Program Environmental Impact Statements: Review and Remedies

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“[R]ecognizing the profound impact of man’s activity on the interrelations of all components of the natural environment,”¹ the Congress enacted the National Environmental Policy Act of 1969 (NEPA).² This Act declared that it was the policy of the federal government “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.”³ To carry out this environmental policy, NEPA directed all federal agencies to prepare a detailed statement on the environmental effects of all “major Federal actions significantly affecting the quality of the human environment.”⁴ Early litigation focused only on whether particular individual actions were within the scope of NEPA⁵ and thereby required so-called site-specific state-

   The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
   (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
      (i) the environmental impact of the proposed action,
      (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
      (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 irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
   Prior to making any detailed statement, the responsible Federal official 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. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . .
5. See, e.g., Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693

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ments. More recent cases, however, have determined that NEPA also applies to broad federal programs that encompass a number of individual component projects, although the full extent of that application remains unclear.

This Note discusses the application of NEPA to federal programs. It first analyzes when the courts have required a program impact statement and draws upon that analysis to explain the relative functions of site-specific and program statements. It then examines the appropriate scope of judicial inquiry and the proper standards for reviewing federal program compliance with NEPA. Finally, the Note scrutinizes the types of remedies that may be imposed if a program does not comply with NEPA and proposes a procedure for determining the proper scope of judicial remedies.

I. REQUIREMENT FOR A PROGRAM STATEMENT

An important early decision holding that the requirement of a detailed impact statement applied to federal programs was Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, which involved an Atomic Energy Commission (AEC) research program to develop a liquid metal fast-breeder-reactor. The AEC had conceded that impact statements were required for each of the major test facilities and demonstration plants planned for the breeder reactor program. The critical issue, however, was whether at some point "the Commission must issue a statement for the research and development program as a whole, rather than simply for individual facilities . . . ." The court, declaring that the "Commission [had taken] an unnecessarily crabbed approach to NEPA" in assuming


For a discussion of early NEPA litigation, see F. ANDERSON, NEPA IN THE COURTS (1973).


8. A fast-breeder-reactor transforms a nonfissileable material into a different, fissileable substance that can fuel an atomic reactor. "It is estimated that after about 10 years of operation the typical fast-breeder-reactor will produce enough fissile Plutonium-239 not only to refuel itself completely, but also to fuel an additional reactor of comparable size." 481 F.2d at 1083. Development of a fast-breeder-reactor was expected to overcome the limitations placed on the use of atomic energy by the scarcity of naturally suitable atomic fuel. 481 F.2d at 1083. For a pessimistic opinion on the prospects for development of a feasible fast-breeder-reactor, see A LOOK AT THE PRESENT STATUS OF THE BREEDER REACTOR PROGRAM: POWER "TOO CHEAP TO METER" REVISITED, 5 ENVIRONMENTAL L. REP. 50202 (1975).

9. 481 F.2d at 1085.

10. 481 F.2d at 1085. For a discussion of the court's view in Scientists' Institute as to when a program statement should be prepared, see note 22 infra.
that NEPA requirements do not extend to programs,\(^{11}\) held that the program was an action significantly affecting the quality of the environment within the meaning of NEPA\(^ {12}\) and that an impact statement was thus required not only for each individual facility but also for the entire development program.

To support its decision, the *Scientists' Institute* court cited a Council on Environmental Quality (CEQ)\(^ {13}\) memorandum on the application of impact statements:

> Individual actions that are related either geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single program statement. Such a statement also appears appropriate in connection with . . . the development of a new program that contemplates a number of subsequent actions. . . . [T]he program statement has a number of advantages. It provides an occasion for a more exhaustive consideration of effects and alternatives than would be practicable in a statement on an individual action. It ensures consideration of cumulative impacts that might be slighted in a case-by-case analysis. And it avoids duplicative reconsideration of basic policy questions . . . .\(^ {14}\)

Thus, an essential reason for requiring program impact statements is that some activities are so interrelated that they will have cumulative or synergistic environmental effects. Where such interrelatedness exists, an environmental evaluation of one project will not be adequate unless it takes into account the effects of the other projects.

The court then considered whether the breeder-reactor develop-

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11. 481 F.2d at 1086.
12. 481 F.2d at 1088.

As to the influence that Council recommendations should have, one court has said that "[a]lthough the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality' . . . has misconstrued NEPA." Greene County Planning Bd. v. Federal Power Commn., 455 F.2d 412, 421 (2d Cir. 1972), quoting NEPA § 204, 42 U.S.C. § 4344 (1970); see Carolina Action v. Simon, 389 F. Supp. 1244, 1246 (M.D.N.C. 1975).

14. 481 F.2d at 1087-88 (deletions original), quoting CEQ, Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972) [hereinafter CEQ Memorandum], reprinted in 3 BNA ENVIRONMENT REP. 82-87 (1972).
ment activities were a group of closely related projects for which a comprehensive program statement was required. In deciding that these projects ought to be evaluated as a unit, the court placed great weight on the irreversible commitment that would result from taking the first step in the program. Because of the massive investments necessary to develop new energy technology, developing a workable breeder reactor will necessarily mean that some alternative methods of energy production will not be explored. When in the future new forms of energy must be employed, the only technologies available will be those developed today. Therefore, by engaging in the development of breeder reactors now, the government may very well be committing itself to using the breeder reactor in the future. Any impact statement that did not take into consideration the effects of relying solely on breeder reactors for energy in the future would thus fail to discuss one of the most significant environmental impacts of the research and development program.

Other cases considering the need for a program statement for arguably interrelated projects have also employed the irretrievable commitment of resources analysis. In these cases, taking the first step would not have precluded future options to the same extent as would embarking on the development of a breeder reactor; however, making an initial commitment could serve to shift the balance of environmental costs and economic benefits in favor of completing the program. For example, in cases involving highway construction, courts have held that in considering the environmental effects, the government cannot break a highway project into small segments as if each segment had no relation to the completion of the entire highway. Even though a segment may be justifiable when considered in isolation, the construction of that segment may make any alternative to the entire highway relatively more expensive. Moreover, the increased traffic that may result from the completion of one segment

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15. See generally Application of NEPA to Long-Range Technology Development Programs: SIPI v. AEC, 3 ENVIRONMENTAL L. REP. 10099, 10099 (1973): "Research in the area has been encouraged within the AEC [Atomic Energy Commission] for over 20 years, with Congress recently appropriating an average of $100 million per year for the program. Future outlays will bring the total to about $2 billion by 1980, as much as that spent federally for the development of all other energy sources combined."

