Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements

David M. Lesser
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Administrative Law Commons, Environmental Law Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol13/iss2/6
PUTTING BITE IN NEPA'S BARK: NEW COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS FOR THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS

In response to increasing concern over the nation's environment and heightened legislative awareness of the dangers of unbridled technological advancement, Congress passed the National Environmental Policy Act of 1969 (NEPA). Through NEPA, Congress hoped to spawn increased administrative concern for the environment by expressing substantive policies which became part of the mandates of every federal agency and

---


Congress' concern about technological growth was aptly stated by Senator Jackson:

We have, however, paid a price for our progress, and our prosperity. We have paid in the form of sluggish, rubbish laden rivers, air which is fouled with smoke and poisoned by chemicals, wasted forests and stripmined lands, extinct species of wildlife, haphazard growth of urban areas and transportation systems, increased congestion in our cities, and intolerable noise levels.

Jackson, supra at 1073.


2 See National Environmental Policy Act of 1969 [hereinafter cited as NEPA], §§ 101-102(1), 42 U.S.C. §§ 4331-4332(1) (1976), setting out Congress' goals for environmental protection and providing that "to the fullest extent possible: . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies" of NEPA. NEPA, § 102(1), 42 U.S.C. § 4332(1).

3 As used in this article, "agency" applies to both independent regulatory bodies and
establishing procedures for implementing those policies. Many of those who had hoped that NEPA would help arrest or control the degradation of the environment feel, however, that the NEPA process has not met their expectations.

One of Congress' primary goals in passing NEPA was to make agency decisionmakers aware of future demand for our nation's natural resources. The procedural provisions of the Act were intended to promote that objective. Until recently, however, NEPA has primarily provided environmentalists and non-environmentalists alike a tool with which to delay federal projects by challenging the adequacy of environmental impact statements. The Act has enabled the former group to forestall, but rarely prevent, interference with the earth's ecological balance and enabled the latter to achieve short-term non-environmental ends.

The NEPA process must do more if the realignment of national policies that the Act purports to achieve is to be realized.

Two commentators have described NEPA and its most notable requirement, the preparation of environmental impact state-

parts of the executive branch.

NEPA, § 102(2), 42 U.S.C. § 4332(2) (1976). The most important provision of § 102(2) is § 102(2)(C), which requires the preparation of what has come to be called an Environmental Impact Statement (EIS).

Political forecasters were uncertain what impact the Act would have upon the workings of the federal government. Since 1969, the ramifications of NEPA have been reviewed and assessed periodically by commentators, see, e.g., F. ANDERSON, NEPA IN THE COURTS (1973), the Council on Environmental Quality (CEQ), see, e.g., CEQ, ENVIRONMENTAL QUALITY-1978, an annual report discussing the year's developments in environmental fields, and Congress, see, e.g., ENVIRONMENTAL POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, AN ANALYSIS OF PROPOSED LEGISLATIVE MODIFICATIONS (1973).


R. ANDREWS, supra note 1, at 158-60.

See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). The Court upheld the Nuclear Regulatory Commission's informal rulemaking procedures for determining environmental effects of fuel reprocessing. Despite the Court's holding, the Vermont Yankee litigation lasted four years and thus forestalled the environmental damage feared by the public interest plaintiffs. See also note 51 supra.

See, e.g., National Helium Corp. v. Morton, 326 F. Supp. 151 (D. Kan.), aff'd, 455 F.2d 650 (10th Cir. 1971) (NEPA applicable to termination of federal helium conservation contract). Though the government contract in question was ultimately terminated, the government purchased $30 million worth of unwanted helium during the litigation. Wall St. J., June 9, 1978, at 25, col. 3. See also Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975) (injunction sought by area residents against proposed low income housing project, claiming inadequacy of EIS prepared by Department of Housing and Urban Development).

ments, as a "built in mechanism for leading the bureaucratic horses to environmental waters." To a great extent, however, the federal government's shortcomings in implementing NEPA's policies result from agency decisionmakers' failure to utilize information prepared pursuant to the Act in formulating their decisions.

NEPA, in its most potent form, could be a powerful tool for controlling the threat that advanced technology poses to our environment. Today, improved technology also provides means to control that threat. If utilized properly, the EIS can provide an avenue by which methods of environmental protection will be implemented.

In a step toward utilizing the potential of EIS's, President Carter ordered in May of 1977 that the Council on Environmental Quality (CEQ) promulgate regulations for the preparation and use of EIS's which would be binding on federal agencies. In the resulting regulations, the CEQ has attempted to transform the NEPA process so as to ensure the serious consideration of environmental values currently lacking in federal decisionmaking.

13 National Academy of Sciences, Technology: Processes of Assessment and Choice 11-12 (1969) ("[A]dvances in science and technology have brought advances in our ability to anticipate the secondary and tertiary consequences of contemplated technological developments . . . . For the first time in human history [mankind can] realistically aspire to have it both ways: to maximize our gains [from technology] while minimizing our [environmental] losses.").
15 The new guidelines took effect on July 30, 1979. Prior to this time, CEQ's advisory guidelines were in effect. 40 C.F.R. § 1500.1-1500.14 (1978).

In the light of the acknowledgement in the statement accompanying Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978), that the President may not be able to bind independent regulatory agencies, 43 Fed. Reg. 12,760 (1978), it is unclear whether CEQ or the President have the authority so to bind independent federal agencies by these regulations. It should be noted that NEPA itself purports to apply to all federal agencies. 42 U.S.C. § 4332(2) (1976).

16 In order to gain acceptance for its new guidelines, CEQ has attempted, to a great extent, to respond to prior judicial interpretations of NEPA. Throughout this article, re-
This article will examine the new regulations to assess the manner in which they will affect federal decisionmaking. Part I briefly reviews the role the NEPA process has heretofore played in agency decisionmaking and its potential for the future. Parts II, III, and IV discuss specific provisions of the new regulations which may profoundly affect the agencies. Part II examines those sections of the regulations which seek to ensure that the EIS contains the substantive information necessary to fulfill NEPA's policies. Part III discusses significant procedural changes in the environmental assessment process designed to insure that this substantive information is considered by agency decisionmakers. Part IV examines provisions which seek to guarantee that agency decisions subsequent to the preparation of the EIS actually reflect the information it contains. The article concludes that CEQ's initiative will greatly promote the policies of NEPA.

I. NEPA—Past and Future

When NEPA was enacted it was hailed as a "window to the outside world,"18 opening previously closed aspects of the administrative process to public scrutiny and comment, thus forcing more considered and informed decisionmaking. The EIS was viewed by many as the Act's most important feature.17 In practice, however, NEPA procedures have not had a profound impact upon agency decisionmaking. Two problems have plagued the Act's effectiveness. First, while the procedural provisions of section 102(2)18 are clearly binding on all federal agencies, and the courts have rarely hesitated to order strict compliance with these requirements,19 judges have been reluctant to reverse agency de-

17 Cramton & Berg, supra note 11, at 516-17.
18 See, e.g., Jackson, supra note 1, at 1079.
19 42 U.S.C. § 4332(2)(C) (1976). Section 102(2)(C) contains NEPA's "action-forcing" provision for the preparation of an EIS for "major federal actions significantly affecting the quality of the human environment." The statement, under the Act, must include (i) the projected environmental impact of a proposed action, (ii) unavoidable adverse environmental impacts, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irrevocable commitments of resources associated with the proposed action. Id.
20 See, e.g., Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d
cisions for failure to comport with the policy declarations of sections 101 and 102(1). Second, when not under judicial scrutiny, agencies have been recalcitrant in fulfilling the procedural obligations imposed by the Act. The latter problem prompted President Carter to order the promulgation of the new regulations.

A. The Administrative Process and National Environmental Policy

The policies set out in sections 101 and 102(1) of NEPA theoretically became part of the statutory mandate of each federal agency; thus, consideration of environmental protection should enter into the deliberations of all federal agencies. Agencies, however, have remained loyal to their original statutory missions in formulating decisions, becoming, in effect, part of the environmental problem rather than part of its solution. While there has been pro forma compliance with the procedural requirements of section 102(2), information obtained through the environmental assessment process has rarely been translated into decisions which take account of national environmental pol-
icities and goals. Courts have repeatedly found it necessary to remind agencies that an EIS may not be used to justify a decision formulated prior to its preparation.

The agencies' shunning of environmental values is a function of two common features of the federal bureaucracy. First, agencies can be effective only if they can mobilize political support for their legislatively created roles. The federal bureaucracy operates on a reward system; it is dependent upon "political basis for its survival and growth." It is in an agency's interest to be responsive to its most powerful constituents, most often those involved in industry and business, thus retaining the support of those constituents' lobbies.

Second, because agency action is ultimately that of the individuals who constitute the agency, an agency's reluctance to implement NEPA's substantive policies is due in part to the attitudes of those individuals. While an abstract concept of the "organization" does not control each choice of a decisionmaker, it does provide the official with the values premises upon which those choices are based. The particular values imparted by a federal agency to its personnel are an outgrowth of the mission it was created to fulfill. This phenomenon is dictated by the educational background of the agency's staff members, the relation-

---


[See, e.g., Brooks v. Volpe, 350 F. Supp. 269, 276-79 (W.D. Wash. 1972) ("The environmental impact study may not 'be used as a promotional document in favor of the proposal.'") Id. at 276 (footnote omitted)].


[Id. It has also been suggested that agencies may fail to respond to NEPA so as not to alienate their congressional constituents whose interests are in non-environmental areas. R. Liroff, A National Policy for the Environment 82 (1976).]

[It has been suggested that bureaucrats' perspectives are molded by their individual responses to the stimuli provided by the agency. H. Simon, Administrative Behavior 123 (1957).]

[Id.]

