970), and Guidelines on April 23, 1971. 36 Fed. Reg. 7724 (1971). An unresolved and often ignored question is the weight to be given the CEQ Guidelines. Do they rise to the status of an executive order or of a regulation? Since they do not technically conform to either in promulgation or source, the most that can be said is that they are accorded some "special" status by the courts which is as yet ill-defined and singularly unchallenged among the various aspects of NEPA. Perhaps the best description of their status is that they are contemporaneous interpretations of a statute by the agency charged with its initial implementation. As such they would be entitled to "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1965).

Created by NEPA § 202, 42 U.S.C. § 4342 (1970), CEQ is charged with advising the President on environmental matters and assisting in the preparation of the Annual Environmental Quality Report. For a complete description of CEQ's duties and responsibilities, see NEPA § 204, 42 U.S.C. § 4344 (1970); Exec. Order 11,514, § 3, 3 C.F.R. 528 (1970). The functions of CEQ under NEPA § 204(5), 42 U.S.C. § 4344(5) (1970), pertaining to ecological systems, have been transferred to the Environmental Protection Agency (EPA), effective December 2, 1970. Reorganization Plan No. 3 of 1970, § 2(a)(5), 35 Fed. Reg. 15,623 (1970). Labeled a "superagency," Donovan, *supra* note 2, at 325, EPA was transferred functions of various councils, boards and commissions previously scattered throughout the federal bureaucracy, in effect consolidating many of the federal government's pollution enforcement

Exempt Programs

It is now generally accepted that NEPA is "part of the mandate of every federal agency."[20] As such, NEPA has been applied to almost all aspects of executive branch business having environmental consequences.[21] Some agencies, however, have contended that the

operations. For a statement by the EPA's Administrator concerning its mission, see Ruckelshaus, *The Role of the Environmental Protection Agency,* 1 ENV. AFFAIRS 528 (1971).

Professor Donovan has made the following observations concerning the relationship between CEQ and EPA:

> Reorganization Plan No. 3 does not define the relationship of the Executive Office with the EPA and the Council on Environmental Quality. The Council and the EPA are, however, separate, and the Administrator of the EPA is directly responsible only to the President. Moreover, the EPA is of such importance that it was established as an independent body rather than as a department of an existing agency, and it has been given authority over federal environmental programs. The Council, on the other hand, serves mainly to advise the President rather than to exercise power over federal agencies whose programs affect the environment. It does exercise considerable power, however, by establishing guidelines for federal action . . . .

Donovan, *supra* note 2, at 325-26. *But see* Note, *Enforcing Environmental Policy: The Environmental Ombudsman,* 56 CORNELL L. REV. 847, 848-53 (1971), pointing out structural and jurisdictional weaknesses in Reorganization Plan No. 3.

20. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

21. The broad applicability of NEPA is illustrated by the various agencies and departments of the federal government whose programs have been held subject to the Act: the Atomic Energy Commission (AEC) (explosion of a nuclear device), Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); the Civil Aeronautics Board (CAB), Complaint of National Resources Defense Council, 2 E.R.C. 1808 (CAB July 26, 1971); the Federal Aviation Administration (FAA), Citizens Airport Comm. v. Volpe, 4 E.R.C. 1738 (E.D. Va. 1972); the Federal Trade Commission (FTC), Lever Bros. v. FTC, 325 F. Supp. 371 (D. Me. 1971); the Interstate Commerce Commission (ICC), City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972). Impact statements must also be filed before the Federal Power Commission (FPC) can grant permission for the construction of natural gas lines, Arkansas-Louisiana Gas Co., 3 E.R.C. 1735 (FPC Feb. 18, 1972), or power lines, Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463 (2d Cir. 1971). Department of the Interior programs affected by NEPA include off-shore oil leasing, Natural Resources Defense Council v. Morton, 337 F. Supp. 165 (D.D.C. 1971), mining claim contests, Henry N. Gerritsen, 2 E.R.C. 1893 (I.B.L.A. Aug. 9, 1971), work affecting parks, Berkson v. Morton, 3 E.R.C. 1121 (D. Md. Oct. 1, 1971), and even the termination of a contract to purchase helium (a depletable resource lost if not extracted from natural gas when the latter is mined), National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan. 1971). Programs of the Department of Agriculture subject to NEPA include roadbuilding, Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D.N.M. 1971); timbering, Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971); land exchanges, National Forest Preservation Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972); use of pesticides in aid of crop protection, Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971); and private exploratory activities in national forests of the Soil Conservation Service, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971). Virtually every facet of Army Corps of Engineers' activities comes within the scope of NEPA, including dam and reservoir construction, Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728, 749 (E.D. Ark. 1971); canal construction, Environmental Defense Fund, Inc. v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971); and waterway improvement, Sierra Club v. Laird, 1 E.L.R. 20085 (D. Ariz. June 23, 1970). The Federal highway Administration is required to study the impact of the following road projects: interstate, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); "primary," Named Indiv. Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971); and "secondary," Nolop v. Volpe, 333 F. Supp. 1364 (D.S.D. 1971). The Department of Housing and Urban Development (HUD) is required to study the effects of its aid to building programs before granting

Act was inapplicable to one or more of their programs, if not to the entire agency.[22] The judicial response to such attempts has been predictably adverse.[23]

A notable example of an attempt to exempt an entire program was the omission by the Army Corps of Engineers of the refuse-dumping permit program[24] from NEPA-compliance regulations.[25] The purported exemption was successfully challenged in *Kalur v. Resor*.[26] There, the Corps of Engineers argued that it need not prepare an impact statement where the dumping program met the minimum federal pollution standards as administered by the Environmental Protection Agency. The Corps had promulgated a regulation to this effect.[27] The result of this position was that the entire permit program would be exempt from NEPA application since all permits were subject to these minimum standards. The Corps based part of its argument on a CEQ Guideline[28] that might be interpreted to give it support. The court ignored the Guideline, however, and held that a

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assistance, Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971), as is General Services Administration (GSA), Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

22. During the course of litigation, the Law Enforcement Assistance Administration (LEAA) of the Justice Department retreated from an argument that NEPA was inapplicable to its administration of the Safe Streets Act to a position that certain "hands-off" grants intended to be free from federal interference were exempt from NEPA; it was held, however, that all LEAA programs come under NEPA. Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), *rev'g in part* 321 F. Supp. 1088 (E.D. Va. 1971).

23. One exception may develop in the area of military actions related to national defense. McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) (NEPA inapplicable to storage of chemical and biological warfare agents in Army arsenal); Citizens v. Laird, 336 F. Supp. 783 (D. Me. 1972) (NEPA statement not required for amphibious landing of Marines on state park beach).

24. Rivers and Harbors Act of 1899 § 13, 33 U.S.C. § 407 (1971). This section prohibits the discharge of refuse into any navigable water or tributary thereof, but allows the Secretary of the Army to grant exceptions by permit.

25. 33 C.F.R. § 209.131(l)(2) (1972). For previous court decisions involving the Corps of Engineers, see Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970); United States v. Town of Brookhaven, 2 E.R.C. 1761 (E.D.N.Y. July 3, 1971); United States v. Joseph G. Moretti, Inc., 331 F. Supp. 151 (S.D. Fla. 1971).

26. 335 F. Supp. 1 (D.D.C. 1971); *accord*, Sierra Club v. Sargent, 3 E.R.C. 1905 (W.D. Wash. Mar. 16, 1972); *cf.* New York v. Department of the Army, 3 E.R.C. 1947 (S.D.N.Y. Jan. 12, 1972); Businessmen for the Public Interest, Inc. v. Resor, 3 E.R.C. 1216 (N.D. Ill. Oct. 14, 1971).

The dredging and filling aspect of the permit program was also in jeopardy until the Corps of Engineers promulgated regulations. 37 Fed. Reg. 2525 (1972). See Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.D. 1456 (S.D.N.Y. Aug. 4, 1972); Delaware v. Pennsylvania New York Cent. Transp. Co., 323 F. Supp. 487 (D. Del. 1971); Izaak Walton League of America v. Macchia, 2 E.R.C. 1661 (D.N.J. June 16, 1971).