16. 481 F.2d at 1090.
17. 481 F.2d at 1089 n.43.
generates additional public and institutional pressures to complete the remaining segments.\textsuperscript{20}

Thus, the crucial element in the irretrievable commitment test for determining the need for a program impact statement is whether the taking of a particular action now will so alter the balance of environmental cost and economic benefit as to preclude a meaningful decision on the program in the future.\textsuperscript{21} It is often true that as the government invests more in a program, the loss that would be caused by abandonment increases and the gross benefits that can be derived from completing the program are measured against a decreased cost to complete. In such a case, the economic benefit derived from completion of the last few segments includes the increased benefit that would result from the use of the entire program; thus, for the particular highway segment in question, the economic benefits steadily gain weight in comparison with the computed environmental cost, which remains the same as the last few individual segments are completed. Eventually, once a particular initial action has been taken in many government programs, the economic benefit to be achieved by completion becomes sufficiently great relative to the environmental and economic costs of completion to make a decision to abandon the program highly unlikely.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item Under similar reasoning, the court in Atchison, Topeka & Santa Fe Ry. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974), granted a preliminary injunction to the plaintiffs who charged that the environmental impact statement prepared for the renovation and enlargement of a lock on the Mississippi River was inadequate because it did not discuss the environmental effects of enlarging all the locks on the waterway. The court, in determining that the plaintiffs were likely to prevail in proving that the single lock enlargement represented the beginning of a system-wide improvement program, relied on the draft version of the environmental impact statement. The statement conceded that for the proposed enlarged lock to operate at full capacity, a substantially increased amount of traffic and larger vessels had to be allowed to reach it. Thus, the Corps of Engineers would be under constant pressure from those navigating the river to make the fullest possible use of the enlarged lock by enlarging the other locks on the river. 382 F. Supp. at 618-19.
\item See Scientists' Institute for Pub. Information, Inc. v. Atomic Energy Commn., 481 F.2d 1079, 1089 (D.C. Cir. 1973) ("To wait until a technology attains the stage of commercial feasibility before considering the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs against economic and other benefits").
\item See Coalition for Safe Nuclear Power v. United States Atomic Energy Commn., 463 F.2d 954, 956 (D.C. Cir. 1972) (each increment of government investment "tilts the balance away from the side of environmental concerns").
\item Having discussed the primary significance of Scientists' Institute—the germination of the irretrievable commitment test—it is now appropriate to note the second issue presented in the case: Assuming that a program impact statement is required in a particular instance, when should it be prepared? The court recognized that "[s]tatements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that what information is contained can practically serve as an input in the decision-making process." 481 F.2d
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This shift away from environmental concerns is reinforced by the creation of institutional pressures to complete a program once it has begun. The prime concern of an agency charged with missions such as road or dam building is the completion of the program even at the expense of the environment. The effects of this mission-orientation are heightened not only by institutional inertia but also by a reluctance of administrators to admit that the program, on which large expenditures have been made, would never have been undertaken had a comprehensive environmental assessment been made at the outset. Thus, if an agency is allowed to begin segments of the program without first preparing a comprehensive impact statement, a bias will be added to the problems already present in attempting to make a fair assessment of environmental factors, a bias that is difficult to identify and correct.

A separate line of cases has sought to determine whether a project was a part of a program for which an impact statement should be required by ascertaining whether that specific project had significance independent of other alleged program elements. A project has such significance if it can function alone and if no further actions need be taken to derive benefit from it. If a project has an "independent significance," it has been held that no program statement is required.

One example of the "independent significance" analysis is *Trout Unlimited, Inc. v. Morton,* in which the court sought to determine whether an impact statement prepared for the first phase of the two-
phase Teton Dam and Reservoir Project need also consider the environmental effects of the second phase. The first phase included the construction of a dam and an electrical generating station and the improvement of the local irrigation system. The second phase was to provide for the disposition, primarily for irrigation, of the one half of the reservoir capacity that was not disposed of by phase one. The court observed that the immediate benefits of flood control, irrigation, and hydroelectric power would result from the first phase whether or not phase two was ever carried out. Thus, the court ruled that the impact statement need not consider the effects of phase two because phase one was substantially independent of the second project.

To a certain extent, the independent significance test of Trout Unlimited and the irreversible commitment test of Scientists' Institute can be seen as opposite sides of the same coin. The Scientists' Institute court required a program statement when the first step compelled the agency to take subsequent actions; the Trout Unlimited court said an overall statement was not needed when future actions were not made necessary by the project in question. The cases that require a program statement discuss the irreversible commitment involved and the cases that find a program statement to be unnecessary direct their analysis toward the finding of independent significance.

It would be incorrect to conclude that the result is always determined by the choice of analysis. Indeed, in many situations the result would be the same regardless of which test were applied. Still,

28. 509 F.2d at 1285 n.13.
29. 509 F.2d at 1285. Furthermore, because the second phase would not be put into effect until the Secretary of the Interior submitted a finding of feasibility to the Congress and the President, the court concluded that Congress intended the two phases of the program to be considered separately. 509 F.2d at 1284-85.
30. The court in Trout Unlimited, observing that in Scientists' Institute the fast-breeder-reactor research and development program had no independent significance absent future application of the technology developed, see text at notes 7-17 supra, specifically pointed out that its analysis was not inconsistent with that of the court in Scientists' Institute. The court pointed out that no benefits would result from the mere development of fast-breeder-reactor technology; benefits would only result if the technology were put into use. In contrast, immediate benefits would flow from the first phase of the Teton Dam and Reservoir project even if phase two were never put into effect. 509 F.2d at 1285 n.13.
32. 509 F.2d at 1285; see Sierra Club v. Stamm, 507 F.2d 788, 792-93 (10th Cir. 1974).
34. See Trout Unlimited, Inc v. Morton, 509 F.2d 1276 (9th Cir. 1974); Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974).
there have been cases, for example *Atchison, Topeka and Santa Fe Ry. v. Callaway*,\(^{35}\) in which the result has depended on the test. In that case, the Army Corps of Engineers planned to rebuild and enlarge one of a series of locks on the Mississippi River. When the *Scientists’ Institute* test of irreversible commitment is applied, a program statement on the related network of locks and dams is properly called for.\(^{36}\) First, use of the increased capacity of the one lock would necessitate the modification or rebuilding of other dams and locks.\(^{37}\) If the environmental impacts of each lock were considered separately, the economic benefits to be gained through the additional use of completed locks would then be balanced against the environmental loss caused by the construction of only the lock under consideration. This results because the completion of each new lock contributes to the derivation of benefits from all other locks while only the environmental damage caused by the construction of the individual lock being proposed would be considered.\(^{38}\) In such a situation it is unlikely that an agency would determine the environmental costs to outweigh the economic benefits.

Moreover, by focusing on the environmental impact of only individual locks within the system, the Corps precludes a meaningful consideration of alternatives to expanding the complete waterway system. As each lock is constructed the remaining cost of completion in both economic and environmental terms for the whole program is reduced. Consequently, when the waterway system is then compared to such alternative transportation systems as a railway, the relative economic and environmental costs will be shifted in favor of completing the partially constructed network. A comprehensive evaluation of the environmental impact of the entire lock and dam program conducted before the commencement of individual projects may result in the selection of an alternative that will cause less environmental damage.

However, when the independent significance test is applied to the plan to enlarge an individual lock, a contrary result is obtained. Even though full use of the expanded lock would not occur unless all the locks were enlarged, substantial benefit would result from remodelling only the one lock, *i.e.*, the existing river traffic could use


\(^{36}\) The court in *Atchison* did rely on the irreversible commitment test set forth in *Scientists’ Institute*, and decided that a program statement was necessary. The decision was based on the finding that there was a comprehensive plan to enlarge the Mississippi river lock and dam system. *See* 382 F. Supp. at 620-22; note 20 supra.

\(^{37}\) 382 F. Supp. at 622; *see* note 20 supra.

\(^{38}\) This assumes that all the environmental harm results from the construction and the operating of the locks and not from the increased river traffic. If the increase in traffic had environmental effects, the degree to which construction of each lock would increase traffic would have to be considered in each site-specific evaluation.
a modern facility instead of the outmoded lock that it replaced. Because the rebuilt lock would have independent significance, the Trout Unlimited test would not require a program statement.