[Most agency personnel, even those involved with the preparation of EIS's, have narrow perspectives, Cramton & Berg, supra note 11, at 516; an agency's "professional staffs normally included only the range of disciplines necessary to the fulfillment of [their] particular missions," R. Andrews, supra note 1, at 4. See 1976 Report, supra note 14, at 5-10, for a general discussion and data concerning agency NEPA offices.]

One critic of agency efforts to comply with NEPA has pointed out that the traditional mission-oriented agency does not have a staff qualified to prepare EIS's because its members are unfamiliar with environmental concerns and sciences. Stroehn, NEPA's Impact on Federal Decisionmaking: Examples of Non-Compliance and Suggestions for Change, 4 Ecol. L.Q. 93, 102 (1974); accord, 1976 Report, supra note 14, at 11; cf. Frederickson, Public Administration in the 1970's: Developments and Directions, 36 Pub. Ad. Rev. 564, 565 (1976) ("Most public servants . . . identify with some . . . professional field.").]
ships they develop with the agency's constituents, and their constant striving to perform the agency's statutory mission. In the context of NEPA, agency personnel resist implementing the Act's policy declarations because these policies run counter to the values that have been instilled in them by their agency.

B. Stricter Enforcement of NEPA Through CEQ's New Regulations

The focus of the CEQ's new regulations is on procedures to be employed in preparing an EIS. Ultimately, however, it is not better environmental documents, but decisions which take account of environmental values, that are important. Procedural reforms alone will not change the substantive direction of agency policies if agencies continue to resist applying NEPA's precepts to their decisions. Combatting agency resistance is a difficult task since the agencies are well insulated from outside influence. The regulations can erode this insulation in three ways. First, while the public has heretofore been a primary source of NEPA

The extensive requirements of the new regulations may cause agencies either to develop or acquire special personnel to prepare their EIS's. If the regulations do induce agencies to hire staff members with greater environmental consciousness and analytic expertise than those currently preparing EIS's, two changes could result. First, the quality of the information in EIS's might improve. Second, the agencies' perspective might be broadened and their orientation might shift, causing greater consideration of and deference to environmental values. See Cramton & Berg, supra note 11, at 516.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.

The extensive requirements of the new regulations may cause agencies either to develop or acquire special personnel to prepare their EIS's. If the regulations do induce agencies to hire staff members with greater environmental consciousness and analytic expertise than those currently preparing EIS's, two changes could result. First, the quality of the information in EIS's might improve. Second, the agencies' perspective might be broadened and their orientation might shift, causing greater consideration of and deference to environmental values. See Cramton & Berg, supra note 11, at 516.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.

The extensive requirements of the new regulations may cause agencies either to develop or acquire special personnel to prepare their EIS's. If the regulations do induce agencies to hire staff members with greater environmental consciousness and analytic expertise than those currently preparing EIS's, two changes could result. First, the quality of the information in EIS's might improve. Second, the agencies' perspective might be broadened and their orientation might shift, causing greater consideration of and deference to environmental values. See Cramton & Berg, supra note 11, at 516.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.

The extensive requirements of the new regulations may cause agencies either to develop or acquire special personnel to prepare their EIS's. If the regulations do induce agencies to hire staff members with greater environmental consciousness and analytic expertise than those currently preparing EIS's, two changes could result. First, the quality of the information in EIS's might improve. Second, the agencies' perspective might be broadened and their orientation might shift, causing greater consideration of and deference to environmental values. See Cramton & Berg, supra note 11, at 516.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.

The extensive requirements of the new regulations may cause agencies either to develop or acquire special personnel to prepare their EIS's. If the regulations do induce agencies to hire staff members with greater environmental consciousness and analytic expertise than those currently preparing EIS's, two changes could result. First, the quality of the information in EIS's might improve. Second, the agencies' perspective might be broadened and their orientation might shift, causing greater consideration of and deference to environmental values. See Cramton & Berg, supra note 11, at 516.

One commentator described the nexus between NEPA and the identity of agency mission, and agency staff orientation, stating that the Act was designed to enable agency staff members to "overcome, through study and discussion, anti-environmental biases resulting from inertia and ignorance." Comment, The National Environmental Policy Act Applied to Policy-Level Decisionmaking, 3 Ecol. L.Q. 799, 816 (1973).

The draft guidelines were not well received by federal agencies which, among other things, felt they betrayed a lack of "appreciation of bureaucratic reality." Comment, CEQ Proposes Ambitious Regulations for Comment, Stands Ground Despite Agency Criticism, [1978] 8 Envr. L. Rep. (ELR) 10129, 10130.
enforcement, certain provisions of the new regulations facilitate even greater enforcement by the public as lobbyists as well as litigants. Second, until now, courts reviewing EIS's have been restricted to applying the standard of review set out in section 706(2)(D) of the Administrative Procedure Act. Courts will now impose upon federal agencies the concrete requirements set forth by CEQ. Third, while they remain capable of nullifying Congress' environmental mandate communicated through NEPA, agency decisionmakers may become more amenable to accepting the Act's precepts. The more often a decisionmaker is confronted with the projections in an EIS and the subsequent realization of those projections, the greater the probability that he or she will begin to take greater heed of the document.

The new guidelines modify existing NEPA procedures in two general ways. First, they particularize or alter procedures which are generally followed by most agencies. Second, they add innovative procedures intended to improve EIS's and compel agencies to utilize them in decisionmaking. Frequently, provisions in the latter category will have some basis in case law or literature, though they are not presently common practice in most agencies.

---

38 See notes 183-205 and accompanying text infra. A Senate report concluded that, through attempts to enforce NEPA in the courts, the public has been the most effective champion of the environmental cause, the principal force driving NEPA's implementation. R. ANDREWS, supra note 1, at 154, citing S. REP. No. 296, 91st Cong., 1st Sess. (1969).

There have been various types of public organizations involved in NEPA litigation. One such type consists of national or regional public interest organizations such as the Sierra Club, Kleppe v. Sierra Club, 427 U.S. 390 (1970), and the Natural Resources Defense Council, NRDC v. Sec. & Exch. Comm'n, 389 F. Supp. 689 (D.D.C. 1974). Another type includes local civic and environmental groups. Examples are I.M.A.G.E. of Greater San Antonio, Texas, Image v. Brown, 570 F.2d 517 (5th Cir. 1978), and the Conservation Society of Southern Vermont, Inc., Conservation Soc'y v. Secretary of Transportation, 531 F.2d 637 (2d Cir. 1976). Finally, some NEPA litigation has been initiated by groups formed for the sole purpose of combating a single government action. Such organizations include the Stop H-3 Association, Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14 (D. Hawaii), and Save Our Ten Acres, Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973).

While citizen suits have not altered many individual decisions, they have been instrumental in raising the environmental consciousness of agency staff members. Environmental protection statutes passed subsequent to NEPA have often specifically provided for citizen suits. See, e.g., Clean Air Amendments of 1977, § 129, 42 U.S.C. § 7604 (Supp. II 1978); Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C. § 1365 (1976); Noise Control Act of 1972, § 413, 42 U.S.C. § 4911 (1976); and Safe Drinking Water Act, § 2(a), 42 U.S.C. § 300j-8 (1976).

39 For example, through the record of decision, see part IV B infra, the public will be afforded even greater access than previously to information concerning the agencies' treatment of environmental values and thus an even better opportunity to challenge agency actions which ignore environmental concerns.

40 5 U.S.C. § 706(2) (1976). Judicial review of administrative determinations is generally limited to the standards in this section. Agency decisions are not normally reviewable de novo by the courts.
II. ASSURING THE INCLUSION OF SUBSTANTIVE INFORMATION IN THE EIS

The most essential step in attaining acceptance of environmental policies is to make certain that federal decisionmakers are aware of the harm their agencies' actions may cause. Congress established the EIS to present decisionmakers with this information. On the whole, however, NEPA's description of the substantive information to be included in an EIS is ambiguous and disjointed. Section 102(2)(C) of NEPA, which provides for the preparation of an EIS for "all major federal actions significantly affecting the human environment," lists five general subjects to be addressed in the statement. In addition, NEPA mandates that all federal agencies consider (1) "the natural and social sciences and the environmental design arts," (2) "presently unquantified environmental amenities," (3) "appropriate alternatives to recommended courses of action," and (4) "ecological information." Thus, it is difficult to pinpoint the precise data which should be included in an EIS.

General interpretations of NEPA's requirements for the content of EIS's have been consistent. The prevailing judicial interpretation is that NEPA requires the information included in an EIS to be of sufficient depth to provide the agency with a basis

---

An effort to remedy the Act's skeletal treatment of this question was made in 1973 when Senator Weicker of Connecticut introduced a bill which, if it had been enacted, would require that an EIS discuss:

(i) The environmental impact of the proposed action, together with the impact of the proposed action on the economic, social, and cultural dimensions which contribute to the quality of the human environment,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented, along with any opposing considerations of national policy as set forth in Section 102(2)(B) which are used to justify implementation of such proposal,

(iii) Alternatives to the proposed action, including the reasons, environmental, social, or economic, for rejection of such alternatives,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action, should it be implemented, and that any such commitments are warranted in terms of balancing policy considerations as set forth in Section 102(2)(B).

S. 1668, 93d Cong., 1st Sess. (1973) (proposed amendments to the Act are in italics).

See note 18 supra.


for a reasoned decision. Courts, however, have been unable to offer a comprehensive statement of the specific issues which should be addressed in an EIS; they are generally confronted with an EIS deficient in certain particulars but otherwise procedurally adequate. Similarly, no binding regulations, except those prepared by individual agencies, have heretofore existed.

The new guidelines contain several provisions which attempt to assure that all relevant and necessary information concerning the environmental effects of major federal actions is evaluated by decisionmakers. Some of these provisions enumerate, without much elaboration, items which are normally included in an EIS. Three provisions, however, stand out as particularly significant in precipitating greater adherence to NEPA's policies.