27. 33 C.F.R. § 209.131(1)(2) (1971). Water quality, the key issue in a dumping permit application, is determined with reference to standards set by the Water Quality Improvement Act, 33 U.S.C. § 1171(b)(1) (1970). The WQIA is administered by EPA. Reorganization Plan No. 3, *supra* note 19, at § 2(1).

28. CEQ Guidelines § 5(d), 36 Fed. Reg. at 7725 (1971). This Guideline states that "environmental protective regulatory activities concurred in or taken" by the EPA do not require an impact statement. It has thus been disregarded in requiring NEPA compliance of EPA in its Clean Air Act activities. Anaconda v. Ruckelshaus, 4 E.R.C. 1817 (D. Colo. Dec. 19, 1972).

NEPA statement was required so that, beyond meeting certain minimum standards, the individual permit would receive a "balancing analysis . . . to ensure that, with possible alterations, the optimally beneficial action is finally taken."[29] This lends weight to the notion that the courts will construe the Act broadly, even in the face of an arguably narrower interpretation by CEQ as implemented in its Guidelines.[30]

Regulatory Restrictions

While some agencies have attempted to reduce the administrative burdens of complying with NEPA via exempt program regulations, others have attempted to ameliorate the reporting requirement of section 102 in fashioning their own regulations. These regulatory restrictions have, not surprisingly, suffered the same fate as the so-called "exempt program" regulations. For example, *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*[31] struck down a 14-month delay in the implementation of NEPA that the AEC had inserted into its regulations, despite the absence of a timetable for compliance in the Act. The Court of Appeals for the District of Columbia observed that the Commission's interpretation of the statute was "so strange that it seems to reveal a rather thoroughgoing reluctance to meet the NEPA procedural obligations . . . ."[32] The court held the absence of a timetable in the Act indicated that compliance was "required forthwith."[33]

Various other types of restrictions have been attempted by the agencies. These attempts, like the others, stemmed from either a failure to incorporate the Act's procedural obligations into the conduct of agency business or incorporation of these obligations into existing modes of doing business that did not fulfill the NEPA requirements.[34]

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29. Kalur v. Resor, 335 F. Supp. 1, 14 (D.D.C. 1971). The impact of this case has been largely dissipated by § 511(c) of the Federal Water Pollution Control Act of 1972. 40 C.F.R. §§ 124 *et seq.* (1972).

30. *Contra*, Getty Oil v. Ruckelshaus, 4 E.R.C. 1567, 1572 (3d Cir. Sept. 12, 1972).

31. 449 F.2d 1109 (D.C. Cir. 1971), *discussed in* Note, *National Environmental Policy Act of 1969 Requires the Federal Agency Charged with Ultimate Responsibility for a Project to Conduct Comprehensive Environmental Impact Studies in Every Important Stage of its Decision-Making Process*, 60 GEO. L.J. 1353 (1972).

32. 449 F.2d at 1119.

33. *Id.* at 1120. After *Calvert Cliffs'*, it seemed only a matter of time before a similar delay provision in Federal Highway Administration (FHWA) regulations would be rejected. See 36 Fed. Reg. 23,666-67 (1971). Several district courts have done so. Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972); Conservation Society v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Keith v. Volpe, 4 E.R.C. 1350 (C.D. Cal. July 7, 1972). *But see* Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n, 464 F.2d 1358 (3rd Cir. 1972) (some delay permitted).

34. *See* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) (failure

One regulatory restriction that appears to have a reasonably good chance of surviving in certain situations, however, is the concept of a "negative impact statement"—a statement that the action has been scrutinized and found, within defined guidelines, not to be a "major" action or to have no significant impact on the environment and that a NEPA statement is therefore not required. The Department of Housing and Urban Development (HUD) was successful with the concept in a case involving a request for insurance assistance under the National Housing Act by a private apartment builder.[35] HUD has set some fairly well-defined parameters in its own regulations which indicate the actions it considers to be outside the scope of the NEPA reporting requirement. While the setting of such parameters does not preclude judicial review of individual agency decisions, as many agencies have learned,[36] it does provide the courts with the standards the agency used to reach the determination that the statement was not required. Although some actions seem "obviously" major,[37] the review of closer questions is aided by this type of pre-set administrative guideline, affording the court a view of the reasons behind a particular agency decision.[38]

Major Federal Actions Significantly Affecting the Quality of the Human Environment

The determination whether an impact statement must be prepared is made by considering the cumulative effect of a federal action on the environment.[39] The basic question to be resolved is whether the project or program is a "major Federal action significantly affecting the quality of the human environment."[40] Because of the diversity of fed-

of agency to prepare its own draft statement by using that of the applicant); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971) (regulation that did not require the impact statement to accompany a proposal through the agency review processes); Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971) (permitting an applicant to initiate the activity under review, failure to prepare a final statement).

35. Echo Park Residents Comm. v. Romney, 3 E.R.C. 1255 (C.D. Cal. May 11, 1971) (summary judgment for defendant granted); *see* Maryland-National Capital Park & Planning Comm'n v. United States Postal Serv., 4 E.R.C. 1655 (D.D.C. Oct. 13, 1972). *But see* Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore., 1971).

36. Save Our Ten Acres v. Kreger, 4 E.R.C. 1941 (5th Cir. Jan. 16, 1973) (GSA); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (FHWA), *aff'g*, 336 F. Supp. 882 (W.D. Wis. 1971); Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189 (D.D.C. 1972) (ICC); Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1464 (S.D.N.Y. Aug. 4, 1972); *cf.* Citizens for Reid State Pk. v. Laird, 336 F. Supp. 783 (D. Me. 1972).

37. *See* Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (conversion of two-lane conventional highway to four-lane freeway).

38. *See, e.g.*, Citizens for Reid State Pk. v. Laird, 336 F. Supp. 783 (D. Me. 1972).

39. Guidelines § 5(b), 36 Fed. Reg. at 7724-25 (1971).

40. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). Recommendations

eral actions already held subject to NEPA,[41] it can be concluded that the type of federal action will seldom provide the basis for excusing the agency from the reporting requirement of the Act.[42] Nor will the fact that the action is temporary, to be replaced by some final action at a subsequent date, preclude major status.[43] Such parameters as cost, size and duration of construction, duration of useful life and the effect on the environment are determinative.[44]

Whatever the project or program, it is likely to be characterized as major if any adverse environmental result can be demonstrated. There are very few cases[45] where courts have found no major federal action, with the others either expressly finding such action[46] or assuming the point.[47] Practically, if major status is found, a finding of "significant" environmental impact will follow.

Federal-State Projects

The Act operates only upon federal agencies, imposing no duties on the states or private parties.[48] Where a project at the state level is

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and favorable reports on proposals for legislation are also included within the obligations of this section. *See also* Guidelines § 5(a)(i), 36 Fed. Reg. at 7724 (1971).

41. *See* cases cited note 21 *supra.*

42. *See* Guidelines §§ 5(a)(ii), (iii), 36 Fed. Reg. at 7724 (1971).

43. Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189 (D.D.C. 1972).

44. *See* Guidelines § 5(b), 36 Fed. Reg. at 7724 (1971). There has been an attempt by at least one agency, the Federal Highway Administration, to avoid the full impact of NEPA by "project-splitting"—segmenting projects to avoid reporting on part of the work. That effort has, to date, been unsuccessful. *E.g.*, Named Individual Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013, 1022-24 (5th Cir. 1971); Thompson v. Fugate, 347 F. Supp. 120 (E.D. Va. 1972); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972); Keith v. Volpe, 4 E.R.C. 1350 (C.D. Cal. July 7, 1972).