In addition to yielding contradictory results in certain cases, the irreversible commitment and independent significance tests will not require program statements in all cases in which one is desirable. The CEQ memorandum, upon which the Scientists' Institute court relied, stated that program statements may be required for a group of "[i]ndividual actions that are related either geographically or as logical parts in a chain of contemplated actions." This language is neither limited to actions that will result in an irreversible commitment nor excludes actions that have an independent significance. The memorandum states that one of the purposes of requiring a program statement is to evaluate cumulative effects of the program "that might be slighted in a case-by-case analysis." This purpose would not be served if the cumulative effects of independently significant projects that were actually program components were not considered in a program statement.

The dissent to the decision of the Court of Appeals for the District of Columbia Circuit in Sierra Club v. Morton provides one example of how neither the irreversible commitment nor the independent significance test would require a program statement when environmental considerations of the type described in the CEQ memorandum seem to warrant preparing such a statement. In this case involving the development of the coal resources of the Northern Great Plains area, the dissent would not have required a program impact statement because each coal mine had independent significance and because granting a permit for one mine would not irreversibly commit the government to approving another mine later. The dissent pointed out that the agencies had required each individual impact statement to consider the cumulative impacts of the related developments.

However, if the cumulative effects of all the projects are conceded to have an environmental impact deserving of consideration, it would seem more rational to consider the overall effects before, not after, development is begun. If the cumulative effects are only considered as each mine is proposed, it is possible that the environmentally worst operation, i.e., that which causes the most damage to the environment, would be permitted if it were proposed early, when the cumulative effects were at a low level, and that the envi-

39. See CEQ Memorandum.
40. See id.
41. 514 F.2d 856 (D.C. Cir. 1975), revd., 96 S. Ct. 2718 (1976). Judge MacKinnon wrote the Court of Appeals dissenting opinion. 514 F.2d at 884. For a discussion of the majority opinion, see text at notes 45-55 infra.
42. 514 F.2d at 886 (MacKinnon, J., dissenting).
ronmentally best project would not be allowed if proposed later, when even a slight impact would bring the cumulative effect to an intolerable level. Had a comprehensive environmental evaluation been made before development on individual projects began, projects could have been selected to provide the greatest use of coal resources at the smallest environmental cost.\textsuperscript{43}

The approach of the majority in \textit{Sierra Club v. Morton} would have filled the gap left open by the independent significance and irreversible commitment tests; it involved independent judicial examination of the actions of the Interior Department to determine whether the government had, in fact, contemplated a program regardless of whether the agency declared the actions to constitute a program.\textsuperscript{44} However, in \textit{Kleppe v. Sierra Club}\textsuperscript{45} the Supreme Court reversed the court of appeals. The Court concluded that NEPA required impact statements only for actions that are actually proposed by the agency and not merely contemplated.\textsuperscript{46} On the facts the court determined that there was no proposed regional program; all actions that had been proposed were either local or national in scope and each had an impact statement that was not disputed.\textsuperscript{47}

Yet the Court did, at least, suggest an approach to defining the need for program statements that is broader than either the independent significance or the irreversible commitment analyses. It

\textsuperscript{43} In \textit{Cady v. Morton}, 527 F.2d 786 (9th Cir. 1975), the court implicitly recognized the inadequacy of the independent significance test. \textit{Cady} involved a lease of mineral rights in coal by the Crow Indians to a private company, which the Bureau of Indian Affairs approved without preparing an environmental impact statement. The lease covered 30,876.45 acres and ran for ten years and as long thereafter as coal was produced in paying quantities. Thereafter, the company entered into contracts to supply 77,000,000 tons of coal over twenty years to four utility companies. When the company applied for federal governmental approval of a mining plan covering operations for five years on 770 acres of the leased land, the BIA prepared an impact statement for that plan. In holding that an impact statement was required for the lease of all the land for coal mining, the court said that

\textit{...while it is true that each mining plan prepared for tracts within the leased area is to a significant degree an independent project which requires a separate [impact statement] with respect to each, it is no less true that the breadth and scope of the possible projects made possible by the Secretary's approval of the leases require the type of comprehensive study that NEPA mandates adequately to inform the Secretary of the possible environmental consequences of his approval. [The leasing company's] massive capital investment and extended contractual commitments present a situation in which "it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." ...} However, even were this not true, it cannot be denied that the environmental consequences of several strip mining projects extending over twenty years or more within a tract of 30,876.45 acres will be significantly different from those which will accompany [the leasing company's] activities on a single tract of 770 acres.

\textsuperscript{44} 514 F.2d at 873.

\textsuperscript{45} 96 S. Ct. 2718 (1976).

\textsuperscript{46} 96 S. Ct. at 2728-29.

\textsuperscript{47} 96 S. Ct. at 2725.

\textsuperscript{48} 96 S. Ct. at 2726.
noted that, in general, “[c]umulative environmental impacts are, indeed, what require a comprehensive impact statement.” The Court also specifically identified “the extent of the interrelationship among the proposed actions and the practical considerations of feasibility” as being among the relevant factors that must be considered. There was no mention of any requirement that an irreversible commitment be present nor were actions that are independently significant excluded from being considered a part of a broader program that would require an impact statement. This approach thus provides the basis for an analysis that will encompass a broader range of action for which a program statement ought to be required and in this regard is a doctrinal advance along the lines suggested by the CEQ memorandum.

Despite the broad implications that Kleppe may have for the evolution of standards for ascertaining whether a program exists, the holding of the Court on when an action requires an impact statement may significantly restrict the effectiveness of NEPA in forcing agencies to consider program environmental impacts early in their decision-making process. The Court, as noted above, rejected the position of the court of appeals that an agency may be required to begin preparing an impact statement prior to the recommendation or report on a proposal for an action. A court, then, has no role in the process of considering environment impacts until a report or recommendation on the proposal for an action is made. This construction of NEPA requires that the program statements encompass only those actions that have been proposed, not those that are merely contemplated. Unfortunately, the Kleppe majority offered no

49. 96 S. Ct. at 2732.
50. 96 S. Ct. at 2731. In the context of projects geographically interrelated, the Court said that it was the role of the responsible federal agency to determine whether "a comprehensive regional statement is needed and, if so, to determine the appropriate region. The agency determination will not be disturbed unless it is shown that the agency acted arbitrarily. See 96 S. Ct. at 2731.
51. 96 S. Ct. at 2728-29. The Court of Appeals had devised a balancing test involving four factors to determine when an agency must begin preparing a statement:
   - How likely is the program to come to fruition, and how soon will that occur?
   - To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses?
   - How severe will be the environmental effects if the program is implemented?
52. 96 S. Ct. at 2729.
53. "The statute, however, speaks solely in terms of proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." 96 S. Ct. at 2730 n.20 (emphasis original). However, Kleppe should not mean that program statements are no longer necessary in cases such as Scientists' Institute, see text at notes 7-17 supra, in which early actions irreversibly commit the agency to an entire group of actions. The point of the irreversible commitment analysis is that by proposing
guidance for distinguishing "proposed" and "contemplated" actions. As the dissent noted, both the statute and the legislative history shed little light on this question. It is therefore unclear to what extent Kleppe will reduce the comprehensiveness of program statements. There is no doubt, however, that the Court has adopted an approach that will substantially limit timely judicial review of an agency's compliance with its obligations under NEPA to integrate the consideration of environmental effects into its decision-making process.

Now that the basic requirement that an agency prepare program impact statements has been established, it is appropriate to consider the functions of a program statement. This discussion will make it even more evident why courts should strictly enforce statement requirements for programs. First, it is necessary to review the policies of NEPA that are fulfilled by both site-specific and program impact statements. The relative roles of site-specific and program impact statements in accomplishing specific purposes of NEPA will then be analyzed.