A. Scoping

Due to the paucity of statutory guidance concerning the content of EIS's, agencies have repeatedly failed to discuss certain relevant considerations while dealing with others that are insignificant concerning a particular project. The byproducts of such breakdowns in planning have been excessive and protracted litigation, unnecessary expenditure of agency resources, and de-
lay of important projects. To avert these problems, CEQ has developed provisions requiring interagency cooperation in pre-EIS planning procedures. One of these procedures is aimed at identifying, at an early stage, the information which is important in evaluating a particular project. This process has been termed "scoping."

The regulations first provide that "there shall be an early and open process for determining the scope of issues to be addressed in the EIS and for identifying the significant issues related to a proposed action." Scoping also includes specific planning for the preparation of the EIS, including allocating responsibility for particular sections to the various agencies participating in its preparation. The lead agency is to invite federal, state, and local agencies, any affected Indian tribe, the proponent of the proposed action, and other interested parties to participate in the scoping process.

One danger associated with interagency cooperation on a given project is that the institutional biases of the various agencies may only confuse the decisionmaker, who will be presented with information from a variety of inconsistent perspectives. The scoping requirement alleviates this problem to a great extent by providing for an exchange of ideas prior to the preparation of the EIS. This should enable lead and cooperating agencies to integrate and evaluate data developed by other agencies, being cognizant of the other agencies' priorities and what they view as the primary benefits and dangers of the proposed action.

Objections have been raised concerning the time-consuming

---

53 One significant change that the new guidelines introduce into the NEPA process is a formalized set of procedures for interagency cooperation in each step of the EIS preparation process. See part II C infra. The statutory language does not mandate the extensive cooperation established by CEQ, but it implies that some cooperation should take place. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976), states that the preparer of the EIS "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" with a proposed action. Apparently, the new guidelines' provisions for interagency cooperation in EIS preparation are rooted in this sketchy statutory language. To effectively implement the Act, CEQ has required formal cooperation, not mere consultation.

40 C.F.R. § 1501.7 (1979).

Id. § 1501.7(a)(2)-(7).

Id. § 1501.7(a)(4).

See id. § 1501.5: "A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency [is involved in the proposed action]."

Id. § 1501.7(a)(1).

See id. § 1501.6. A "cooperating agency" is any agency besides the lead agency which is involved in preparing an EIS.

Alternatively, it is possible that one agency may improperly discount information from another agency because of what it perceives are biases of that agency.
nature of the scoping process. The CEQ, however, believes that any disruption of the decisionmaking process will be insignificant and that scoping will sufficiently enhance the efficiency of the NEPA process to justify the expenditure of time. While administrative economy is a laudable objective, it should not become an ultimate goal, especially at the expense of comprehensive decisionmaking.

A potential flaw in the scoping technique is that it will cause a cursory treatment of the issues by diffusing the energies available for EIS preparation. When agencies with divergent orientations debate which questions are relevant to a particular project, their diverse backgrounds will beget diverse priorities. Compromises could well produce an EIS addressing so many issues that none can be developed adequately if the statement is to be prepared in accordance with CEQ's page limitations. It is also possible, however, that scoping will result in an EIS which reflects the many values of a pluralistic society and which helps reach decisions which do the same. In view of the adolescent character of environmental sciences, a sacrifice of detail in exchange for broadened perspectives may be beneficial in the short run if it serves to familiarize agencies with the nature and range of environmental problems their actions might cause.

It should be emphasized that environmental considerations will not necessarily be accorded their due weight simply because of interagency cooperation or because scoping ensures that the EIS will contain the proper information. Such cooperation will, however, permit those decisionmakers who are responsive to environmental concerns to protect the environment while achieving other objectives by making necessary information available to them. In sum, the formal organization and planning of EIS preparation through scoping will allow "more timely, coordinated, and efficient review of [proposed actions]."\[3\]

B. Alternatives to the Proposed Action

One clear NEPA requirement is that agencies must consider alternatives to a proposed action, whether or not an EIS is pre-

---


13 "The text of final environmental statements . . . shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." 40 C.F.R. § 1502.7 (1979).

pared. The discussion of alternatives has been termed the "heart" of the EIS because it provides agency decisionmakers with information about the environmental impacts of a range of concrete avenues for achieving the agency's objective, rather than merely revealing the environmental effects of the proposed action.

In *Natural Resources Defense Council, Inc. v. Morton,* the authoritative interpretation of the alternatives requirement, the court addressed three important aspects of the treatment of alternatives in an EIS: the range of alternatives discussed, the extent to which each alternative is evaluated, and the standard for judicial review. Under *Morton*, the alternatives considered must include the alternative of no action, methods of achieving the objective sought that are outside the jurisdiction of the agency preparing the statement, and methods which may not completely achieve that objective. The discussion of each alternative must provide "information sufficient to permit a reasoned choice [among] alternatives so far as the environmental effects [of each] are concerned." Finally, the case established a rule of reason for determining whether an impact statement discusses all appropriate alternatives to the proposed action.

The applicable CEQ regulations are consistent with judicial interpretations of the alternatives requirement. Section 1502.14 details the method for discussing alternatives in an EIS. Generally, the agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives, and . . . briefly discuss the

---

---
Each alternative must be sufficiently detailed to allow decisionmakers to evaluate its comparative merits. The range of alternatives explored should not be limited to those within the jurisdiction of the agency preparing the EIS if options outside its jurisdiction are viable, and must include the possibility that no action should be taken. Finally, the agency is to identify its preferred alternative and include appropriate measures for mitigating environmental harm that have not already been developed and included as part of the proposed action or an alternative thereto.

Section 1502.14 of the regulations enhances decisionmaking in several ways. First, treating all reasonable alternatives to a proposed action should facilitate better decisions. NEPA has been interpreted to require agencies to balance the costs and benefits of a proposed action in a "finely tuned and 'systematic' balancing analysis." Assessment of the relative advantages and disadvantages of a particular course of action should be affected by the potential environmental harm from possible alternatives. Thus, the best choice is more readily determined when all reasonable alternatives are examined in the EIS.

Second, the elaborate discussion of alternatives required by sections 1502.14(a) and 1502.14(b) is important in assuring that the decisionmaking process becomes "finely tuned." If agencies do not develop data about alternatives as extensively as they do for the original proposal, an adequate basis for comparison may not exist. It is imperative that when any information is available to decisionmakers concerning a proposed action, equivalent information about the possible alternative be provided as well.

Third, when a decisionmaker is provided with more comprehensive information on a given alternative than on others, the decision could be prejudiced in favor of that alternative. If the decisionmaker is better able to perceive the ultimate result of more than one alternative he or she may be less likely to choose a course of action with a more speculative impact.

---

75 40 C.F.R. § 1502.14(a) (1979) (emphasis added).
76 Id. § 1502.14(b).
77 Id. § 1502.14(c)-(d). While § 1502.14(c) refers specifically to the jurisdiction of the lead agency, see note 59 supra, it is evidently the intention of CEQ that agencies beside the lead agency be involved in the preparation of the EIS (see §§ 1501.5-1501.6). Thus, § 1502.14(c) will be discussed here as if the terms "lead" and "preparing" were interchangeable.
78 Id. § 1502.14(e)-(f).
80 Id. at 1114.
81 See part II C infra.
The requirements in sections 1502.14(c) and 1502.14(d) should broaden the approach of agencies in considering alternatives. The requirement of section 1502.14(c) that an EIS consider alternatives outside the jurisdiction of the preparing agency is significant because it recognizes that environmental problems transcend the sometimes artificial jurisdictional lines of agencies and emphasizes that the CEQ believes these lines must be ignored in combatting environmental harm. Furthermore, section 1502.14(d) provides that an agency must include the "no action" alternative in the EIS; while an agency may have almost completely abandoned the "no action" alternative in the earliest stages of project development, it is important to reassess the wisdom of proceeding when more facts are available.

A particularly significant requirement is that preparers of an EIS include environmental mitigation measures. Previously, when a proposed action or alternative was developed, it may have ignored mitigation measures because those who formulated the alternative lacked familiarity with environmental matters and means of minimizing environmental harm.\(^2\)

While the comprehensive study of alternatives is a laudable goal, several of the specific requirements in the guidelines are subject to criticism. Initially, the requirement that agencies consider alternatives outside their own jurisdiction presents three problems. The first is one of expertise; agency staffs cannot be expected to adequately develop alternatives outside their jurisdiction because they lack familiarity with other agencies' capabilities. In extreme cases, the staff of one agency may be unaware of alternative methods utilized by other agencies. Though other agencies can be solicited to develop and evaluate alternatives outside the preparing agency's jurisdiction, the former may be uninterested in the project.\(^3\) Such an agency may not make a good faith effort to present the alternative completely and objectively,\(^4\) and thus the information it supplies decisionmakers may not provide a suitable basis for a reasoned decision.

Second, it appears that cooperating agencies are expected to finance the development and assessment of an alternative

---

\(^2\) The inclusion of mitigation measures in the alternatives considered in an EIS may have a significant impact upon the ultimate agency decision. See part IV A infra.

\(^3\) See R. Andrews, supra note 1, at 5.

\(^4\) There is also some ambiguity concerning the rights and obligations of the agency which is not primarily responsible for the EIS. It is unclear whether an agency is obligated to aid in the preparation of another agency's EIS or the responsibility a given agency would have if a decisionmaker in another agency were to determine that an alternative to a proposed action which required involvement of the former agency were the preferred alternative.
outside the preparing agency's jurisdiction. It is unrealistic to view the federal government as a monolith. Agencies vie for resources from a limited pool, and are understandably reluctant to expend any of those resources developing project proposals for other agencies.