45. One court has held that the leasing of 120 acres of Indian land for mining purposes was not a major federal action, although other major actions were involved in the case. Jicarilla Apache Tribe v. Morton, 3 E.R.C. 1919 (D. Ariz. Mar. 14, 1972), *aff'd*, 4 E.R.C. 1933 (9th Cir. Jan. 2, 1973). The Tenth Circuit, however, has held that an impact statement was required prior to the Secretary of the Interior's approval of a lease of 1,300 acres of restricted Indian land owned by the Pueblo of Tesuque, with an option to lease 4,100 acres more. Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), *rev'g* 335 F. Supp. 1258 (D.N.M. 1971). *See also* Kisner v. Butz, 4 E.R.C. 1692, 1702 (N.D. W. Va. Oct. 27, 1972) (4.3 mile, one-lane, gravel road segment through National Forest not a major federal action); Citizens for Reid State Pk. v. Laird, 336 F. Supp. 783 (D. Me. 1972) (amphibious landing of some 900 Marines on state park beach in Maine was not a major action requiring an impact statement).

46. *See, e.g.*, Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971); Named Individual Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728, 749 (E.D. Ark. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971).

47. *See* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

48. *See* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration, administrating agency of Safe Streets Act, was required in approving block grants to states for law enforcement purposes to comply with procedural requirement of NEPA); Miltenberger v. Chesapeake & O. Ry., 450 F.2d 971, 974 (4th Cir. 1971) (National Historic Preservation Act of 1966 and NEPA are directed only to federal agencies). For examples of actions construed as not "federal,"

federally funded, however, NEPA may be applicable to the granting federal agency. Because of the inherent problems of delay that result from federal agency compliance with NEPA, some states understandably may become reluctant to accept federal funds.

Several cases have discussed whether a state can avoid the delay caused by the interjection of NEPA into a cooperative state-federal project by simply returning or refusing the federal grant involved and proceeding on its own. The Court of Appeals for the Fifth Circuit met this contention[49] and, applying a partnership principle and finding federal involvement in the project as "beyond challenge,"[50] rejected Texas' contention that it could finish building an intrastate expressway with its own money and refuse to accept 50 percent federal aid earmarked for the project.

> No one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law. . . .[51]

In highway projects, the Federal Highway Administration (FHWA) exerts tremendous influence early in the project, although it generally waits until some subsequent date to commit itself. To circumvent NEPA, FHWA might withhold funds for a state highway project until it was substantially completed and at that time commit itself financially, thereby attempting to moot NEPA evaluation. In *Arlington Coalition on Transportation v. Volpe*,[52] however, the Court of Appeals for the Fourth Circuit enjoined state condemnation of land for an interstate highway because the activity was not independent of federal influence and federal funding was still being sought. The question was not raised whether a state can condemn land for highway construction if it disavows any further attempt to obtain federal funds and sets out to build the highway itself. In any event, assuming the liberal interpretation given NEPA, where construction of a high-

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see Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972) (location of telephone exchange building); Bradford Township v. Illinois Hwy. Auth., 463 F.2d 537 (7th Cir. 1972) (highway extension with no federal involvement); Civic Improvement Comm. v. Volpe, 4 E.R.C. 1160 (W.D.N.C. Mar. 24, 1972), *aff'd*, 4 E.R.C. 1163 (4th Cir. May 14, 1972) (locally-financed street widening); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972) (preliminary state-financed freeway plan).

49. Named Individual Mem. of San Antonio Con. Soc. v. Texas Hwy. Dep't, 446 F.2d 1013 (5th Cir. 1971). *See also* Morningside-Lennox Pk. Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971).

50. 446 F.2d at 1027.

51. *Id.* at 1028.

52. 458 F.2d 1323 (4th Cir. 1972), *rev'g* 332 F. Supp. 1218 (E.D. Va. 1971).

way in compliance with federal standards has begun, even though contemplated federal funding has not yet started, the project probably will be subject to the type of rigorous evaluation posited by the Act.

PREPARING THE IMPACT STATEMENT

It is apparent that the initial attempts at NEPA-compliance, or NEPA-avoidance, as the case may be, were largely unsuccessful in the courts. Most of the agency reasons for noncompliance or delay were rejected. Through the early decisions, the courts left a clear picture of how they view NEPA and these and later decisions have answered many of the questions concerning preparation of an impact statement left unanswered by the Act and CEQ Guidelines.

Focus on Procedural Duties

Once it is determined that section 102 is applicable to a particular federal action, the appropriate federal agency must comply with the statute's procedures. NEPA, aside from its policy aspects, is primarily a procedural statute, the main thrust of which is the reporting mandate embodied in section 102. Enforcement of NEPA can thus be summed up in the phrase "strict procedural compliance." Accordingly, most courts have viewed their role as enforcing such compliance rather than reviewing the merits of federal actions.[53] Even such procedural strictness, however, has its limitations, as the court recognized in *Natural Resources Defense Council, Inc. v. Morton*: "if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible . . . ."[54] The rule has been succinctly stated by the Court of Appeals for the Tenth Circuit: "[t]he mandates of the N.E.P.A. pertain to procedure and not to substance, that is, decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision."[55] The cases have made it clear that before the final decision to proceed with the project is made,

53. *See* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), *aff'g* 326 F. Supp. 151 (D. Kan. 1971); Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 467-69 (2d Cir. 1971); Ely v. Velde, 451 F.2d 1130, 1138 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401, 1404 (D.D.C. 1971). *But cf.* Morningside-Lennox Pk. Ass'n v. Volpe, 334 F. Supp. 132, 145 (N.D. Ga. 1971), where the court indicated a willingness to review the Secretary of Transportation's decision "under the appropriate standards of the Administrative Procedure Act."

54. 458 F.2d 827, 837 (D.C. Cir. 1972); *see* Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972).

55. Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1236 (10th Cir. 1971).

the impact statement procedures must be followed. But what are these procedures? NEPA itself does not supply them. They must be found from a maze of cases and guidelines construing the Act in light of its purpose and in the context of the differing procedures of the various agencies.

Lead Agency

NEPA directs "all agencies" of the federal government to include a detailed statement prepared by the responsible officials in recommendations or reports on proposals for legislation and major federal actions that will significantly affect the environment.[56] This generality has caused predictable confusion where there is more than one agency involved. Section 5(b) of the CEQ Guidelines creates the "lead agency" concept: "[t]he lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action. 'Lead agency' refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact."[57] No case has yet faced the issue whether this approach is a regulatory restriction that conflicts with the "all agencies" mandate. In *Upper Pecos Association v. Stans,* however, the Tenth Circuit noted, "both parties agree that the environmental impact statement is to be prepared by the agency with overall responsibility for the project."[58] Concerning the issue of choosing between agencies, the court held:

> There is no dispute that the Forest Service has the continuing commitment to the course of action to build the road and the expertise to prepare the statement, whereas a requirement that the E.D.A. [Economic Development Administration] do so would be unduly burdensome to that agency. The trial court found that the Forest Service was the lead agency, and thereby had the responsibility of preparing the environmental impact statement.[59]

It seems unlikely that litigants will be able to mount a successful attack on the lead agency concept. The Second Circuit has directly

56. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).
57. 36 Fed. Reg. 7724, 7724-25 (1971).
58. 452 F.2d 1233, 1235-36 (10th Cir. 1971). *See also* Jicarilla Apache Tribe v. Morton, 3 E.R.C. 1919, 1921 (D. Ariz. Mar. 14, 1972), *aff'd,* 4 E.R.C. 1933 (9th Cir. Jan. 2, 1973).
59. 452 F.2d at 1236. While the lead agency concept may survive, the court of appeals' choice of a lead agency in *Upper Pecos* has not. A writ of certiorari was granted in that case, 406 U.S. 944 (1972). Meanwhile, EDA drafted an impact statement of its own, the government suggested mootness and the Court remanded the case for consideration of the issue, 93 S. Ct. at 458. Tacitly, then, the government is saying that in the choice of a lead agency, money, not expertise, talks.

implemented it in one case[60] and a number of decisions in multi-agency cases have tacitly assumed that the agency with the most responsibility, control and expertise would be the reporting agency, and thus that only one statement was required.[61] It would seem that this conclusion is proper since it avoids unnecessary duplication of effort. As to the choice of agency, it would be the unusual case where one agency did not clearly have primary authority for committing the government to action, even though it was without environmental expertise.