According to the CEQ Guidelines, the purpose of requiring impact statements is to assist agencies in carrying out the environmental protection policies of NEPA. Specifically, section 102(2)(c) of NEPA requires agencies to build into their decision-making processes a consideration of the environmental effects of their activities.

one action, an agency is in effect proposing the whole series of activities to which the agency is irreversibly committed. If later actions inevitably follow from early actions, it is meaningless to say that such later actions are only "contemplated." Cf. 96 S. Ct. at 2732 n.26.

54. 96 S. Ct. at 2735 (Marshall, J., concurring in part and dissenting in part): "A statute that imposes a complicated procedural requirement on all 'proposals' for 'major Federal actions significantly affecting the quality of the human environment' and then assiduously avoids giving any hint, either expressly or by way of legislative history, of what is meant by a 'proposal' or by a 'major Federal action' can hardly be termed precise."

55. The dissent stated that "this vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA," 96 S. Ct. at 2735, and, thus, that courts should be able to create mechanisms to enforce the duties imposed by NEPA.

The dissent relied on two policies in support of requiring agencies to begin preparation of an impact statement before a proposal is made. First, because the preparation of an impact statement involves a significant amount of time, an agency must begin preparation early enough to complete it by the time a decision on the project must be made. 96 S. Ct. at 2734 ("because an early start in preparing an impact statement is necessary if an agency is to comply with NEPA, there comes a time when an agency that fails to begin preparation of a statement on a contemplated project is violating the law"). Second, the essential policy of NEPA, see text at notes 1-3 supra, requires consideration of the environmental effects of a project throughout the entire planning and decision-making process. 96 S. Ct. at 2734.

56. 40 C.F.R. § 1500.1(a) (1976).

The impact statement is intended to provide the decision-makers with the information needed to consider the impact on the environment; it is not supposed to serve only as a post hoc rationalization of decisions already made. Furthermore, the impact statement is intended to guide not only the agency but also the ultimate decision-makers, Congress and the President.

A second major purpose of the impact statement is to alert interested parties to the environmental consequences of a proposed action. These interested parties may suggest alternatives that will reduce the environmental damage or may identify additional environmental costs of which the agency was not aware. In this man-


In order to comply with section 102(2) (C) of NEPA, 42 U.S.C. § 4332(2)(C) (1970), which requires that an agency solicit comments on its plans prior to preparing the environmental impact statement, agencies must prepare two impact statements—a draft statement and a final statement. See 40 C.F.R. § 1500.7(a) (1976). The draft statement must circulate for review and comment to federal and federal-state agencies that have jurisdiction by law, or have special expertise with respect to the environmental effect involved, 40 C.F.R. § 1500.9(a)(1) (1976), and to the public. 40 C.F.R. § 1500.9(d) (1976). Before preparing the final statement, which must also be circulated for comment, comments received on the draft statement are to be carefully evaluated and considered. 40 C.F.R. § 1500.7(a) (1976). Copies of substantive comments received on the draft statement are to be attached to the final statement whether or not the agency decides to discuss the comments in the text of the final statement. 40 C.F.R. § 1500.10(a) (1976). It should be emphasized that only the final statement satisfies NEPA; a draft statement prepared without the solicitation of comments does not fulfill the requirements of section 102(2)(C).

To inform the public of the availability of impact statements for comment, the CEQ publishes monthly the 102 Monitor, which lists the impact statements filed with the CEQ during the preceding month and tells who in the agency may be contacted to provide information about the statement. The 102 Monitor should list all impact
ner, the agency will gather more information to help it make an appropriate decision.

Although these general comments about the purpose of impact statements apply to both program and site-specific statements, the two types of statements address different issues and serve different functions.63 Basically, the site-specific statement focuses upon the environmental impact of one project. However, because the total impact of a program is greater than the sum of the impacts of the individual projects, a program statement should evaluate the cumulative environmental effects of all the projects.64 Although each site-specific statement may report the cumulative effects of the projects thus far undertaken, such a procedure does not assist comprehensive environmental planning,65 one of the basic functions of the impact statement,66 because some of the actions would already have been taken.

Another function of program statements is to settle broad questions of policy.67 For example, general alternatives to the program would be dealt with in the program statement and then need not be reevaluated in every site-specific statement.68 The site-specific statements would then discuss alternatives only to particular projects, such as alternative sites.69

It might be argued that an agency may avoid preparing a program statement by discussing questions of policy and alternatives in the site-specific statements. However, the cumulative effects of programs cannot be adequately considered in the planning stages without a program evaluation. Therefore, discussing broad policy issues in site-specific statements would not spare an agency the efforts of preparing a program statement. Considerations of efficiency would then mandate a discussion of all matters pertaining to the program at one time. There is no need to reconsider basic questions in every site-specific statement.70

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64. CEQ, Memorandum; see Application of NEPA to Long-Range Technology Development Programs: SIPI v. AEC, supra note 15, at 10099.

65. See text at notes 41-43 supra.

66. See text at notes 56-60 supra.

67. See CEQ Memorandum. See generally Application of NEPA to Long-Range Technology Development Programs: SIPI v. AEC, supra note 15, at 10099.

68. See CEQ Memorandum. Of course, in a long-range program a change in underlying assumptions may warrant revision of the program statement.


70. Cf. CEQ Memorandum.
Although the Scientists' Institute court said that it was of "little moment" whether the program analysis was issued separately or as part of a statement for a particular project, it recognized that the program statement discusses different issues and addresses a different audience than does the site-specific statement. The court expressed the opinion that it would make more sense to issue a separate program statement than to burden a site-specific statement with the program analysis. Later courts have required a separate program evaluation in addition to the evaluation for each individual project. Such a requirement for multiple impact statements has been labelled by some commentators as "tiering." Each level or tier deals with different issues, although each relies upon the findings of the other tiers.

II. JUDICIAL REVIEW OF IMPACT STATEMENTS

Once an impact statement for a major federal action has been prepared, two questions concerning judicial review inevitably arise: First, what is the proper scope of judicial review of agency action, and, second, what is the appropriate standard of review? Although it is clear that agency compliance with NEPA is subject to judicial review, the courts do not agree on what obligations NEPA imposes on the federal agencies and, consequently, they do not agree on the extent of judicial review that is appropriate. To date, the cases that have dealt with these questions have involved only single projects, and it is thus on the basis of these cases that an initial delineation

72. 481 F.2d at 1092-93.
73. See Cady v. Morton, 527 F.2d 786, 795 (9th Cir. 1975); CEQ Memorandum.
75. See F. ANDERSON, supra note 5, at 290-91: For instance, the alternative of flood-plain zoning could be exhaustively considered in an early comprehensive statement on the best way to manage a river basin; that alternative need not then be comprehensively reconsidered in statements on particular projects if the decision is made to construct a series of dams or river levees. The latter statements could focus on localized impacts, without the agency's having failed to give the comprehensive early environmental review called for by NEPA.
76. NEPA does not expressly provide for judicial review. See F. ANDERSON, supra note 5, at 13. However, the Administrative Procedure Act § 10, 5 U.S.C. §§ 701-706 (1970), creates a presumption of reviewability of agency action. See, e.g., National Helium Corp. v. Morton, 455 F.2d 650, 655 n.12 (10th Cir. 1971); Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA, 88 HARV. L. REV. 735, 741 (1975). The presumption is conclusive unless judicial review is precluded either by statute or because "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (1970). Because NEPA contains no express prohibition of judicial review and the Supreme Court has narrowly interpreted the agency discretion exemption, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), no court has denied reviewability.
of the principles of judicial review must be made. The application of these principles to the review of program statements will then be considered.