Third, this provision may meet with agency nullification. Decisionmakers may be prejudiced against choosing a course of action that would fall either primarily or wholly outside the jurisdiction of their agencies. The agency which originally conceives the project does so for specific reasons, including anticipated increase in prestige, desire to please constituents, and personal interest of the agency staff or leaders. The agency is not likely to surrender jurisdiction over a project to another agency when it has a stake in completing that project itself.

There is also a question of whether requiring the "no action" alternative is merely a paper concession to environmentalists, because that alternative may never be chosen. As noted above, once an agency decides to proceed with the planning of a project it has, in all likelihood, ruled out the no action alternative. Moreover, once a selection of alternatives has reached the decisionmaker's hands, not only an EIS, but many other information and planning documents, have been produced, at great cost to the agency. Abandoning a project at this stage would constitute a significant financial loss.

Finally, section 1502.14(e), regarding the identification of the agency's preferred alternative, is subject to three criticisms. First, it is somewhat impractical. If the EIS is to be prepared as part of a decisionmaking process, the agency's final determination cannot be identified therein. There is little chance of determining what the "agency's" preferred alternative is at a static point because decisionmakers' dispositions could be changing continuously. Second, identifying a preferred alternative in the EIS cannot further the objectives of NEPA. At that point, the EIS has not been considered by the decisionmaker; before the EIS is considered, the preferred alternative is irrelevant to its content. Third, singling out a specific "preferred" alternative may influence the decisionmaker's choice. If this subpart is merely aimed at indicating to the public which of the alternatives considered in the EIS is the originally proposed action, the

---

Footnotes:

54 40 C.F.R. § 1501.6(b)(5) (1979) provides that a cooperating agency shall "[n]ormally use its own funds." At least in the case of an agency which has jurisdiction by law over a proposed action, participation as a cooperating agency is required upon request of the lead agency. Id. § 1501.6.

55 See notes 125-28 and accompanying text infra.
language of the provision should be clarified.

There is a general drawback of section 1502.14, though it does not vitiate the need for a thorough consideration of alternatives. The regulations are ambiguous as to what constitutes a wholly distinct alternative and what constitutes a variation of another alternative. Agencies are called upon to develop, explore, and evaluate "all reasonable alternatives" to a proposed action. This could place a severe burden on an agency in terms of time and money. For this reason, many courts have demonstrated flexibility in reviewing agencies’ selection of alternatives. A solution to this problem is to require that agencies initially make a good faith effort to research a reasonable range of alternatives rather than all possible alternatives. A decisionmaker could then require a closer analysis of the alternatives within that part of the spectrum presented in which he or she is most interested. Despite this criticism, section 1502.14 is a vital requirement and, if followed, should play a major role in assuring that decisionmakers have the greatest possible amount of environmental information available.

C. Unavailable and Incomplete Information

Even when all relevant information is available, predictions in EIS's may be little more than "informed guesswork." Behavioral political scientists are concerned that federal decisionmakers often fail to take proper account of uncertainty.

---

87 See, e.g., Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 232 (7th Cir. 1975), cert. denied, 325 U.S. 967 (1976) (HUD need only consider alternatives in site selection, not manner of accomplishing objective); Sierra Club v. Lynn, 502 F.2d 43, 60 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975) (HUD need not consider alternatives suggested by members of public); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973) (alternatives with substantially equivalent environmental effects may be discussed in a limited fashion); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974) (EIS need not consider alternatives whose effect cannot reasonably be ascertained or whose implementation is remote or speculative.).

88 See E. Dolgin & T. Guilbert, supra note 1, at 387.

89 Id. at 384. Three characteristics of NEPA contribute to this uncertainty. Generally, although early preparation of the EIS is essential if the statement is to play the desired role in the decisionmaking process, the greater the time lapse between the preparation of the EIS and the commencement of work on the project the more speculative its contents. More specifically, when an EIS is prepared for a project that is the first of its kind, it is unlikely that any degree of thoroughness can reduce the high degree of speculation. Finally, while "programmatic" EIS's, which evaluate the environmental effects of broad government programs are important to agency environmental planning, the information they contain is, by design, less specific and comprehensive than the information in an EIS evaluating the impacts of a specific project.

This is a special concern in the environmental field where technology is still in a relatively primitive stage.

While NEPA's delineation of what an EIS must contain is at best imprecise, the statute completely overlooks the possibility that potentially relevant information may be unavailable or cost-prohibitive. Despite Congress' failure to address this problem in the statute, the legislative history demonstrates that Congress was well aware that man's understanding of the environmental impacts of his actions is limited.\(^\text{11}\)

Judicial reaction to the problem of information gaps in EIS's initially seemed inconsistent with other NEPA decisions.\(^\text{12}\) The court in *Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee-Tombigbee Waterway),*\(^\text{13}\) however, set the tone for consistent responses to the problem. The court there held that the Army Corps of Engineers was not required to launch a massive research effort for the sake of complying with NEPA, stating that such an undertaking would be beyond the scope of an EIS.\(^\text{14}\)

Later cases have suggested two justifications for permitting an EIS merely to acknowledge gaps in its data. First, unavailability of information should not bring the wheels of government grinding to a halt. In *County of Suffolk v. Secretary of the Interior,*\(^\text{15}\) the court stated that as long as federal agencies indicate that the presentation of certain information has been deferred they are not required to engage in "crystal ball" speculation and that uncertainty regarding environmental information cannot, by itself, forestall government action.\(^\text{16}\)


\(^{12}\) In *Environmental Defense Fund, Inc. v. Corps of Engineers (Cossatot River),* 325 F. Supp. 728 (E.D. Ark. 1971), Judge Eisele remanded the EIS to the Corps of Engineers to ascertain information excluded from the original EIS. When faced with obvious errors in the updated EIS upon rehearing, however, he held the EIS adequate because the errors were not included intentionally, arbitrarily, or capriciously. *Environmental Defense Fund, Inc. v. Corps of Engineers (Cossatot River), injunction vacated,* 342 F. Supp. 1211, 1214 (E.D. Ark.), *aff'd,* 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973).

\(^{13}\) 348 F. Supp. 916 (N.D. Miss. 1972) (EIS challenged by environmental group held adequate when viewed as a whole).

\(^{14}\) *Id.* at 938-39.

\(^{15}\) 562 F.2d 1368 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978) (EIS prepared by Secretary of Interior for leasing of federally owned outer continental shelf for oil and gas exploration held adequate).

\(^{16}\) *Id.* at 1378. The court in *Natural Resources Defense Council v. Callaway,* 524 F.2d 79 (2d Cir. 1975) (EIS on dumping of polluted dredged spoil in Long Island Sound held inadequate because of failure to discover cumulative impact of dumping projects) agreed. The court stated, "A government agency cannot be expected to wait until a perfect solution of environmental consequences of a proposed action is devised before preparing and circulating an EIS." *Id.* at 88.
Another justification for permitting an EIS to acknowledge a gap in data is that it may be feasible to obtain the necessary information at a later point. In *Sierra Club v. Morton* the court approved the Department of Interior’s postponing detailed research into the hazards of geological conditions on the ocean floor until after granting oil and gas leases because the agency would retain control of the project. The court found the EIS reasonable as a whole without this information. Similarly, in *Suffolk County* the court considered whether it was “meaningfully possible” to develop the missing information at a later stage. Thus, while *Sierra Club v. Morton* and *Suffolk County* are careful to note that information may be omitted from an EIS only when the potential danger from such an omission will be considered at a later date, *Suffolk County* and *NRDC v. Calaway* strongly state that federal agencies need not be frozen in their tracks because information required by NEPA is unavailable, and that other national policy objectives can override an agency’s inability to obtain environmental information in deciding whether to proceed with a proposed action.

CEQ has heeded these cases and included a provision in the guidelines aimed at ensuring that the decisionmaker is aware

---

*510 F.2d 813 (5th Cir. 1975).*

*Id.* at 827-28. The rule of reason was originally applied as a standard for EIS review in National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). While the courts have acknowledged that filing supplemental statements will constitute compliance with NEPA, not all courts have gone as far as *Sierra Club v. Morton*. In National Resources Defense Council, Inc. v. Morton, 337 F. Supp. 170, 172 (D.D.C. 1972), the court held on remand that supplementary statements were inadmissible in a case considering the adequacy of an EIS if they were circulated among the agencies and considered after the final decision to go ahead with the project had been made. *Accord, Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 91-92 (2d Cir. 1975).*

*Suffolk County* and Natural Resources Defense Council, Inc. v. Morton are not necessarily inconsistent. It appears implicit in *Sierra Club’s* approval of supplemental statements that such statements be allowed only when the action in question can be stopped or environmental harm avoided after additional information is filed. *But see Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980, 993 (E.D.N.Y. 1977)*, where the court refused to enjoin the construction of sewage treatment facilities while ordering the preparation of a supplemental EIS concerning the impact the facilities would have on shellfish. *See also* notes 125-28 and accompanying text *infra.*

*562 F.2d 1368 (2d Cir. 1977).*


Courts have been particularly amenable to this suggestion in cases where information is not available at the time the original statement is prepared. *See Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980, 993 (E.D.N.Y. 1977)* (fact that information on effect of sewage treatment facilities on shellfish was not available at time EIS was issued did not render it inadequate).
that possibly relevant information has not been included in the statement. Entitled "Incomplete or unavailable information," section 1502.22\(^{102}\) provides that an agency shall indicate the gaps which exist in the relevant information and the points at which scientific uncertainty impinges upon the completeness or accuracy of the EIS. That section also provides for obtaining the missing information if the cost of obtaining it is not disproportionate to its estimated value\(^{103}\) or, if the cost is excessive, preparing a "worst case" analysis\(^{104}\) indicating the worst environmental harm the project could cause and the probability of such harm resulting.\(^{105}\) By requiring such an analysis, the new guidelines have gone further than the authorities cited above.\(^{106}\)

Heretofore, agencies have been reluctant to abandon projects on the basis of environmental costs identified in an EIS.\(^{107}\) Because of its specificity, conspicuousness, and pessimism, the "worst case" analysis could conceivably induce greater concern with environmental protection on the part of decisionmakers. Despite the fact that these analyses would be framed in terms of probabilities, agencies may be less likely to take risks when the possible adverse effects of their actions become part of a reviewable public record.\(^{108}\) While Congress envisioned that NEPA would make decisionmakers cognizant of the environmental ramifications of their choices, it did not intend to inhibit them to the point of foreclosing valuable agency action. Thus, the "worst case" analysis could hinder decisionmaking in ways unforeseen by CEQ.