Composing the Draft Statement

The environmental impact statement begins as a draft which accompanies the project proposal through the decisionmaking process and is forged, theoretically, into the final statement. The statement is then available for the final decision whether to proceed with the project. In totally federal endeavors, the responsible or "lead" agency is the obvious choice to compose the draft statement. A number of agencies, however, have attempted to rely on applicants in permit cases and on state "partners" in cooperative state-federal projects for preparation of the impact statement. In *Greene County Planning Board v. FPC*[62] the Court of Appeals for the Second Circuit rejected this approach and required draft impact statements to be composed by the FPC. The court said it would allow the agency to use all available sources of information in the draft's preparation, however, including an applicant-prepared impact statement.[63] Litigation is just beginning to focus on the degree to which the responsible agency may rely on such materials.[64]

Another problem surrounding the preparation of the draft is one of timing—when must the statement be prepared and circulated in

60. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

61. *See* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1971); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971); Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971); Izaak Walton League of America v. Schlesinger, 327 F. Supp. 287 (D.D.C. 1971); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971).

62. 455 F.2d 412, 420-22 (2d Cir. 1972).

63. The Fifth Circuit first approved but then abstained from approving the use of a state highway department's statement with regard to a federal highway project. Pizitz v. Volpe, 4 E.R.C. 1401 (5th Cir. July 11, 1972), *modified*, 4 E.R.C. 1672 (5th Cir. Oct. 18, 1972). One district court has probably misconstrued *Greene County* to allow a state draft and federal final impact statement. Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 741 (D. Conn. 1972).

64. It is unclear whether a general application of *Greene County* is necessary or justified where states have the expertise (as in highway cases) with which to study and draft a report on environmental impact. See National Forest Preservation Group v. Volpe, 4 E.R.C. 1836 (D. Mont., Dec. 11, 1972); Iowa Citizens v. Volpe, 4 E.R.C. 1755 (D. Ia., Nov. 30, 1972); Lathan v. Volpe, 4 E.R.C. 1487 (W.D. Wash. Aug. 4, 1972); Brooks v. Volpe, 4 E.R.C. 1492, 1498 (W.D. Wash. Aug. 4, 1972); Daly v. Volpe, 4 E.R.C. 1481, 1484-85 (W.D. Wash. Mar. 31, 1972).

the overall timetable for the project? Since the various federal agencies have somewhat different procedures, this problem should be viewed in light of these differences, keeping in mind the essential test under section 102 that the detailed statement "shall accompany the proposal through the existing agency review processes."[65] For the independent agencies,[66] this apparently means that their staffs should draft a statement and circulate it prior to the normal hearings required by their regulations.[67] For executive department agencies with hearing requirements, such as the FHWA, the statement also must be prepared "early,"[68] which apparently means before any hearing.[69] As to ongoing projects, draft preparation probably should have begun immediately after the passage of NEPA,[70] especially where federal approval of some phase of the project has been sought and obtained, even though federal funds may not yet have been committed to the project.[71] For new projects, preparation should start when the plan is sufficiently definite to admit of environmental analysis,[72] and at least early enough to produce a draft statement before any hearing is held. This is equally true for executive department agencies with discretionary hearing requirements for particular programs, if such hearings are to be held.[73]

A third problem concerns the factors to be considered in the draft statement. Very little has been said about the substantive content of the draft,[74] its scope[75] or the detail required to examine the environmental impact of the project involved.[76] The tenor of section 102 and

65. NEPA § 102(2)(C), 42 U.S.C. § 4332(C) (1970).

66. *E.g.*, Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) (FPC); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971) (AEC).

67. For the most part, the agencies appear to view the hearing as part of the comment process and not as an independent step to precede or follow receipt of comments. *Cf.* Ex parte No. 55, 3 E.R.C. 1650, 1656 (ICC Jan. 14, 1972).

68. Lathan v. Volpe, 455 F.2d 1111, 1121 (9th Cir. 1971); *see* Brooks v. Volpe, 4 E.R.C. 1492 (W.D. Wash. Aug. 4, 1972); Daly v. Volpe, 4 E.R.C. 1481 (W.D. Wash. Mar. 31, 1972).

69. *See* Daly v. Volpe, 4 E.R.C. 1486 (W.D. Wash. Aug. 4, 1972); Lathan v. Volpe, 4 E.R.C. 1487 (W.D. Wash. Aug. 4, 1972).

70. Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971). *But see* Transcontinental Gas Pipe Line Corp. v. Hackensack Meadows Dev. Comm'n, 464 F.2d 1358 (3d Cir. 1972).

71. *See* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971). *See also* Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972); Keith v. Volpe, 4 E.R.C. 1350 (C.D. Cal. July 7, 1972); Northeast Area Welfare Rights Org. v. Volpe, 2 E.R.C. 1704 (E.D. Wash. May 12, 1971).

72. Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1464 (S.D.N.Y. Aug. 4, 1972).

73. *See* Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.D.C. 1972).

74. Daly v. Volpe, 4 E.R.C. 1481, 1484 (W.D. Wash. Mar. 31, 1972).

75. *Compare* Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972) *with* National Forest Preserv. Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972).

76. Environmental Defense Fund, Inc. v. TVA, 339 F. Supp. 806 (E.D. Tenn.

the CEQ Guidelines leads to the conclusion that the draft should be as detailed and as comprehensive as possible.[77] In this way, the draft will probably withstand a challenge that it did not on its face provide adequate notice of the project to commenting agencies, state officials and interested groups or individuals.[78] A thorough draft at the outset avoids the problem of having to rewrite it later in order to cover adequately all aspects of the project's impact. Great expansion of the statement might provide grounds to object that the original draft provided inadequate public notice or that the agency did not really know what impact was involved. In such a case, the so-called final statement might have to be recirculated as a draft.[79] But some change, perhaps significant, must be anticipated between the draft and final version of the statement, or the comment process with its public and agency input would have no value.

Circulating the Draft for Comments

The CEQ Guidelines have greatly simplified the task of selecting federal sister agencies to ask for environmental comments about a project or program. Appendix II to the Guidelines lists the expertise each agency is presumed to have and for which each should be consulted.[80] This does not simplify the task of selecting state or local governmental bodies, individuals or private organizations, but the watchword should be generosity—when in doubt, include them. In this spirit a "systematic interdisciplinary approach" can be devised that will carry the procedure through to a successful end.[81] It is also in this spirit that

1972). For a discussion of the statement filed in one case, see Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 757-62 (E.D. Ark. 1971).

77. CEQ Guidelines § 5, 36 Fed. Reg. at 7724-25 (1971). It must be remembered that even though the Second Circuit expressly refrained from limiting the sources of information which the FPC could use in composing a draft, the draft must be demonstrably an agency product, Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972).

78. *Cf.* Students Challenging Regulatory Agency Procedures v. United States, 346 F. Supp. 189 (D.D.C. 1972), *stay pending appeal refused sub nom.*, Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures, 93 S. Ct. 1 (1972) (Burger, C.J., sitting as Circuit Justice), *probable jurisdiction noted*, 41 U.S.L.W. 3339 (Dec. 19, 1972).

79. The problems incurred by omitting something are amply illustrated by the Department of Interior's dilemma on remand in Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.D.C. 1972).

80. 36 Fed. Reg. 7724, 7727-29 (1971). The existence of this list may explain why no court has yet had to decide a challenge directed at inadequate circulation of the draft for comments, although complete lack of notice had been criticized. Lathan v. Volpe, 4 E.R.C. 1487, 1490 (W.D. Wash. Aug. 4, 1972); Daly v. Volpe, 4 E.R.C. 1481, 1483 (W.D. Wash. Mar. 31, 1972).

81. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1113-15 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401, 1403-04 (D.D.C. 1971). *Cf.* Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972). This type of dissemination would have been practically impossible in the Trans-Alaska Pipeline draft circulation, judging from the large num-

agencies can fairly argue later in the procedure that those who were asked to comment but failed to do so should not be allowed to delay the project by later efforts to interject their opinions.[82]

Public Hearing

There are a number of mandatory hearing requirements imposed by statute or self-imposed by agency regulation which have made available a forum for discussion of environmental matters. The AEC,[83] FPC,[84] FTC,[85] ICC[86] and the other independent agencies are subject to these, as are the FHWA[87] and the Corps of Engineers.[88] The difficulty arises in deciding, under a discretionary provision, whether to hold public hearings. Several decisions have mentioned this discretionary exercise[89] but only one has had to decide whether a particular failure to hold such a hearing violated either the letter or the spirit of NEPA and the CEQ Guidelines.[90] Discretionary decisions of this issue are sure to draw more fire in future litigation.

If a hearing is to be had, however, what type of hearing should it be? Must "due process" be afforded, including the right to cross-examine? The answer to both of these questions is probably not. NEPA does not create substantive rights to a clean environment.[91] Arguably, therefore, no due process requirement is violated by failure to hold public hearings, or if held, by denial of the right to cross-examine witnesses as long as there are available alternative means of affording public notice and comment.[92] Certain agency procedures into which NEPA is incorporated already afford such opportunities.[93] Whether

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bers of people who participated in those hearings. In such a situation, a reasonable solution is suggested in Daly v. Volpe, 4 E.R.C. 1486, 1487 (W.D. Wash. Aug. 4, 1972), whereby the draft should be made available for copying.

82. *See* Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971) (laches invoked for failure to raise claim of improper public hearing for 7 years), *on remand*, 4 E.R.C. 1487, 1490-91 (W.D. Wash. Aug. 4, 1972) (claim that statement must be drawn by federal rather than state authorities dismissed for want of timely interposition).

83. 10 C.F.R. § 50.58(b) (1972).

84. 18 C.F.R. § 3.103 (1972).

85. 16 C.F.R. Part 3 (1972).

86. 49 C.F.R. Part 1100 (1972).

87. 23 U.S.C. § 128 (1970).

88. 33 C.F.R. § 209.120(g) (1972).

89. National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (dictum that where hearings are discretionary no hearing is required); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.C. Cir. 1972).

90. Jicarilla Apache Tribe v. Morton, 4 E.R.C. 1933 (9th Cir. Jan. 2, 1973). Since neither NEPA nor the Guidelines requires a hearing, there is some question whether failure to hold one is a valid cause for complaint. It probably is not, since the primary purpose of the reporting requirement is to give notice of the impact of the project, and a hearing is but one way to afford such notice.

91. Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1236 (10th Cir. 1971).

92. *See* Jicarilla Apache Tribe v. Morton, 4 E.R.C. 1933 (9th Cir. Jan. 2, 1973); Lathan v. Volpe, 4 E.R.C. 1487, 1492 (W.D. Wash. Aug. 4, 1972).

mandatory or discretionary, NEPA seems to contemplate a non-due process, informal hearing,[94] the basic purpose of which is to inform the public and to be used to receive comments from interested persons.

Responding to Comments Received

Section 102 provides that copies of "the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards . . . shall accompany the proposal through the existing agency review processes."[95] A reasonable summarization which accurately characterizes all "responsible scientific opinions concerning possible adverse environmental effects"[96] may suffice. The CEQ Guidelines expand the class of potential commentators to include private organizations and individuals.[97] The scope of this category is not specified and has not yet been construed. Caution dictates, however, that it should at least include litigants in suits involving the proposal[98] and, where practicable, those persons or groups who have come forward to express definite views on the matter.[99]

The Guidelines also require the agency to respond to the issues raised by this expanded class of commentators. The impact statement must, where appropriate, include "a discussion of problems and objections raised by . . . [the commentators] in the review process and the disposition of the issues involved. (This section may be added at the end of the review process in the final text of the environmental statement.)"[100] This language is clearly broad enough to require that the agency's decisions and reasoning regarding problems and objections raised at public hearings be included as well. For that matter, section 102 might be read to require inclusion of a verbatim transcript of any hearings held, at least to the extent that testimony transcended prepared statements.[101] These issues have not yet been tested in the

93. *See* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Daly v. Volpe, 4 E.R.C. 1486 (W.D. Wash. Aug. 4, 1972).
94. *But see* Zabel v. Tabb, 430 F.2d 199, 214 (5th Cir. 1970).
95. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).
96. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971). The mere physical presence of the draft and comments in the review process without active consideration is not enough, however. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1117-18 (D.C. Cir. 1971).
97. 36 Fed. Reg. at 7725, 7726 (1971).
98. *Cf.* Brooks v. Volpe, 4 E.R.C. 1492, 1498 (W.D. Wash. Aug. 4, 1972).
99. The compendium of comments will often be as voluminous as the statement itself.
100. 36 Fed. Reg. at 7725 (1971).
101. This can be useful even if it is not required. Conservation Council v. Froehlke, 3 E.R.C. 1687, 1689 (M.D.N.C. Feb. 14, 1972), *aff'd mem.*, 4 E.R.C. 1044 (4th Cir.

courts and may not be if the agencies liberally construe their procedural duties.[102]

Pitfalls in the Path to a Final Statement

It is now apparent that any number of omissions or agency miscalculations can taint a final impact statement. Examples include the failure to follow agency regulations in preparing the statement[103] or, regarding the substance of the statement itself, the failure to set forth all known environmental impacts[104] or unavoidable adverse effects,[105] the failure to mention and explore all alternatives[106] and their environmental impacts[107] whether or not under agency control,[108] the failure to discuss irreversible and irretrievable commitments of resources,[109] and the failure to discuss future plans emanating from the proposed action.[110] Additionally, it might be fatal to fail to consult all appropriate agencies and commentators specified by section 102 and the CEQ Guidelines,[111] fail to include responsible comments in the report,[112] or fail to show that these comments accompanied the proposal

May 2, 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 342 F. Supp. 1211 (E.D. Ark. 1972).

102. *See* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1124-25 (D.C. Cir. 1971), demonstrating that the reporting agency cannot "take another's word" for a particular impact, even though the commenting agency has expertise not present in the reporting agency. *See also* Lathan v. Volpe, 4 E.R.C. 1487, 1489 (W.D. Wash. Aug. 4, 1972).

103. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 756 (E.D. Ark. 1971); *cf.* Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1464 (S.D.N.Y. Aug. 4, 1972).

104. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 758 (E.D. Ark. 1971).

105. *Id.; cf.* Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917, 920-30 (1971) (denial of application for injunction in aid of jurisdiction) (Douglas, J., dissenting).

106. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970); *see* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 761-62 (E.D. Ark. 1971). *See generally* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1465 (S.D.N.Y. Aug. 4, 1972); Keith v. Volpe, 4 E.R.C. 1350, 1357 (D.C. Cal. July 7, 1972).

Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 741 n.6 (D. Conn. 1972), has added yet another wrinkle by suggesting that the Department of Transportation (DOT) rather than FHWA should do the impact statement because some alternatives are outside FHWA's jurisdiction.

107. *See* cases cited note 106 *supra.*

108. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

109. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 758 (E.D. Ark. 1971). *See generally* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1465 (S.D.N.Y. Aug. 4, 1972).

110. Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972).

111. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 758 (E.D. Ark. 1971); *cf.* Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 481 (2d Cir. 1971).

112. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C.

through the agency review process.[113] Failure to include an agency comment post-dating the final statement has been noted,[114] and the failure to circulate an addendum to the final statement has been declared improper.[115] All of these matters have received attention by courts in deciding whether the agency had produced a "detailed" statement,[116] or whether it had failed in some respect.[117]

Two opinions have shed light on some of these pitfalls and what it takes to avoid them. In *Committee for Nuclear Responsibility, Inc. v. Seaborg*[118] the court admonished the AEC to include "the full range of responsible opinion" in the comments received concerning the environmental impact of an underground nuclear explosion on Amchitka Island in the Aleutians:

> When, as here, the issue of procedure relates to the sufficiency of the presentation in the statement, the court is not to rule on the relative merits of competing scientific opinion. Its function is only to assure that the statement sets forth the opposing scientific views, and does not take the arbitrary and impermissible approach of completely omitting from the statement, and hence from the focus that the statement was intended to provide for the deciding officials, any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects. Only *responsible* opposing views need be included and hence there is room for discretion on the part of the officials preparing the statement; but there is no room for an assumption that their determination is conclusive. The agency need not set forth at full length views with which it disagrees, all that is required is a meaningful reference that identifies the problem at hand for the responsible official. The agency, of course, is not

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Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 758 (E.D. Ark. 1971); *cf.* Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917, 920-30 (1971) (denial of application for injunction in aid of jurisdiction) (Douglas, J., dissenting).

113. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 748, 758 (E.D. Ark. 1971); *cf.* National Forest Preserv. Group v. Butz, 343 F. Supp. 696 (D. Mont. 1972).

114. Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

115. Natural Resources Defense Council, Inc. v. Morton, 3 E.R.C. 1623 (D.D.C. Feb. 1, 1972).

116. Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 481 (2d Cir. 1971); Conservation Council v. Froehlke, 3 E.R.C. 1687, 1690 (M.D.N.C. Feb. 14, 1972), *aff'd mem.*, 4 E.R.C. 1044 (4th Cir. May 2, 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972); Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971).

117. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971); Lathan v. Volpe, 4 E.R.C. 1487, 1490 (W.D. Wash. Aug. 4, 1972); Brooks v. Volpe, 4 E.R.C. 1492, 1498 (W.D. Wash. Aug. 4, 1972); Daly v. Volpe, 4 E.R.C. 1481, 1484 (W.D. Wash. Mar. 31, 1972).

118. 463 F.2d 783 (D.C. Cir. 1971).

> foreclosed from noting in the statement that it accepts certain contentions or rejects others.[119]

Who determines the "responsible" character of a particular point of view or observation, and how is this to be done? What constitutes a "meaningful" reference to these views? These are interesting questions, but it is obvious, in spite of any apparent leeway, that the only completely safe course of action for the agency is to include all comments received in their entirety. Whatever bulk this may add to the impact statement should be more than compensated for by agency peace of mind, knowing that this pitfall has been avoided.

A second opinion dealt at length with another of these pitfalls: the degree to which the statement must consider alternatives to the proposed action. *Natural Resources Defense Council, Inc. v. Morton*[120] concerned the Interior Department's sale of oil and gas leases on submerged lands off eastern Louisiana. Calling the impact statement "the environmental source material for . . . the making of relevant decisions,"[121] which should include an evaluation of the proposal and its alternatives, the court rejected the argument that the impact of such alternatives need not be discussed:

> A sound construction of NEPA . . . requires a presentation of the environmental risks incident to reasonable alternative courses of action. The agency may limit its discussion of environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment, or that [the] effect, briefly described, is simply not significant. A rule of reason is implicit in this aspect of the law as it is in the requirement that the agency provide a statement concerning those opposing views that are responsible.[122]

The rationale for this construction is that "[t]he impact statement is not for the exposition of the thinking of the agency, but also for the guidance of [the] ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest."[123] The court referred to and rejected several possible limitations on the discussion of alternatives. Alternatives requiring a wide range of analysis beyond the immediate proposal must be discussed. Thus, necessary consideration of such matters as economics, foreign rela-

119. *Id.* at 787 (citations omitted).
120. 458 F.2d 827 (D.C. Cir. 1972).
121. *Id.* at 833.
122. *Id.* at 834 (footnote omitted).
123. *Id.* at 835.

tions and national security do not discount an alternative.[124] Nor can an agency fail to discuss an alternative merely because someone else must effectuate it.[125] Nor does the need to be implemented through legislation render an alternative "unreasonable" per se, as long as the possibility of legislative action is not "remote from reality."[126] Furthermore, an alternative cannot be disregarded merely because it does not offer a complete solution to the problem.[127] The court also stated that detailed discussion of the environmental effects of alternatives is unnecessary if "these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities . . . not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed."[128] At another point, the court made an important distinction between the magnitude of the action involved in the case, the offshore oil leasing program involving 380,000 acres which could affect 7.9 million acres of coastal marshes, and more routine proposals:

> The scope of this project is far broader than that of other proposed Federal actions discussed in impact statements, such as a single canal or dam. The Executive's proposed solution to a national problem, or a set of inter-related problems, may call for each of several departments or agencies to take a specific action; this cannot mean that the only discussion of alternatives required in the ensuing environmental impact statements would be the discussion by each department of the particular actions it could take as an alternative to the proposal underlying its impact statement.
>
> When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened.[129]

In all cases, the goal for the statement's writers envisioned by the court is "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."[130]

> In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness, and we say this with full awareness that this approach necessarily has both strengths and weaknesses. Where the environmental aspects of alternatives are readily identifiable by the agency, it is reasonable to state them—for ready reference by those concerned with the consequences of the decision and its alternatives. . . .[131]

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124. *Id.* at 834.
125. *Id.*
126. *Id.* at 837.
127. *Id.* at 836.
128. *Id.* at 837-38.
129. *Id.* at 835 (footnotes omitted).
130. *Id.* at 836.
131. *Id.* at 837.

In summary, it seems that only demonstrably speculative, presently unfeasible or unreasonably remote alternatives can be given short shrift or excluded altogether.

THE FINAL STATEMENT: IS IT ADEQUATE?

Adequacy

If there are no fatal omissions in the procedures used to compile the final statement, what test should be applied to determine whether it complies with NEPA's mandate to produce a "detailed statement?" Faced with a substantive challenge to the final statement itself, a federal court is limited in the scope of its review by the standards established in the Administrative Procedure Act (APA).[132] The applicable standards of review have been construed by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*.[133] In its discussion, the Court pointed out that when the agency action complained of is nonadjudicatory in nature and not the exercise of a rule-making function, neither a "substantial evidence" standard nor a de novo review are authorized under the APA.[134] The final NEPA statement is arguably nonadjudicatory and nonrule-making in nature.[135] It is separate and apart from, and indeed is supposed to precede, agency decisionmaking. Any judicial review of action under NEPA examines both the agency procedures followed and whether the matters required under section 102 have been included in the final statement, neither of which determines the ultimate merits of the project.[136] Under the APA, then, the courts should examine whether agency NEPA action observed "procedure required by law."[137] Nevertheless, the review should be thorough and careful.[138] The crucial question becomes how far this review may go

132. 5 U.S.C. §§ 701 *et seq.* (1970).
133. 401 U.S. 402 (1971).
134. *Id.* at 413-15, *discussing* 5 U.S.C. § 701(a) (1970).
135. It must be asked, however, whether an agency's procedure for complying with NEPA may be so entwined with its adjudicatory or rule-making function as to require the application of the substantial evidence test to the review of its actions under NEPA. *Cf.* Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 470-80 (2d Cir. 1971); Arkansas-Louisiana Gas Co., 3 E.R.C. 1735 (FPC Feb. 18, 1972).
136. *See* Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1115-18 (D.C. Cir. 1971).
137. 5 U.S.C. § 706(2)(D) (1970); *see* Jicarilla Apache Tribe v. Morton, 4 E.R.C. 1933 (9th Cir. Jan. 2, 1973); Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 468 (2d Cir. 1971) (applying substantial evidence test to FPC decision and finding procedural compliance "in accordance with" NEPA). *See also* Sierra Club v. Hardin, 325 F. Supp. 99, 113 (D. Alas. 1971).
138. *E.g.*, Scenic Hudson Preserv. Conf. v. FPC, 453 F.2d 463, 468-81 (2d Cir. 1971); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 337 F. Supp. 167 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 757-59 (E.D. Ark. 1971).

in the name of thoroughness before it becomes a substantial evidence or de novo review.