All courts have recognized that section 102 of NEPA\textsuperscript{77} imposes certain procedural requirements on agency decision-making\textsuperscript{78} and that these requirements are judicially enforceable.\textsuperscript{79} Included in these procedures is the requirement that for each major federal action significantly affecting the quality of the environment, the agency must prepare a detailed statement.\textsuperscript{80} This statement must describe the environmental effect of the project, alternatives to the proposed action, and any irretrievable commitment of resources that would result from the action.\textsuperscript{81}

Although the requirement that agencies prepare impact statements has probably been the greatest source of NEPA litigation, there are additional procedural requirements of section 102 that are designed to insure that the agencies develop and use sound environmental planning methods.\textsuperscript{82} The agencies are required to use the social and natural sciences and the environmental design arts in an interdisciplinary approach to planning;\textsuperscript{83} to develop methods to give appropriate consideration in decision-making to presently unquantified environmental factors;\textsuperscript{84} and to develop alternatives to proposed actions involving "unresolved conflicts concerning alternative uses of available resources."\textsuperscript{85} NEPA also orders the agencies to cooperate with the Council on Environmental Quality and international, state, and local agencies in environmental planning.\textsuperscript{86} Thus, full compliance with NEPA procedures means not only complying with the requirement for an environmental impact statement but also observing all of the other dictates of section 102.\textsuperscript{87}


\textsuperscript{78} These "action-forcing" procedures are designed to insure that the environmental protection policies of the statute, 42 U.S.C. § 4331 (1970), are put into effect. See S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969); Robie, Recognition of Substantive Rights Under NEPA, 7 Nat. Resources Law. 387, 393 (1976).

\textsuperscript{79} See, e.g., Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974); National Helium Corp. v. Morton, 486 F.2d 995 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974); Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1971).


\textsuperscript{82} See Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 492 F.2d 1123, 1132 (5th Cir. 1974).


\textsuperscript{87} See Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 492 F.2d 1123, 1132 (5th Cir. 1974).
Even though NEPA establishes specific procedural requirements and directs all federal agencies to carry out these section 102 requirements "to the fullest extent possible," it does not provide standards of judicial review of agency compliance with them. The courts must therefore devise a standard of review that will give meaning to this directive.

The courts seem to agree on a "rule of reason" standard for reviewing compliance with the NEPA procedures. For example, in preparing impact statements, agencies may be faced with the problem that not all information called for is known or presently discoverable. Under the rule of reason approach of the Scientists' Institute court, an agency would not be expected to be as detailed in its discussion of remote effects as it is in its consideration of immediate impacts. Where environmental effects are unknown, it is the function of the impact statement to point out the lack of knowledge. But an agency cannot "avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting." The heart of agency responsibility under NEPA is to predict the environmental effects of a proposed action.

Although the courts purport to apply the same test of reasonableness, it is not at all clear that a uniform, well-defined standard exists. Several courts have recognized that the standards for procedural review are still in the process of evolution and currently have more of an ad hoc nature than may be desirable. Consequently, any


90. 481 F.2d at 1092.

91. See 481 F.2d at 1092; Applicability of NEPA to Long-Range Technology Development Programs: SIPI v. AEC, supra note 15, at 10100.

92. See 481 F.2d at 1092; Applicability of NEPA to Long-Range Technology Development Programs: SIPI v. AEC, supra note 15, at 10100.

93. 481 F.2d at 1092.

94. 481 F.2d at 1092.

discussion of the standard of review of procedural compliance must remain somewhat general and episodic.

A good example of the ad hoc nature of procedural review is *Trout Unlimited v. Morton*, in which the court was faced with a challenge to an impact statement for a dam and reservoir project. The plaintiffs alleged that, *inter alia*, the statement failed to discuss adequately many possible environmental consequences, possible measures that could be taken to minimize the environmental harm, and alternatives to the proposed dam and reservoir.

In response to the first allegation that certain environmental effects, such as the building of docks and summer homes along the reservoir once it was completed, were not discussed, the court determined that while the statement would have been improved by a discussion of these consequences, the statement was nonetheless adequate for the purposes of the statute. In deciding that there was adequate discussion in the impact statement of possible measures to mitigate environmental harm, the court's examination was more perfunctory. It confined itself merely to noting that mitigation measures were discussed under eight separate headings, which, presumably, covered all possibilities. Again, the court conceded that the discussion, though adequate, could have been better. Finally, the court also found the discussion of alternatives to be adequate.

Taking the agency conclusions about the alternatives that were considered in the impact statement at face value, the court was primarily

a standard of reasonableness. See note 89 supra. This statutory provision requires courts to set aside agency actions taken “without observance of procedure required by law.” The failure of this statutory language to provide specific guidelines for reviewing agency actions was noted by the court:

The “without observance of procedure required by law” standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish. Its difficulty lies in the fact that the “procedure required by law” by which the sufficiency of the EIS is measured consists substantially of judicial responses, to specific allegations of insufficiency directed at specific impact statements prepared in connection with particular projects that were challenged in various federal courts. Neither NEPA nor the “Guidelines” of the Council on Environmental Quality set forth sufficiently comprehensive “procedures” to obviate the necessity to resort to such judicial responses. The consequence has been and, to a degree, is that the judicial review of the adequacy of an EIS employs standards fashioned to meet the needs of the particular case in which the standards are applied. In due course the presence of a large volume of case law and the principle of *stare decisis* will yield reasonably precise “procedural rules” by which the adequacy of an EIS can be measured. That time, however, has not arrived.

509 F.2d at 1282-83 (citations omitted).

96. 509 F.2d 1276 (9th Cir. 1974).

97. See 509 F.2d at 1281.

98. 509 F.2d at 1283-84.

99. 509 F.2d at 1284.

100. 509 F.2d at 1284.

101. 509 F.2d at 1284.

102. 509 F.2d at 1286.
interested in whether a sufficient range of alternatives had been discussed. The court did determine from the record that other alternatives, though not discussed in the impact statement, had been considered and rejected.

The response of the Trout Unlimited court to these specific allegations of statement inadequacy does not seem to follow a consistent pattern. In the first instance, the court examined the record to see whether the agency's conclusion that certain environmental consequences were remote possibilities was correct. At the other extreme was the approach of the court in judging the adequacy of the possible mitigation measures; it simply concluded from the form of the discussion—that is, from the existence of eight topic headings—that the discussion was adequate. These examples show the ad hoc nature of procedural review, which seems to be carried out on an issue by issue basis.

Many of the circuits have come to hold that NEPA not only creates these procedural obligations but also creates substantive requirements. This, of course, is a departure from the early cases that concluded there were only procedural duties and from the few recent cases that continue to maintain that position. According to the courts that have found substantive duties, judicial review appropriately serves two purposes: to determine whether the decision-making procedures of NEPA have been used and to examine whether the final agency decision is consistent with the environmental goals of the statute.

103. 509 F.2d at 1286.
104. 509 F.2d at 1286.
105. 509 F.2d at 1283-86.
106. 509 F.2d at 1284.
108. See Yarrington, supra note 107, at 280-84.
109. See Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974); La­than v. Brinegar, 506 F.2d 677, 692 (9th Cir. 1974); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650, 656 (10th Cir. 1971).
110. See, e.g., Arkansas Community Organization for Reform Now v. Brinegar,
Although the statute contains no language explicitly creating substantive obligations, the courts and commentators have based their finding of substantive NEPA rights in part on the language and structure of the statute. One of the provisions in which the courts have found substantive rights is section 101(b). This section enumerates specific goals toward which the conduct of the agencies must be directed as they seek to fulfill the general environmental protection policy of section 101(a). The opening paragraph of section 101(b) instructs the agencies to use "all practicable means" to achieve these goals. The fact that the section 101(b) goals are to be accomplished "in order to carry out the policy" of the statute indicates that the creation of the goals itself was intended to be more than a statement of policy.