III. PROCEDURAL PROVISIONS

In its early years NEPA was often interpreted by the courts as merely imposing a procedure for assessing the environmental ramifications of agency action,\(^{109}\) regardless of whether or not

---

\(^{102}\) 40 C.F.R. § 1502.22 (1979).

\(^{103}\) Id. § 1502.22(a).

\(^{104}\) Id. § 1502.22(b).

\(^{105}\) The requirement of an assessment of the probability that the worst case will occur was added when comments on the draft guidelines expressed concern that an EIS which included a worst case analysis would unduly highlight the often remote possibility of adverse environmental consequences. 43 Fed. Reg. 55,978, 55,984, col. 3 (1978), Comments to § 1502.22.

\(^{106}\) See notes 92-101 and accompanying text supra.


\(^{108}\) See notes 181-213 and accompanying text infra.

\(^{109}\) E.g., Environmental Defense Fund, Inc. v. Corps of Engineers (Gillman Dam), 325 F. Supp. 749, 759 (E.D. Ark. 1971) (while acknowledging that it might be more, court treated NEPA as an "environmental full disclosure law").
that assessment was used by decisionmakers. If the EIS is to play a significant role in decisionmaking under the new guidelines, however, execution of CEQ’s procedural requirements must take on greater significance. It is thus appropriate to examine some of the procedural provisions in the new guidelines which attempt to guarantee that decisionmakers utilize the information in the EIS. This part will discuss three crucial procedural requirements of the new regulations: timing of the EIS, forestalling of agency action until the EIS is filed, and interagency cooperation in the preparation of the EIS. It will also examine the secondary effects of the CEQ procedures.

A. Timing

Section 102(2)(C) of NEPA provides that the EIS “shall accompany the proposal through the existing agency review processes.”110 In addition, section 102(2)(H) states that federal agencies shall “utilize ecological information in the planning and development of research-oriented projects.”111 Both sections indicate that Congress anticipated that the EIS would be prepared at an early stage of a project evaluation and would accompany a proposal through agency decisionmaking channels.112 Commentators have construed NEPA as imposing two general obligations on federal agencies: full disclosure concerning the environmental impact of proposed actions and balanced decisionmaking.113 The proper parties must get the proper information at the proper time so that these obligations can be fulfilled.114

Unfortunately, EIS’s have had “little relation to actual decisionmaking on location, design, construction, and operation of the endeavor being studied.”115 This result is due in part to the fact that EIS’s have invariably taken a long time to prepare and

111 NEPA, § 102(2)(H), 42 U.S.C. § 4332(2)(H) (1976) (emphasis added). It is arguable that this subsection does not require such information to be in an EIS. When an EIS is prepared, however, other forms of environmental assessment are customarily foregone. Thus, the information contemplated by § 102(2)(H) will usually come to a decisionmaker via the EIS. See also Friesma & Culhane, Social Impacts, Politics, and the Environmental Impact Statement Process, 16 Nat. Res. J. 339 (1976).
112 See W. Rodgers, Environmental Law 767 (1977) (NEPA’s “purpose is to require consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.”).
114 Id. at 199.
often are not completed until decisions have in fact been made; the statements then become instruments for justifying rather than assessing projects. This use of EIS’s is not only contrary to the statutory language but is also wasteful since it does not heighten the government’s responsiveness to environmental threats. To remedy this problem, the CEQ promulgated section 1502.5,116 which provides that “an agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is presented with a proposal . . . so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal.”117 This requirement of early preparation of the EIS is crucial to the effectiveness of the Act.

Several courts have clearly mandated preparation of the EIS as early as possible.118 There are, however, objections to this practice. First, the earlier the EIS is prepared the more likely it is to contain errors and speculative data.119 Second, CEQ envisions EIS’s which include information on costs and benefits unrelated to purely environmental matters,120 which calls for work by staff members other than those involved in the development of environmental data. Including and evaluating such non-environmental information in an EIS depends on its timely development by these other staff members, and thus, the filing of the EIS may be retarded. Staff members responsible for preparing the EIS have not, in the past, been forced to coordinate their efforts with those performing other functions within the agency. Precise coordination, therefore, may be a practical impossibility.

Coordinating the preparation of environmental and non-environmental information so that both can be included in the EIS is of questionable value. The ultimate responsibility for balancing information lies not with the staff members who prepare an EIS but with the decisionmaker. Rather than imposing excessive pro-

117 Id.
119 E. DOLEON & T. CUIBERT, supra note 1, at 384. One court has pointed out that impact statements must be prepared “late enough in the [project] development process to contain meaningful information.” Scientists’ Institute for Public Information, Inc. v. Atomic Energy Comm’n., 481 F.2d 1079, 1094 (D.C. Cir. 1973) (agencies must set forth reasons when choosing not to prepare an EIS at a particular stage of program development in order to facilitate judicial review of that decision).
120 40 C.F.R. § 1502.16(b) (1979) states that an EIS shall include a discussion of the indirect environmental effects of a proposed action and alternatives. “Effects” are defined as including aesthetic, historic, cultural, economic, and social impacts. Id. § 1508.8.
cedural hurdles on agencies the EIS should be limited to environmental assessment. In this form, the document can "serve practically as an important contribution to the decisionmaking process."\textsuperscript{121}

The regulations leave the exact timing of an EIS to agency discretion.\textsuperscript{122} Section 1501.8 establishes procedures for setting exact time limits for EIS preparation and contains a non-exhaustive list of considerations which may enter into that determination, including potential for environmental harm, the size of the proposed action, the state of the art of analytic techniques, and the consequences of delay.\textsuperscript{123} Other factors that have been proposed include the amount of information needed, whether there is a sound basis for the decision prior to preparing the EIS, whether there is a preconceived bias on the part of decisionmakers, and whether there is adequate extra-agency participation.\textsuperscript{124}

\textbf{B. Forestalled Action}

When the environmental costs of a project are not properly assessed before detailed planning or work on a project proceeds, two problems commonly jeopardize the goal of environmental preservation. The first is the use of the "sunk cost" justification by agencies.\textsuperscript{125} When an agency assumes that it will proceed with a proposal and invests resources in the project, the cost of abandoning that project becomes greater. Thus, for example, while a cost-benefit analysis of the project might demonstrate that the proposal should not be adopted when no work has been done, the inclusion of the agency's analysis expenditures as part of the project cost may tip the balance in favor of continuing the project.\textsuperscript{126}

The court in \textit{Keith v. Volpe}\textsuperscript{127} foreclosed any possible use of the sunk cost argument by the state of California. Despite the defendant's admission that land purchased for highway construction might have to be resold if the project were abandoned, the court refused to approve the continued acquisition of land for the project, believing that the more the state government spent

\textsuperscript{121} Id. § 1502.5.
\textsuperscript{122} Id. § 1501.8.
\textsuperscript{123} Id. § 1501.8(b)(1).
\textsuperscript{125} Friesma & Culhane, supra note 111, at 347.
\textsuperscript{126} See E. \textsc{Dolgin} & T. \textsc{Guilbert}, supra note 1, at 385.
on the project the harder it would be to abandon, even if the expenditures could be recouped.\textsuperscript{128}

The second problem that results when an agency commences work without completing an environmental assessment is that staff members develop greater allegiance to a particular alternative or the project in general as the project advances. Consequently, a complementary bias develops against any alternatives to the proposed action or entirely different projects for which the agency’s resources might be utilized.\textsuperscript{129}

These two problems require that adequate EIS’s be prepared before any action is taken. Although the general problem of premature action has not arisen frequently in litigation, it has been at issue in a few cases. The court in \textit{Arlington Coalition on Transportation v. Volpe},\textsuperscript{130} for example, enjoined a highway transportation project pending the filing of an EIS.\textsuperscript{131} In \textit{Environmental Defense Fund v. Hardin},\textsuperscript{132} the court stated that section 102(2) “makes the completion of an adequate research program a prerequisite to agency action.”\textsuperscript{133}

The new CEQ regulations\textsuperscript{134} support their timing requirements with a provision prohibiting any environmentally deleterious action\textsuperscript{135} until the agency has issued a record of its decision explaining whether and why it will proceed with a particular project.\textsuperscript{136} Section 1506.1(a) precludes agency action which will either “have an adverse environmental impact,” or “limit the

\textsuperscript{128} Id. at 1355. \textit{See also} Stop H-3 Association v. Volpe, 353 F. Supp. 14 (D. Hawaii 1972) (acquisition of right of way enjoined pending preparation of acceptable EIS). Rodgers has described the problem of agencies proceeding on a project prior to the completion of an adequate EIS as one of “project momentum.” \textit{W. Rodgers, supra} note 112, at 774.

\textsuperscript{129} Comment, \textit{supra} note 124, at 813.

\textsuperscript{130} 458 F.2d 1323 (4th Cir. 1972).

\textsuperscript{131} Id. at 1330.

\textsuperscript{132} 325 F. Supp. 1401 (D.D.C. 1971) (injunction against Secretary of Agriculture to prevent use of pesticides in southern United States denied because department research program was adequate).