To set the stage for this analysis, NEPA must be considered as the courts have viewed it. "At the very least, NEPA is an environmental full disclosure law."[139] It requires a "detailed statement"[140] which "should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress, to all known possible environmental consequences of proposed agency action."[141] In this way, decisionmaking is made "more responsive and more responsible."[142]

While some courts have referred to review of the final statement in terms of "adequacy,"[143] the sum of the attempts to establish a test for the contents of the statement is that there is no real test at all. The subjective judgment of the court is really the method of review, unguided save in spirit by much of anything in the law or the agency or CEQ Guidelines. It is this lack of a test, this case-by-case confrontation, that tempts the courts toward thinly-veiled decisions rejecting particular proposals in the name of judicial review of the adequacy of the impact statement. The danger is that the courts will be weighing the naked facts surrounding the proposal, instead of adhering to the standards of review of an administrative procedure. The problem is certainly not of the courts' making. The problem is inherent in any broad law and is compounded by the interjection into conventional cost-benefit analysis[144] of a most unconventional value—the environment.

139. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971). *See also* Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 735 (D. Conn. 1972): "Many who quote Judge Eisele's pertinent remark that 'at the very least NEPA is an environmental full disclosure law' . . . have failed to emphasize his first four words."

140. NEPA § 102(2)(C), 42 U.S.C. 4332(2)(C) (1970). It would seem that this requirement, the affirmative duty to report, overlaps the requirements of the Freedom of Information Act, 5 U.S.C. § 301 (1970). See EPA v. Mink, 4 E.R.C. 1913 (S. Ct. Jan. 22, 1973).

141. Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971) (all opinions should be included, even if the agency finds them of no merit whatsoever).

142. *Id.*

143. Lathan v. Volpe, 4 E.R.C. 1487, 1489 (W.D. Wash. Aug. 4, 1972); Brooks v. Volpe, 4 E.R.C. 1492, 1498 (W.D. Wash. Aug. 4, 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 759, 762 (E.D. Ark. 1971), 342 F. Supp. 1211 (E.D. Ark. 1972); Environmental Defense Fund, Inc. v. Hardin, 325 F. Supp. 1401, 1404 (D.D.C. 1971).

144. NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B) (1970), requires agencies to establish means by which "presently unquantified environmental amenities and values may be given appropriate consideration . . . along with economic and technical considerations." For varying cost-benefit approaches, see Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1123 (D.C. Cir. 1971); Lathan v. Volpe, 4 E.R.C. 1487, 1490 (W.D. Wash. Aug. 4, 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 345 F. Supp. 916 (N.D. Miss. 1972); Environmental Defense Fund v. TVA, 339 F.

In order to judge the adequacy of the final statement, the court should ask "adequate" for what? The purpose of NEPA's reporting process is to advise the decisionmakers in the executive branch and in Congress of the relative merits and drawbacks of any ongoing or proposed major federal action.[145] If an impact statement does that with reasonable clarity, it has accomplished its purpose; if not, it should be reworked and expanded. But agonizing over minutiae or pondering unmeasurable, speculative effects of that action have no real relationship to the essential purpose of NEPA; that is not what a "detailed statement" should have to consider. If there can be any one test of the sufficiency of a NEPA statement, it should be whether the statement fairly alerts the responsible decisionmakers to the significant factors involved in the project or program, and does so with enough clarity to allow the decisionmakers to weigh these factors in arriving at a decision.[146] Notice is the key, a concept already familiar to jurists, and reasonable notice should suffice.

Injunction Pending Compliance

Once it has been determined that there is a NEPA defect, the litigants will be concerned with avoiding or procuring injunctive relief prior to proper completion of NEPA procedures. The preponderance of cases where such relief was granted suggests that it has been a rare occasion where a NEPA-related failure has not drawn an injunction. While some courts have refused to enjoin federal conduct, most of these cases were decided on such factors as retroactivity,[147] prematurity[148] and no major federal action.[149] *Upper Pecos Association v. Stans*,[150] however, is one example of a court staying its hand

Supp. 806 (E.D. Tenn. 1972); Conservation Council v. Froehlke, 3 E.R.C. 1687, 1689 (M.D.N.C. Feb. 14, 1972), *aff'd*, 4 E.R.C. 1044 (4th Cir. May 2, 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 748, 759-62 (E.D. Ark. 1971).

145. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

146. As one court has declared, the final statement should facilitate "comprehensive and objective environmental management." Environmental Defense Fund, Inc. v. Corps of Engineers, 348 F. Supp. 923, 933 (N.D. Miss. 1972); *see* City of New York v. United States, 4 E.R.C. 1646 (E.D.N.Y. June 7, 1972) (final statement adequate).

147. *E.g.*, Transcontinental Gas Pipeline Co. v. Hackensack Meadowlands Dev. Ass'n, 464 F.2d 1358 (3d Cir. 1972); Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972); Concerned Citizens v. Volpe, 459 F.2d 332 (3d Cir. 1972); Pennsylvania Env. Council, Inc. v. Bartlett, 454 F.2d 613 (3d Cir. 1971); Investment Syndicates, Inc. v. Richmond, 318 F. Supp. 1038 (D. Ore. 1970).

148. *E.g.*, Port of New York Auth. v. United States, 451 F.2d 783 (2d Cir. 1971); Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970); Northeast Area Welfare Rights Org. v. Volpe, 2 E.R.C. 1704 (E.D. Wash. May 12, 1971).

149. *E.g.*, Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971) (presidential decision on national security held *ultra vires* injunctive power); Citizens for Reid State Pk. v. Laird, 336 F. Supp. 783 (D. Me. 1972); Davis v. Morton, 3 E.R.C. 1546 (D.N.M. Dec. 21, 1971).

150. 452 F.2d 1233 (10th Cir. 1971), *cert. granted sub nom.*, Upper Pecos Ass'n v.

in a suit involving an admittedly major federal action requiring an impact statement, a proposed highway across the Santa Fe National Forest. In *Upper Pecos* the Court of Appeals for the Tenth Circuit affirmed a refusal to enjoin the Economic Development Administration (EDA) pending completion of NEPA procedures by the Forest Service. Although the Forest Service had prepared and submitted a draft statement and was proceeding to a final statement prior to deciding whether to grant a right-of-way for the road, the EDA had already made a grant of funds for the road. The plaintiffs contended that since no NEPA statement had been prepared by the EDA, its action was illegal. The court, however, refused to exercise its equitable powers:

> The point at which the project had become more than a mere proposition . . . the offer of grant by the E.D.A.—had been passed before the environmental impact statement was prepared. Certainly the project must be of sufficient definiteness before an evaluation of its environmental impact can be made and alternatives proposed.
>
> Preparation and submission of the environmental impact statement at the point in time selected by the Forest Service is not a meaningless gesture, as appellant argues. The Forest Service must still approve the location and the construction plans and specifications of the proposed road before a grant of right-of-way easement necessary to permit the use of National Forest Lands for highway purposes is possible. The final environmental impact statement will provide the basis on which the Forest Service will decide on the issuance of the right-of-way easement. . . .[151]

It would thus seem that an important factor in many cases is the environmental status quo.[152] As long as it is maintained during the completion of NEPA procedures, an injunction is arguably unnecessary

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Peterson, 406 U.S. 944 (1972), *remanded for determination of mootness*, 93 S. Ct. 458 (1972).

151. *Id.* at 1236-37. *See also* Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972) (injunction denied where project was 80 percent completed); Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456 (S.D.N.Y. Aug. 4, 1972) (no injunction where nearly completed project's impact will be slight).