The second source of substantive obligations found in the language of the statute is section 102. This section specifically requires 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 the statute]." Although section 102(2) sets forth only NEPA procedural requirements, it is clear that "[t]he procedures included in [section] 102 of NEPA are not ends in themselves." According to the Senate Report, the purpose of the section 10(2) requirements is "to establish action-forcing procedures which will help to insure that the policies enunciated in section 101 are implemented."


A third situation appropriate for judicial review arises when the methods adopted by an agency for preparation of the impact statement are challenged on the ground that they do not comply with NEPA. See Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm., 449 F.2d 1109 (D.C. Cir. 1971).


114. See Yarrington, supra note 107, at 294.


However, legislative history has also been used to support the position that NEPA created only procedural requirements. See Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 325 F. Supp. 749, 755 (E.D. Ark.
On the basis of this language, one court has concluded that "[t]he unequivocal intent of NEPA is to require the agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives."

Because they have found substantive obligations and because of the presumption of reviewability that applies to agency actions, these courts conclude that they are obligated to enforce the substantive duties created by NEPA.

This interpretation is certainly the better view. Those courts that recognize only procedural duties seem to dismiss as mere rhetoric the entire section of the act that declares a national environmental policy. It is unreasonable to maintain that Congress would have enacted such a policy without establishing an effective means of effectuating it. Review of compliance with section 102 procedures alone will insure that environmental factors are brought to the attention of the agencies, but will provide no guarantee that the agencies actually will reach a result that is consistent with the goals of NEPA. Only enforcement of the substantive obligations will force the agencies to achieve those statutory goals.

Although the substantive provisions of section 101(b) are

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1971) ("The Act appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of 'substantive rights' claimed by the plaintiffs. Apparently the sponsors could obtain agreement only upon an Act which declared the national environmental policy. This represents a giant step, but just a step"); Yarrington, supra note 107, at 284.


121. See cases cited note 109 supra.


123. See Yarrington, supra note 107, at 294.


125. 42 U.S.C. § 4331(b) (1970):

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will per-
framed in general language, courts have found the substantive obligations sufficiently definite to guide their review. Subject to one qualification, section 101 requires federal agencies to conduct their activities in a way that will not unduly harm the environment. In addition, the statute suggests a nondegradation policy that would require the government to forgo action that will reduce the current level of environmental quality. In certain cases, agencies are not only to avoid harming the environment but also are to improve and enhance the quality of the environment. Another concern of the statute is the preservation of “diversity and variety of individual choice.”

These substantive duties are explicitly qualified by one limitation. The government is to use “all practicable means consistent with other essential considerations of national policy” to achieve the section 101(b) goals. However, the fact that the provision requires reconciliation of environmental protection goals only with those national policy considerations deemed essential indicates that this qualification is not applicable in every situation. Unessential national policy considerations must yield to the environmental protection goals of NEPA.

To enforce these substantive obligations the courts have applied a two-pronged standard of review based on the Administrative Procedure Act. This standard was explained by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe.* The court on review must decide, first, whether the agency acted within the scope of its authority and, second, whether the ultimate decision reached was “arbitrary, capricious, an abuse of discretion, or otherwise not in accord-

mit high standards of living and a wide sharing of life’s amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

126. See, e.g., Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 492 F.2d 1123, 1139 (5th Cir. 1974).

127. See Robie, supra note 78, at 390.


130. 42 U.S.C. § 4331(b)(4) (1970); see F. ANDERSON, supra note 5, at 265.


132. See Cohen & Warren, supra note 107, at 694; Robie, supra note 78, at 412 (“this policy means that decisions must be made with the balance tipped in favor of environmental protection unless such action is not consistent with other essential considerations of national policy”) (emphasis original).

133. 401 U.S. 402 (1971). Although *Overton Park* was not a NEPA case, it is frequently referred to by courts for guidance on the standard of review in NEPA cases. See Conservation Council v. Freehike, 473 F.2d 664, 665 (4th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).
To decide whether the agency acted within the scope of its authority, the courts make a straightforward examination of the agency's statutory mission. In applying the less clear-cut arbitrary and capricious test in cases under NEPA, however, the courts must consider a number of factors. The inquiry focuses on whether the balance of environmental costs and economic and other benefits struck by the agency was justifiable. The courts must determine whether clearly insufficient weight was given to environmental factors, or whether the agency failed to consider all relevant factors, such as possible alternatives or mitigation measures. In essence, the courts must decide whether the decision itself "represented a clear error in judgment."

As was true with procedural review, the precise meaning of the standard of review used for testing compliance with the substantive requirements is unclear. The arbitrary and capricious standard is said to be a narrow one. The courts echo the Supreme Court statement in *Overton Park* that "[t]he court is not empowered to substitute its judgment for that of the agency," and, generally, the courts have been quite restrained in reviewing agency actions on the merits. It seems the courts will not overturn an agency decision unless it was clearly made in complete disregard of the environmental consequences or was completely unjustifiable. That the

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139. *See* text at notes 88-95 supra.


142. *See* text at notes 88-95 supra.

143. *See* Note, supra note 76, at 746 (observing that apparently every review on the merits of agency action for compliance with NEPA has permitted the agency to proceed).

agency could have made a better decision is not sufficient to cause the courts to overturn the decision.

For example, the district court in *City of Romulus v. County of Wayne*, 145 applying the arbitrary and capricious standard in a substantive review, upheld a decision to add an additional runway to Detroit's Metropolitan Airport. Among the allegations of the plaintiff were that the estimate of future air traffic demand was based on erroneous assumptions, that a better indicator of future demand existed, and that the computer predictions used were not by themselves accurate. 146 The court said that it could not consider these claims because of the limited scope of its review. 147 Having found a certain threshold level of rational decision-making, the court would not take up the question of whether it would be possible to get better information on which to base the decision. 148

Because of the limited nature of review for arbitrariness and capriciousness, it seems evident that in most cases the result would be the same whether a court confined itself to demanding strict compliance with NEPA procedures or also reviewed the agency decision for observance of substantive NEPA provisions. 149 However, extreme cases of environmental harm can arise in which the outcome would hinge on whether or not substantive review was employed. These are exactly the cases in which judicial intervention is most needed to give effect to the environmental protection goals set by NEPA. Even though some commentators have felt the need for the application of a stricter standard of review, 150 substantive review using an arbitrary and capricious test is itself an important safeguard against violation of NEPA goals.

Whether this same kind of judicial review should be applied not only to individual projects but to programs of which the projects are a part is an issue that has yet to be addressed by the courts. However, such a review seems fully appropriate. This Note has established that only judicial review of compliance with the NEPA substantive provisions can insure that the environmental protection policy of the statute will be followed, particularly in those situations in which the environment is most endangered. The same statutory interpretation that has led courts and commentators to approve substantive review of individual actions is applicable to programs. The courts have concluded that a program is a major federal action sig-
significantly affecting the quality of the environment, and that, therefore, NEPA applies as much to a program as to a particular project. Thus, programs should be subject to the requirements of the substantive provisions.

Substantive review of both the program and the individual action is necessary to carry out NEPA. Although program and site-specific evaluations are required by the statute, the two types of impact statements serve different functions. The program statement discusses the cumulative and synergistic effects of all the component individual actions while the site-specific statement deals with the environmental impact questions that are peculiar to one project. Even if all of the component actions individually have environmental effects that are acceptable in light of the NEPA substantive provisions, the total impact of the program may not be acceptable. Therefore, if only the individual projects were subject to substantive judicial review, there would be no way to ensure that the program as a whole satisfied the substantive requirements.