\textsuperscript{133} Id. at 1403. “The Act,” the \textit{Hardin} court continued, “envisions that program formulation will be directed by research results rather than that research programs will be designed to substantiate programs already decided upon.” \textit{Id. See also} Greene County Planning Board v. Fed. Power Comm’n, 455 F.2d 412, 422 (2d Cir. 1972) (it was error for Commission to conduct hearings on application for construction of high-voltage transmission line prior to filing of EIS); Stop H-3 Association v. Volpe, 353 F. Supp. 14, 16-17 (D. Hawaii 1972) (construction, right of way acquisition, and expenditure for design of highway enjoined pending preparation of adequate EIS.)

\textsuperscript{134} 40 C.F.R. § 1506.1 (1979).

\textsuperscript{135} \textit{Id.} § 1506.1(a) speaks of “action concerning the proposal.” (emphasis added). Presumably, this provision applies to action directly related to the project such as construction and to ancillary actions such as clearing land which may cause environmental harm.

\textsuperscript{136} \textit{See} part IV B \textit{infra}. 

choice of reasonable alternatives," before the agency issues the record of decision. The agency must also promptly notify any grant or license applicant who is known to be proceeding with work on a project prior to the record of decision that any measures necessary to protect the environment will be taken, despite the applicant's prior action. Finally, proceeding with a project that is a component of a larger project, and thus the subject of an acceptable programmatic EIS, is proscribed until the record of decision on the individual project is issued, though the section permits preparatory action that does not affect the environment.

Section 1506.1(d) does allow continued planning during the NEPA process by non-federal applicants for government permits or assistance. Such planning, though not directly conducted by the agency preparing the EIS, may involve consulting with or reporting to that agency. It could thus affect the attitudes of decisionmakers and cause them to develop prejudices in favor of the project as the original conception evolves into reality.

Section 1506.1(b) states that when an agency is aware that a non-federal applicant is contemplating action, the "agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved." In the context of section 1506.1, this provision appears to require any environmental harm caused by such an applicant to be rectified to the fullest extent possible. The regulations, however, do not state who is to bear the cost of necessary measures. In order to inhibit environmentally damaging action by private actors, either the guidelines or agency regulations should make clear that the responsible party, and not the government, will bear the cost of any unwarranted injury to the environment. It may also be advisable for agencies to condition the granting of licenses or acceptance of bids on the applicant's forebearance from harming the environment.

Enforcement of section 1506.1(b) may engender great costs to the federal government. CEQ does not indicate what constitutes

---

138 Id. § 1506.1(b).
139 A programmatic environmental impact statement is one that assesses the environmental effects of a related series of actions.
140 40 C.F.R. § 1506.1(c) (1979).
142 40 C.F.R. § 1506.1(b) (1979).
143 Pursuant to 40 C.F.R. § 1501.3 (1979), agencies are to promulgate any necessary supplementary procedures.
"appropriate action." It seems, however, that the agencies are not empowered to require certain measures that might be appropriate to correct or mitigate environmental harm. Most agencies, for example, could not find statutory authority for imposing fines on private individuals who damage the environment. The agencies can exert some power over parties to whom they do grant aid, a contract, or a permit. If, however, the value of that which the government grants these parties is diminished by penalties commensurate with any environmental harm caused by the recipient, the latter may withdraw the application and again be beyond the jurisdiction of the agency. In addition, it is of little concern to the applicant if the agency itself incurs the cost of remedying damage caused by an applicant. The loss of a government grant may serve as a deterrent to private parties damaging the environment, but the manner in which such harm is to be remedied once inflicted is a more significant and unclear problem.

It is possible that by "appropriate action" in section 1506.1(b) CEQ contemplates resort to the judicial process. The issue of private action injurious to the environment prior to the government's completion of a necessary EIS was addressed in Silva v. Romney. In Silva, the district court enjoined the Department of Housing and Urban Development from granting a private developer funds to proceed with the construction of a federally funded housing project pending the preparation of an acceptable EIS. The district court did not, however, enjoin the private developer from cutting down trees. The circuit court affirmed the holding on the first point and, while not taking any definitive action, stated that the district court had the power under NEPA to enjoin the action of a private applicant for public funds and remanded the case for consideration of that issue.

---

144 The court in Gage v. Atomic Energy Comm'n, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973), stated, "Intervention to prevent environmental harm from private and non-federal action . . . may very well go beyond [an agency's] organic power. . . ."

145 473 F.2d 287 (1st Cir. 1973).


147 Id.

148 473 F.2d at 288-90. The Court reasoned that HUD was actually the benefactor of the private developer and that the extensive nexus between the Department and the developer gave the district court jurisdiction to enjoin the private action. See also Gifford-Hill & Co., Inc. v. Fed. Trade Comm'n, 389 F. Supp. 167, 174 (D.D.C. 1974), aff'd, 523 F.2d 730 (D.C. Cir. 1975) (NEPA applies to actions by non-federal parties which have environmental impact and for which federal permission is required); Boston Waterfront Residents Ass'n, Inc. v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (private recipient of HUD grant enjoined from proceeding with demolition work until HUD had complied with NEPA). But see Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration enjoined from granting money to State of Virginia for construction pend-
action in the private sector prior to the filing of the EIS, even by resort to litigation, would be an important step in preserving the environment.

Significantly, CEQ has attempted to define clearly the relationship between its forestalled action provision and programmatic EIS's. If this relationship remained unclear, components of a proposed program could proceed despite the fact that the program itself might be abandoned. Thus, action which might not be required if an overall program is ultimately abandoned cannot, under section 1506.1(c), be taken independently of that program. This section clearly expresses CEQ's intention that the forestalled action provision apply not only to individual projects, but also to more generalized federal programs that may include any number of individual projects.

The forestalled action provision of section 1506.1 is one of the vaguest in the new guidelines. The concept of "appropriate action to insure that the objectives and procedures of NEPA are achieved" will have to be more precisely defined by each agency. Only time will tell whether a definition can be formulated which helps agencies to effectuate CEQ's intention that private actors not cause environmental harm pending the approval of a project by a federal agency.

148 40 C.F.R. § 1506.1(c) (1979) (emphasis added) provides that "agencies shall not undertake . . . any major Federal action covered by [a program under assessment] which may significantly affect the quality of the human environment unless such action: (1) [i]s justified independently of the program; (2) [i]tself accompanied by an adequate [EIS]; and (3) [w]ill not prejudice the ultimate decision on the program." See Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980, 998 (E.D.N.Y. 1977) (an EIS need not be prepared for every component project in a program if an alternative form of environmental assessment is performed). See also notes 125-28 and accompanying text supra.

150 It is also implicit in the prohibition of action before a record of decision has been filed, 40 C.F.R. § 1506.1(a) (1979), that an agency should not proceed with a project that is part of a program for which a programmatic EIS has not been completed. When an individual project is part of a program, the program is normally approved prior to the project. An individual project, however, may be small enough to pass even the strictest scrutiny for adverse environmental consequences, while the program of which that project is a part might wreak environmental havoc. While § 1506.1(c) (3) guards against the "sunk cost" argument, discussed in note 125 and accompanying text supra, by proscribing action that will influence the ultimate decision on the program, that provision does not guard against the possibility that the agency will fail altogether to prepare a programmatic EIS. It must be remembered that these guidelines are, in essence, a form of coercion to attain compliance with NEPA. Thus, CEQ should clarify that programmatic EIS's must be prepared when the overall effect of a sufficiently related series of actions will be environmentally adverse.
C. Administrative Economy

Bureaucratic systems are commonly criticized for being inherently wasteful. Agencies have proven to be particularly vulnerable to this criticism in the preparation of EIS's, most often because they must develop information for an EIS that either does not fall within their areas of expertise, or has already been developed or is being developed contemporaneously by other agencies.\footnote{Federal agencies may not only duplicate the efforts of other federal agencies, but of state and local bodies as well.}

CEQ has attempted to ameliorate this situation by providing for cooperation among federal, state, and local governmental agencies in developing data and preparing EIS's. First, the guidelines set up procedures for establishing a hierarchy of lead\footnote{40 C.F.R. § 1501.5 (1979). This section outlines the process for selecting the lead agency. Specific duties of the lead agency are set out throughout the regulations.} and cooperating\footnote{Id. § 1501.6. This part is the complement of § 1501.5.} agencies in the preparation of an EIS. A federal agency, or at least one federal agency where there are multiple lead agencies, must play the role of the lead agency,\footnote{Id. § 1506.2(b).} while an arm of any governmental entity may perform the functions of a cooperating agency.\footnote{Id. § 1506.2.}

Second, sections 1506.2\footnote{Id. § 1506.2.} and 1506.4\footnote{Id. § 1506.4.} focus on a common feature of bureaucratic waste, unnecessary duplication of effort. Section 1506.4 provides simply that the EIS or any other environmental document “may be combined with any other agency document to reduce duplication and paperwork.” Section 1506.2 is aimed at eliminating duplication of efforts by federal agencies and state and local bodies by providing for joint planning, research, hearings, and environmental assessments when such bodies are dealing with similar problems.\footnote{Presumably, this does not mean that environmental information can be so commingled with other data that the former is obscured. In Greene County Planning Board v. Fed. Power Comm'n, 455 F.2d 412, 420 (2d Cir. 1972), the court stated that a conglomeration of reports and testimony “cannot replace a single coherent and comprehensive environmental analysis . . . .”}

The emphasis on interagency cooperation, if implemented, would help diminish bureaucratic waste. Overall expenditures

\footnote{40 C.F.R. § 1506.2(b) (1979). CEQ envisions that adherence to this section shall “to the fullest extent possible include joint environmental impact statements.” Id. § 1506.2(c). These shall discuss, among other things, problems that may arise as a direct result of problems or laws peculiar to the state or states involved. Id. § 1506.2(d).}
would be decreased because agencies would pool their resources. Disputes among lead and cooperating agencies would, ideally, be reconciled at the preparation stage rather than being raised for the first time when agencies comment on the draft EIS. Later disagreement and unnecessary delay might be minimized because the division of assignments would have been made by all participating agencies through the scoping process. Furthermore, coordination of time, money, and intellectual resources of every level of government would produce a better overall result than would be achieved by separate efforts under the prevailing practices.