152. *See* Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 763 (E.D. Ark. 1971) (imminent construction of dam enjoined). *But see* Stop H-3 Ass'n v. Volpe, 349 F. Supp. 1047 (D. Hawaii 1972). In *Stop H-3* actual highway construction and related condemnation were halted under a stipulation. The plaintiffs contended, however, and the court agreed, that the scope of the preliminary injunction should extend to *design* work on the highway. The court rejected the defendants' argument that since the design phase would involve minimal environmental effect, this phase could proceed without waiting for the completion of NEPA procedures, and enjoined preparation because it was not necessary to the production of an impact statement and because it would involve a large expenditure of money. This expenditure, the court said, would have the effect of making it more difficult to abandon the project should the decisionmakers consider doing so based on the environmental impact statement, and thus would subvert the "compliance with NEPA envisioned by Congress in passing the act." *Id.* at 1049. One possible result of this decision is to foreclose the inclusion of design impacts in any environmental analysis of the highway project.

and possibly avoidable. However, the start of construction or condemnation of property[153] will undoubtedly upset this balance and invite an injunction.[154] One court has said that the decision whether to enjoin involves not merely the traditional balancing of equities or the invocation of judicial maxims.[155] It remains to be seen whether the balancing test ultimately will be rejected in NEPA and similar litigation. Mr. Chief Justice Burger, denying an application for stay pending appeal, commented on the use of equitable powers in environmental cases:

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.[156]

Problems Inherent in Judicial Review of Agency Action Under NEPA

Finally, a problem inherent in judicial review of action under NEPA must be mentioned. It will be assumed that there has been "strict procedural compliance" with NEPA and that this procedural compliance has produced a final statement which is both "detailed" and "adequate." The federal decisionmaker then concludes that, on the basis of the knowledge gained from the statement and its preparation, as well as the other standards of decisionmaking, the project should be pursued. Is this decision immune from further judicial

153. *See* Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Thompson v. Fugate, 452 F.2d 57 (4th Cir. 1971).

154. Arguments about the delays caused have not forestalled injunctive relief. Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971); *cf.* Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972); Conservation Soc. v. Volpe, 343 F. Supp. 761 (D. Vt. 1972); Citizens for Clean Air, Inc. v. Corps of Engineers, 4 E.R.C. 1456, 1465 (S.D.N.Y. Aug. 4, 1972). *But see* Brooks v. Volpe, 4 E.R.C. 1532 (W.D. Wash. Aug. 30, 1972). It might also be asked whether delay amounting to complete frustration of the project or requiring its abandonment will militate against entry of a preliminary injunction. See Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

155. Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971). *See also* Stop H-3 Ass'n v. Volpe, 349 F. Supp. 1047, 1048 (D. Hawaii 1972) (less stringent standard required to effectuate NEPA policy) (balancing test apparently used). *Cf.* Jicarilla Apache Tribe v. Morton, 4 E.R.C. 1933 (Jan. 2, 1973).

156. Aberdeen & R. R.R. v. Students Challenging Regulatory Agency Procedures, 93 S. Ct. 1, 7 (1972) (Burger, C.J., as Circuit Justice, denying applications for stay pending appeal), *probable jurisdiction noted*, 41 U.S.L.W. 3339 (Dec. 19, 1972).

challenge? The District of Columbia Circuit indicated that the courts would, under certain circumstances, have a further role to play:

> We conclude, then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, *unless it can be shown that the actual balance of costs and benefits that was struck was arbitrary, or clearly gave insufficient weight to environmental values.*[157]

Now the Eighth Circuit has put this view into practice, reviewing the decision of the Corps of Engineers to complete the Gillham Dam in Arkansas:

> Given an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits. . . .
>
> . . . .
>
> The standard of review to be applied here and in other similar cases is set forth in *Citizens to Preserve Overton Park v. Volpe* . . . . The reviewing court must first determine whether the agency acted within the scope of its authority, and next whether the decision reached was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In making the latter determination, the court must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.[158]

Assuming that principles of the APA will form the basis of review of a decision to proceed with a project,[159] those principles will be difficult if not impossible to apply. Taking *Calvert Cliffs'* standard of arbitrariness or of "clearly" giving "insufficient weight to environmental values," and applying them to a given situation will undoubtedly tempt the reviewing court to substitute its judgment for the agency's where, on the contrary, it should merely review the decision for arbitrariness.[160] This problem is, of course, inherent in any review

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157. Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis added); *accord*, Jicarilla Apache Tribe v. Morton, No. 72-1634 (9th Cir. Jan. 2, 1973); *cf.* Save Our Ten Acres v. Kreger, 4 E.R.C. 1941 (5th Cir. Jan. 16, 1973) (dictum that court would not review question of desirability of project).

158. Environmental Defense Fund, Inc. v. Corps of Engineers, 4 E.R.C. 1721, 1726, 1727-28 (8th Cir. Nov. 28, 1972). The arbitrary and capricious standard has also been applied to review of decisions not to prepare environmental impact statements. Save Our Ten Acres v. Kreger, 4 E.R.C. 1941 (5th Cir. Jan. 16, 1973); Hanley v. Kleindienst, 4 E.R.C. 1785 (2d Cir., Dec. 5, 1972).

159. An analysis of the interplay between the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970), and NEPA is outside the scope of this article.

160. It is often the choice among alternatives that concerns environmentalist-complainants the most; their wish in many cases is to turn aside, by means of delaying

of an administrative decision made pursuant to certain Congressionally-imposed standards. It is, however, particularly a problem in the context of NEPA where the standard involved—the environment—is practically unquantifiable.[161]

CONCLUSION

Because of the generality of the National Environmental Policy Act, it is no wonder that the courts have had numerous occasions to interpret it, especially section 102. The pattern that emerges is one of requiring increased administrative disclosure, more detailed analysis and more thoughtful planning. Agency attempts to short-cut some of the steps outlined in the law and the guidelines have failed in most cases. Agency recalcitrance, rather than ineptitude, has more often than not supplied the grounds for judicial action. This pattern will continue as the fertile minds of imaginative attorneys continue to develop new theories, at least until the courts begin to draw the line,[162] and until the agencies adopt a more positive approach to NEPA. Until then, protracted litigation is likely to produce expressions of frustration like that of Judge Beeks:

> This case in and of itself poses an awesome ecological problem because of the great volume of paper now on file; a ton of paper represents the loss of 17 green trees.[163]

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litigation, a decision with which they disagree. This philosophy has been summarized by the Sierra Club:

> [n]o law suit will, *ultimately*, win any conservation issue. Ultimate victory requires political victory. To win conservation fights it is necessary to use political action in one form or another. The law suit can win temporary victories, but in the long run the politicians will act on the basis of 'political realities' and the courts will not thwart their will.
>
> Law suits, of course, are very useful and often are decisive. The law suit can buy the time necessary to rally support. Secondly, the courtroom can provide a forum in which the facts can be obtained and aired in public. Third, a favorable decision often creates a major obstacle for our opponents by giving them the burden of having to obtain passage of a bill by Congress if they still want to prevail.

57 SIERRA CLUB BULL. 2 (Jan. 1972) (editorial of James Moorman, Sierra Club Legal Defense Fund). Given this approach, courts must be sensitive to the scope of their review lest they become the performers, not the reviewers, of agency action.

161. The Second Circuit has expressed this dilemma in Port of New York Authority v. United States, 451 F.2d 783, 789 n.28 (1971): "[b]ecause this case does not call for it, we gladly pass over a discussion of the difficult if not insoluble problem of how one defines and then quantifies the [environmental] costs referred to in [*Calvert Cliffs'*]." Judicial review of any NEPA-related matter must be sensitive to this difficulty.

162. *E.g.*, Ragland v. Mueller, 460 F.2d 1196 (5th Cir. 1972); Transcontinental Gas Pipeline Co. v. Hackensack Meadowlands Dev. Comm'n, 464 F.2d 1358 (3d Cir. 1972).

163. Lathan v. Volpe, 4 E.R.C. 1487, 1488 n.4 (W.D. Wash. Aug. 4, 1972).