Conversely, the fact that NEPA substantive standards are met by the program as a unit does not necessarily mean that each individual action also complies with the statute; the environmental deficiencies in a single project might not appear significant when considered as part of a body that otherwise consists of environmentally sound projects. Nonetheless, the statute requires agency compliance for every individual action. Such compliance cannot be secured unless each project is subject to substantive review. Because of the essentially different purposes achieved by substantive judicial review of programs and of component projects, review of both program and project statements is necessary to carry out the policy of NEPA.

III. REMEDIES FOR AGENCY NONCOMPLIANCE

Once a court has decided that a program as well as a site-specific

151. See text at notes 11-12 supra.
152. See text at notes 63-70 supra.
153. See text at note 14 supra.
154. For example, the Scientists' Institute court required the Atomic Energy Commission to prepare a program statement for the development of the fast-breeder-reactor. See text at notes 7-12 supra. Presumably, if the AEC ever succeeds in making the fast-breeder-reactor suitable for commercial use, it will have to prepare impact statements for each individual reactor. This would force the AEC to discuss alternatives to the proposed reactor and to specify precautions required to reduce as far as possible the environmental damage from the individual reactor.

A second example involves the construction of a highway. A program statement is necessary for the entire highway, yet impact statements are also required for individual projects such as a bridge or tunnel. In the case of a bridge, alternatives must be considered and the benefit derived from moving traffic from one side of a river to another must be balanced against the environmental damage resulting from construction of the bridge. Of course predictions as to the amount of traffic that the bridge will carry would be based on the assumption that the entire highway has been constructed.
environmental evaluation is necessary and that the program compliance is deficient, the question of what remedy is most appropriate under the policy of NEPA then arises. A common response of the courts in dealing with inadequate site-specific impact statements has been to enjoin further work on the project until there is compliance with NEPA. Injunctive relief also has been used when an agency violated NEPA by not preparing a program impact statement. As yet, no case has addressed the issue of remedies for a substantive violation of NEPA.

This section of the Note first discusses when and to what extent injunctive relief should be granted for any NEPA violation. A procedure for determining the scope of program injunctions is then suggested. Finally, the suggested procedure is applied to several examples. The immediate purpose of one type of injunctive relief, the preliminary injunction, is to maintain the existing situation until the dispute can be resolved at trial, while that of the second type, the permanent injunction, is to enforce the decision reached in court. However, the broad purpose of both preliminary and permanent injunctions in environmental cases is to prevent any action that would cause environmental damage from being taken in violation of NEPA.

A judicial finding of a NEPA violation does not automatically result in the issuance of an injunction. In nonenvironmental cases, courts have traditionally held that the granting of an injunction rests with the discretion of the trial court. Courts seem to exercise a similar degree of discretion in NEPA cases.


158. In the sense used here, a "permanent" injunction is not one that necessarily enjoins an activity indefinitely. The activity may only be enjoined until a specific condition is met, such as preparation of an impact statement or reconsideration of a decision. A permanent injunction is granted here as final relief after the plaintiff has prevailed on the merits at trial.


160. See, e.g., Beneficial Fin. Co. v. Wirtz, 346 F.2d 340 (7th Cir. 1965); Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964); Morris v. Williams, 149 F.2d 703, 709 (8th Cir. 1945).

In deciding whether to grant preliminary injunctive relief in NEPA cases, the courts have generally relied on an analysis that is similar to that used in nonenvironmental cases. Traditionally, in equity, a plaintiff's case must satisfy three basic requirements: It must demonstrate a probability of success on the merits; it must make a showing of irreparable harm; and it must establish that the balance of equities favors the injunction. These requirements are somewhat modified when they are applied in environmental cases.

The first factor to be considered is whether the plaintiff has shown a probability of success on the merits. Before issuing a preliminary injunction, the purpose of which is to preserve the status quo, the courts try to foresee the final resolution of the case. They do this to avoid the inconvenience to the defendant that may result from a court-ordered freezing of the situation carried out in favor of an ultimately unsuccessful claimant.

A second factor courts consider before granting a preliminary injunction is whether the danger of irreparable harm exists. The traditional requirement of equity cases is that the plaintiff must show that he himself will suffer such harm unless an injunction is granted. Although this language has been used in some NEPA cases, the courts have not actually applied the traditional irreparable injury test. Instead, the word "irreparable" has been given a "broad and expansive meaning." Although the courts say that they are evaluating the potential harm to the plaintiffs, they are, in fact, concerned with the amount of harm to the environment that will result if no preliminary injunction is issued.

162. See City of Romulus v. County of Wayne, 392 F. Supp. 578, 594 (E.D. Mich. 1975). However, one traditional element of equitable relief that is often ignored or assumed to be satisfied in the review of administrative action is the requirement that there be no adequate remedy at law. K. DAVIS, ADMINISTRATIVE LAW TEXT 444 (1959).


For example, in *Steubing v. Brinegar*, the court upheld the grant of a preliminary injunction partly because the plaintiffs had shown that the construction of the bridge in question would permanently scar one of New York State’s most beautiful lakes. Thus, even though the courts have used the language of the traditional equity formula in granting a preliminary injunction, their basic purpose, once a probability of success on the merits is shown, is to make certain that no significant damage to the environment occurs before a final decision can be reached in the case.

While the courts have not applied the irreparable harm analysis in the traditional sense, they generally do accede to the third requirement noted above—the traditional practice of balancing the interests involved. The evaluation of the public interest is normally treated as a separate factor in nonenvironmental cases. In their formulation of the criteria for granting a preliminary injunction, the courts deciding environmental cases have maintained the distinction between the public interest and the parties’ interests. However, the theoretical distinction tends to disappear when the formula is applied, since the balancing in reality becomes one of the public interests in continuing the activity against the public interest in environmental protection.

In any given case the public interest considerations may lead to contradictory results. For example, in *Minnesota Public Interest Research Group v. Butz*, the court observed that two separate public interests had to be weighed in a suit to prevent logging in the Boundary Waters Canoe Area in Minnesota. Primary was the interest, declared by Congress in the Wilderness Act, in preserving...
ing such areas in their primitive states. A second public interest lay in the economic value of the employment and income that would be generated by the logging. The Minnesota court found the wilderness preservation interest to be overwhelming because it was an interest declared by Congress and because the timber industry in Minnesota had opportunities for logging elsewhere.\textsuperscript{178}

On the other hand, in \textit{The Committee for Nuclear Responsibility v. Seeborg},\textsuperscript{179} in which the plaintiff sought to halt the Project Canikan nuclear test explosion, the court found that the public interest required that no preliminary injunction be issued. Even though the court thought that the failure to produce an impact statement was probably a violation of NEPA,\textsuperscript{180} it determined that the overriding national security interest required that the test take place on schedule.\textsuperscript{181}