It is uncertain, however, whether eliminating disjointed exercise of authority will lead to more rational consideration of environmental concerns in decisionmaking. It has been argued that redundancy is instrumental in attaining reliable decisions. The leading proponent of this theory points out that while zero redundancy, i.e., eliminating all duplication of effort, has become a benchmark of both economy and efficiency in decisionmaking, it may actually be a great hindrance to the latter.

This is a valid criticism of the doctrine of zero redundancy and is particularly apposite in the NEPA context. Because the art of

---

160 See generally id. § 1506.10 concerning time period allotted for commenting on draft EIS’s.
111 Id. § 1501.6(b)(2). See notes 51-64 and accompanying text supra for a discussion of the scoping process.
162 In the introductory materials to the new regulations, CEQ sets out its goals for the new regulations in the following sequence: first, reducing paperwork; second, reducing delay; and finally, better decisions. 43 Fed. Reg. 55,978, col. 1 (1978). This order might convey an order of priorities; the order in which the purposes of the guidelines are set out could certainly lead one to believe that CEQ adheres to the traditional agency position that NEPA’s procedural requirements are of greater importance than its substantive mandates. In the case of the sections concerning administrative economy, CEQ may have failed to see the forest—better decisions—for its obsession with the trees—reducing duplication of effort.

An alternative view is that CEQ is attempting to mask its actual intent. President Carter’s Exec. Order No. 11,991 emphasized that the new regulations are to implement the procedural provisions of NEPA. 42 Fed. Reg. 26,967 (1977). CEQ has arguably gone beyond this mandate and produced a set of regulations that will affect substantive actions of federal decisionmakers.

164 Id. at 339. The author states: “[R]edundancy is a powerful device for the suppression of error.” Id. at 340. A famous study by Von Neumann originally advanced the theory that a decisionmaking organization can be more reliable than any one of its component parts by including sufficient duplication of efforts. Von Neumann, Probabilistic Logic and the Synthesis of Reliable Organizations from Unreliable Components, reprinted in AUTOMATA STUDIES (C.E. Shannon & J. McCarthy eds. 1956). Landau goes on to cite instances where a lack of redundancy has resulted in costly errors in decisionmaking. Landau, supra note 163, at 344.
environmental assessment is less developed than many other sciences, placing ultimate confidence in a single study may be imprudent. Duplicative efforts could well reveal errors or differences of opinion of which decisionmakers would otherwise be unaware. The zero redundancy theory may not be a practical solution to current bureaucratic ills. A compromise aimed at decreasing bureaucratic waste, without a corresponding decrease in the accuracy and comprehensiveness of decisionmaking aids such as the EIS, would be preferable to the absolute approach taken by CEQ in the new regulations.

D. Secondary Effects of the Procedural Provisions

In addition to their direct effects, the procedural provisions could have a secondary impact which would profoundly affect agency decisionmaking. The provisions establish a uniform basis for NEPA compliance. The advantages of this change are threefold. First, although agencies have heretofore promulgated their own regulations pursuant to NEPA and thus standardized their own EIS's, when all EIS's are prepared in a similar manner, members of Congress, reviewing courts, the public, and officials of agencies other than the preparing agency or agencies will find them easier to read and understand. Second, the extensive cooperation among agencies provided for in the new regulations will be facilitated if parallel procedures are followed by agencies collaborating on a single EIS. Finally, the uniformity of the process from project to project will enable agency staffs to develop expertise in the preparation of EIS's, simultaneously expediting the preparation and improving the quality of the EIS's.

IV. Requirements After the EIS is Prepared

In addition to provisions aimed at transforming the EIS into a valuable tool for agency decisionmakers, the new guidelines include post-EIS measures which further ensure that the policies set out in sections 101 and 102(1) of NEPA are carried out by federal agencies. Two such significant measures are the requirements that methods for mitigating the adverse environmental consequences of an agency project be developed and that a concise "record of decision" be published after the final agency determination on a project requiring an EIS has been made.

185 Under 40 C.F.R. § 1507.3 (1979), each agency must also adopt any procedures necessary to supplement the new guidelines.
A. Mitigation of Environmental Harm

One might infer from NEPA that agencies are obliged, under the Act, to minimize damage to the environment. In the policy declaration of section 101(a) the Act states that the federal government is to "use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." In no other section, however, does the Act refer to mitigation. There is little available data as to whether agencies have actually taken it upon themselves to mitigate environmental harm in projects in which it would be appropriate to do so.

The goal of mitigating environmental damage did not originate with CEQ. Both commentators and courts have stated that an EIS should discuss measures for minimizing harm to the environment. A few courts have held that agencies are responsible for mitigating environmental damage in particular situations, though they have not based this conclusion on the statutory language quoted above. In Akers v. Resor, for example, the court found that a Corps of Engineers' decision to proceed with a stream channelization project was improper under the Fish and Wildlife Coordination Act of 1958 because the Corps failed to establish measures of mitigation mandated by NEPA.

Resor raises the question whether Congress contemplated, and the new guidelines establish, a duty to mitigate environmental harm. One district court has answered this question in the affirmative. In Gillham Dam, the court viewed NEPA as evidence of congressional intent to "create a duty on the part of federal agencies to prevent or minimize unjustifiable environmental degradation resulting from their activities."

---

187 Id. (emphasis added).
188 See, e.g., D'Amato & Baxter, supra note 113, at 198.
172 The court reasoned that NEPA required the interpretation of the Fish and Wildlife Coordination Act in accordance with NEPA. 339 F. Supp. at 1380.
174 Id. at 755.
CEQ, however, does not make it clear that an agency has a duty to mitigate harm. In section 1505.3, entitled “Implementing the decision,” the Council dictates that mitigation measures shall be implemented if developed during the environmental evaluation of the project and committed as part of the agency’s decision. Use of a conjunctive structure implies that agencies are not necessarily required to adopt mitigation measures that are included in alternatives considered in the EIS. Similarly, under section 1505.2(c), an agency is to “state whether all practicable measures to avoid or minimize environmental harm” have been adopted, implying that the agency may have the power to decline to adopt such methods.

In section 1505.3(b), however, CEQ has provided that lead agencies shall “condition funding of actions on mitigation.” That language indicates that CEQ intends that mitigation measures be adopted as part of agency decisions. Moreover, the discussion in the EIS of each alternative and the proposed action must, according to section 1502.14(f), “include appropriate mitigation measures not already included in the proposed action or alternatives.” If, as implied by section 1502.14, agencies are strictly limited to alternatives discussed in the EIS, their choice would necessarily include the mitigation measures dictated by section 1502.14(f). The agencies would, therefore, have a duty to mitigate environmental harm.

Regardless of whether such a duty would be enforced by a court, the fact that the EIS must focus on mitigation measures can do a great deal to implement NEPA’s policies. Agencies will be forced to investigate avenues for minimizing environmental degradation and to publish information about mitigation measures in EIS’s. Decisions concerning which mitigation measures,
if any, will be adopted should therefore be subject to more informed and extensive extra-agency scrutiny.

B. Record of Decision

In order to facilitate judicial review of an agency decision under the standards set forth in section 706(2) of the Administrative Procedure Act, the agency must develop a record setting forth all evidence considered in reaching that decision. With limited exceptions any document included in such a record is available to the public under the terms of the Freedom of Information Act. The EIS would be part of such a record, and hence available to the public. The rationale for an agency's decision to proceed with or abandon a particular project after the EIS has been considered, however, may not be so easily accessible.

Public accountability for decisions is a common technique for combatting institutional biases and identifying the bases of decisions. In a bold effort to assure adherence to NEPA's policies and to facilitate participation by both the public and the courts in achieving that goal, CEQ has required agencies to prepare a "record of decision" for each decision which involves the preparation of an EIS. The record of decision must state the agency's decision, identify all alternatives considered, specify the environmentally preferable alternative or alternatives, 185

---

180 5 U.S.C. § 706(2) (1976). Currently, the definitive statement of the standard of judicial review of administrative actions is the "substantial inquiry or hard look" test applied by the United States Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In describing courts' obligations under the Overton Park test, the Court stated that while review of agencies' factual determinations is to be "searching and careful, the ultimate standard of review is a narrow one. [Nor is t]he court ... empowered to substitute its judgment for that of the agency." Id. at 416. NEPA litigation in which the "hard look" test has been applied includes Sierra Club v. Froehlke (Kickapoo River), 486 F.2d 946, 963 (7th Cir. 1973); Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1281 (9th Cir. 1973); Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 829-30 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); and Calvert Cliffs' Coordinating Committee v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Some courts have imposed a stricter, objective good faith standard on administrative agencies when only the adequacy of an EIS is in question. See, e.g., National Helium Corp. v. Morton, 486 F.2d 995, 1001-02 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974). A possible rationale for such an approach is that agencies are not entitled to the same deference in environmental matters as they are accorded, under the APA, in areas within their expertise. See also E. Dolgin & T. Guilbert, supra note 1, at 312.


183 Id. § 1505.2(a).

184 In the draft guidelines the identification of the environmentally preferable alternative was to be made in the EIS itself, § 1502.14(e), 43 Fed. Reg. 25,237, col. 3 (1978).
identify all factors, environmental and non-environmental, considered by agency decisionmakers, and discuss the impact of those factors on the ultimate decision. In addition, the record must state whether all practicable mitigation measures included in the chosen alternative have been adopted, explain why any rejected mitigation measures have not been adopted, and set out the agency's planned monitoring and enforcement program for any mitigation measures adopted. Requiring a record of decision may be no more than a particularization of the traditional requirement that an agency produce a record suitable for review by the courts. In Ely v. Velde the court held that in addition to satisfying the express mandate of NEPA the agency was obligated to "explicate fully its course of inquiry, its analysis and its reasoning" so that courts could independently evaluate whether or not it has fulfilled its obligations under NEPA.

It has been argued that visibility promotes responsibility in agencies' fulfillment of their statutory obligations. The most obvious advantage of the record of decision is that it resists "closed door decisionmaking," the insulation of the agency from all but select constituents concerned with its organic mission. The new regulations prevent agencies from insulating themselves and their decisions from scrutiny by those with different orientations. They enable outsiders to pressure an agency into taking account of national policy goals not integrally related to the latter's statutory mission.

Opening the agency decisionmaking process to the public can improve decisionmaking in two important ways. First, it facilitates a thorough airing of the issues. Since the record of decision requirement forces articulation and explanation of agencies' decisions, public awareness will be heightened. This, in turn, will open formerly closed channels of communication to the public.

181 40 C.F.R. § 1505.2(b) (1979).
182 Id.
183 Id. § 1505.2 (c) (1979).
184 Id.
185 Id.
186 Id.
187 451 F. 2d 1130 (4th Cir. 1971) (construction of penal facility ordered enjoined pending preparation of EIS).
188 Id. at 1139.
189 Id. at 1138-39.
191 Ströbehn, supra note 32, at 103. Closed door decisionmaking would be inexcusable under even the most conservative interpretation of NEPA, namely, that it is merely an environmental disclosure law, since failure to publicize the contents of an EIS would preclude disclosure of the environmental assessment.
192 Cramton & Berg, supra note 11, at 515.
and should lead to more thoughtful and responsible decisionmaking.

Second, a record of decision will make it more difficult for decisionmakers to obfuscate the bases of their decisions. This should foster greater accountability to the general public and hence greater sensitivity to their concerns. When an agency becomes responsive to a broader constituency, it also becomes sensitive to a wider range of political viewpoints. If agencies become responsive to political input based on environmental concerns their decisions will take greater account of environmental protection, which Congress has declared a national policy objective.

Many criticisms have been levied against theories of open decisionmaking in general and against CEQ's "record of decision" in particular. In the context of NEPA, this argument is based on the fact that it may be "politically distasteful" to describe in detail how the integrity of the environment has been sacrificed in favor of other policy concerns. Admittedly, some social impacts "are taboo subjects for written public documents." Agencies are reluctant to highlight the role of status, class, or culture in their decisions. Government decisions are produced by the bureaucratic process, and, it is sometimes argued, the public is incapable of understanding how and why our institutions sometimes fail to produce optimal results.

Federal agencies were particularly unhappy with the prospect of identifying the environmentally preferable alternative, whether in the EIS as the draft guidelines required, or in the record of decision. They felt that doing so would, in effect, es-

---

197 Comments of General Public, on file at Council of Environmental Quality, 722 Jackson Place, Washington, D.C. One government employee, expressing her personal views, commented, "[I]t is probably unrealistic to expect a political appointee to publicly air the rationale for a political decision." Letter to Nicholas C. Yost (Aug. 10, 1978), on file at Council of Environmental Quality, 722 Jackson Place, Washington, D.C.


199 Friesma & Culhane, supra note 111, at 3347-48. The authors remark, it is often a "myth that [government] programs serve an undifferentiated public interest." Id. at 348.

200 Many theories have been advanced to explain the failure to reach optimal results. No single theory emphasizes every fault of the system, and usually several are applicable to one agency or even to the decision on a single project. See, e.g., the positivist model based on pure rationality, Simon, ADMINISTRATIVE BEHAVIOR (2d ed. 1957), the incrementalist model, Lindblom, THE INTELLIGENCE OF DEMOCRACY: DECISIONMAKING THROUGH MUTUAL ADJUSTMENT (1965), the mixed scanning approach, Etzioni, Mixed Scanning: A "Third" Approach to Decision-making, 27 PUB. AD REV. 385 (1967). See also W. Gore, ADMINISTRATIVE DECISION-MAKING (1964); D. Braybrooke & C. Lindblom, A STRATEGY OF DECISION (1963); P. Woll, PUBLIC POLICY ch. 2 (1974); BUREAUCRATIC POWER IN NATIONAL POLITICS (2d ed. F. Rourke 1972); READINGS IN AMERICAN POLITICAL BEHAVIOR, Part IV (2d ed. R. Wolfinger 1970).

201 Comment, supra note 36, at 10,045.
establish a priority for environmental policies over others. CEQ responded that the record of decision and identification of the environmentally preferable alternative require only an explanation of the agency's choice, not an ultimate decision. This position is reflected by a substantial change in language between the draft and final regulations. In the draft regulations agencies were directed to state "their reasons why other specific considerations of national policy overrode [the environmentally preferable] alternatives." The final regulations soften this language by requiring an agency to "identify and discuss" all factors contributing to the choice of one alternative over another "including any essential considerations of national policy." In changing this language, CEQ has avoided forcing agencies to confront the question of why the environmentally preferable alternative or alternatives were rejected.

The desirability of this result is questionable. NEPA was a response to the practice of cutting environmental corners in order to achieve other types of ends; its aim is to achieve parity for environmental values with other, more traditional, ones. Thus, while emphasizing environmental concerns may appear to place a premium on them, such emphasis may be necessary to achieve the reorientation envisioned by Congress.

Another problem is that while the record of decision does not transform the EIS into a decision document, in practice it establishes a decision document that concentrates on environmental policy rather than national policy objectives in general. NEPA dictates only the preparation of an information document, not a decision document. In Calvert Cliffs' Coordinating Committee, Inc. v. AEC, a leading NEPA case, the Court of

---

202 Id. at 10,046. This assertion is supported by the fact that no similar requirement exists for identifying either the socially, culturally, economically, or technically preferable alternative.

203 Id.

204 Section 1505.2(b), 43 Fed. Reg. 25,240, col. 3 (June 9, 1978).

205 40 C.F.R. § 1505.2(b) (1979).

206 For the purpose of this article, the term "decision document" refers to a document presenting the evidence considered by an agency, stating the policies which influenced the decision, and explaining how the agency reached its conclusion in light of both the evidence and those policies. Thus, a decision document focuses on the process of choice. On the other hand, an "information document," such as an EIS, focuses on the process of assessment. See generally E. Dolgin & T. Guilbert, supra note 1, at 443-44.


208 449 F.2d 1109, 1114 (D.C. Cir. 1971) ("The apparent purpose of the [EIS] is to aid in the agency's own decisionmaking process . . . .") But see Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972), in which the Eighth Circuit suggested that an EIS might serve as a decision document, stating that "[t]he agency must also explicate fully its course of inquiry, its analysis and its reasoning." Id. at 351. Thus,
Appeals for the District of Columbia agreed that the Act does not mandate the preparation of a decision document. *Calvert Cliffs* concerned the construction of a nuclear power plant which was enjoined because the initial EIS was inadequate. Nevertheless, the Atomic Energy Commission ultimately decided to approve the plant, which is presently in operation.

The danger of requiring what is essentially a decision document which concentrates on environmental concerns is that nonenvironmental project justifications, such as economic, technical, social, and cultural considerations might be "swallowed up."209 Courts have, of course, required agencies to justify their decisions somewhere in the official record. As noted above, the court *Ely v. Velde*210 stated that agencies cannot keep their thought processes "under wraps."211 There has been little indication, however, that courts interpret NEPA to require justification for an agency's decision in an EIS,212 or under any NEPA provision. Nevertheless, this is essentially what CEQ has done by requiring a record of decision emphasizing environmental values in guidelines promulgated under NEPA.213

The record of decision required by section 1505.2 constitutes a radical departure from the traditional conception of the role of an EIS. President Carter ordered CEQ to promulgate regulations to implement the procedural provisions of NEPA.214 Nowhere does NEPA require or suggest that any document other than an EIS be prepared. Thus, to enforce section 1505.2, a court would have to find (1) that the President can require agencies to perform duties beyond those imposed by a statute in order to implement that statute, and (2) that the record of decision is necessary to the implementation of NEPA's procedural provisions.

"the complete formal impact statement represents an accessible means for opening up the agency decision-making process and subjecting it to critical evaluation by those outside the agency, including the public." *Id.* (citations omitted).

209 F. ANDERSON, supra note 5, at 255.

210 451 F.2d 1130 (4th Cir. 1971).

211 *Id.* at 1138. *See also* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Hanly v. Kleindienst (Hanly II), 471 F.2d 823 (2d Cir. 1972); Hanly v. Mitchell (Hanly I), 460 F.2d 640 (2d Cir. 1972), cert. denied, 409 U.S. 990 (1972); Environmental Defense Fund, Inc. v. Corps of Engineers (Gilham Dam), 325 F. Supp. 728 (E.D. Ark. 1971).

212 *But see* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

213 In its record of decision, an agency is free to include information not required by § 1505.2. By so doing, an agency can dull the impact of a record of decision which focuses exclusively on environmental considerations.

CONCLUSION

CEQ's new regulations for the preparation of environmental impact statements contain three significant types of provisions. First, the regulations require that all substantive information necessary for a comprehensive assessment of the environmental effects of a proposed action and alternatives thereto be included in the EIS. Second, the regulations establish procedures to ensure that the information in the EIS will be considered by decisionmakers. Finally, certain provisions of the new regulations are aimed at furthering environmental protection once the EIS is completed. Many provisions of the regulations merely restate previously prevailing practices. Those which have been discussed in this article are either innovative or especially significant. While these latter provisions pose some problems due to lack of clarity and potential difficulties in implementation, on the whole they should improve environmental impact statements, enable decisionmakers to make better use of the statements, and foster heightened awareness of environmental concern in federal decisionmaking. Thus, the regulations should help considerably in implementing the policies articulated in NEPA over a decade ago.

—David M. Lesser