There are a small number of cases in which the courts have deviated from the usual practice and refused to consider the equities involved when deciding whether to grant an injunction, either preliminary or permanent.\textsuperscript{182} These cases have relied on an absolute rule that courts should issue an injunction without looking to the traditional requirements of equitable relief when a federal statute has been violated\textsuperscript{183} and when, in the case of a preliminary injunction, a probability of success on the merits and a likelihood of irreparable harm have also been shown.\textsuperscript{184} These courts reason that if the policy behind an important federal statute is not being followed, an injunction should be granted to enforce that policy.\textsuperscript{185} Because

\begin{footnote}
\textsuperscript{178} 358 F. Supp. at 626.
\textsuperscript{179} 463 F.2d 796 (D.C. Cir.), application for injunction in aid of jurisdiction denied, 404 U.S. 917 (1971).
\textsuperscript{180} See 463 F.2d at 797-98.
\textsuperscript{181} See 463 F.2d at 798. The government claimed that because of numerous technical factors, conditions would not again be right for the test for at least one year. Among the consequences of such a delay would be the disruption of the Safeguard Anti-Ballistic Missile program, which in turn, it was argued, would jeopardize the Strategic Arms Limitation Talks.
\textsuperscript{182} See Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Atchison, Topeka & Santa Fe Ry. v. Callaway, 382 F. Supp. 610 (D.D.C. 1974).
\textsuperscript{183} See Lathan v. Volpe, 455 F.2d 1111, 1116 (9th Cir. 1971).
\textsuperscript{185} The courts in \textit{Lathan} and \textit{Atchison} relied on United States v. City and County of San Francisco, 310 U.S. 16 (1940). The City of San Francisco had violated federal law by selling power to a utility company instead of distributing it directly to the public. In prohibiting the city from continuing this practice, the Court rejected the argument that a balancing of equities would weigh against an injunction: "The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued . . . violation of that policy . . . is both appropriate and necessary." 310 U.S. at 31.
\end{footnote}
environmentally based decisions can have tremendous economic consequences, this approach seems unjustifiably inflexible.\footnote{186}{See text at notes 215-23 infra.}

In deciding whether to grant a permanent injunction, the courts generally consider some of the same factors that are used to determine whether a preliminary injunction is appropriate, but no definite list of considerations is consistently used. The majority of courts engage in a balancing of interests that is similar to the process involved in the consideration of a preliminary injunction.\footnote{187}{See, e.g., Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584 (D. Minn. 1973), \textit{affd.}, 498 F.2d 1314 (8th Cir. 1974); Committee To Stop Route 7 v. Volpe, 346 F. Supp. 731, 738 (D. Conn. 1972).}

For these courts, the conclusion that NEPA has been violated does not automatically result in the issuance of a permanent injunction.\footnote{188}{See \textit{Committee To Stop Route 7 v. Volpe}, 346 F. Supp. 731, 738 (D. Conn. 1972).} Instead, they generally adopt the position that if NEPA has been violated, there is a presumption that injunctive relief should be granted. Unlike the preliminary injunction situation where the burden is on the plaintiff to demonstrate that an injunction is necessary, the burden here is upon the government agency to persuade the court not to issue an injunction.\footnote{189}{See, e.g., \textit{Committee To Stop Route 7 v. Volpe}, 346 F. Supp. 731, 738 (D. Conn. 1972) ("But where an important provision of federal law has not been complied with, the burden should be upon those urging that noncompliance should be excused").}

The consideration of the public interest is one of the most important factors in the granting or denying of a permanent injunction. The courts recognize that concern for the public interest in the preservation of the environment is proclaimed by the statute itself\footnote{190}{See NEPA § 101(c), 42 U.S.C. § 4331(c) (1970): "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."} and that it is this interest that plaintiffs may seek to protect.\footnote{191}{See Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973).} In competition with this interest may be other matters of public concern such as traffic safety and the needs of the motoring public,\footnote{192}{See Vermont Natural Resources Council, Inc. v. Brinegar, 508 F.2d 927, 937 (2d Cir. 1974), \textit{vacated and remanded}, 423 U.S. 809 (1975); Arkansas Community Organization for Reform Now v. Brinegar, 398 F. Supp. 685, 699 (E.D. Ark. 1975), \textit{affd. sub. nom.} Arkansas Community Organization for Reform Now v. Coleman, 531 F.2d 864 (8th Cir. 1976).} or the protection of jobs\footnote{193}{See Minnesota Pub. Interest Research Group v. Butz, 358 F. Supp. 584, 626 (D. Minn. 1973), \textit{affd.}, 498 F.2d 1314 (8th Cir. 1974).} that may be furthered by a continuation of the environmentally harmful activity. It is, of course, a difficult task to
reconcile these conflicting public interests in any particular case. In addition to those elements that are common both to preliminary and permanent injunctive relief, courts are willing to consider numerous factors in deciding whether to grant a permanent injunction. These have included the stage of completion of the project, the plaintiffs' delay in bringing suit, and the relative significance of the environmental impact.

In several cases, courts have pointed out the need to consider the likelihood that an agency action will actually be modified or abandoned if all the procedural requirements of NEPA are met. In *Minnesota Public Interest Research Group v. Butz,* for example, the plaintiff sought to enjoin certain logging operations until the Forest Service prepared an environmental impact statement. In deciding whether to grant a permanent injunction, the court said it was necessary to determine the probability that the Forest Service could be persuaded to ban all logging. On the facts of this particular case, the court decided that such a ban was likely. It acknowledged, however, that if there were only a slight chance that the government would prohibit logging, an injunction would not be appropriate.

The fallacy of this approach is that until the necessary information is compiled by the agency, courts cannot predict the agency response; the court does not know what the new data will be. The varieties of environmental effects and the possible alternatives to mitigate these effects are too numerous for a court to engage in speculation about agency response.

Even if the agency has given some consideration to environmental factors without going through the impact statements process, it will not have been confronted with all pertinent information. After all, an essential purpose of the impact statement is to make public the environmental effects and to invite public comment on the potential consequences of a planned agency activity. The plaintiff, of course, cannot be expected to present all the objections that would have been made by concerned members of the public had the agency

194. See text at notes 176-81 supra.


199. 358 F. Supp. at 625.

200. 358 F. Supp. at 625.

201. 358 F. Supp. at 625.

sought public comment. Without this public comment and the additional pressure that may be generated upon the agency to prepare a thorough report, there is no way the court can be certain that all relevant data is available. Hence, any prediction as to the probable agency response will necessarily be defective.

An additional purpose of NEPA is to force agencies to integrate environmental considerations into their decision-making processes. Enjoining a particular activity until all environmental factors are properly considered will not only compel agency compliance in that particular case but will also place all agencies on notice that the courts intend to enforce NEPA requirements effectively. The threat of injunction may very well be the only judicial tool that is capable of stimulating agencies to comply with this requirement in every case and not just in those cases where the agency believes the environmental impact will not alter its ultimate decision.

The decision to grant injunctive relief is only the first step, for the court must also determine the scope of the injunction. In the case of individual projects, the courts have not limited themselves to the granting or denying of a total injunction but instead have been persuaded in particular cases to enjoin only parts of the project activity. An example of such a partial injunction is *Arkansas Community Organization for Reform Now v. Brinegar.* The suit was brought by a group seeking declaratory and injunctive relief to halt the construction of an interstate highway through the city of Little Rock. The court found inadequate the discussion in the impact statement of possible alternatives and modifications to the project. It thereupon enjoined work on the highway east of a certain point but allowed work on the road west of that point to proceed. In reaching this decision the court gave great weight to the fact that a new hospital, one of only two in the city providing emergency service, was located along the route of the highway and that there was a need for rapid access to this facility. The court was also influenced by the need of the public for an expressway in the western part of the city.

203. See text at notes 57-59 supra.

204. Of course, deciding to grant an injunction may very well involve some determination as to the scope of that injunction. These two steps may not always be distinct and the ability to frame an effective and reasonable injunction may be a factor in deciding whether it should be granted.


Any judicial decision that allows continuation of a portion of a project lacking an environmental impact statement warrants criticism; no agency should be permitted to proceed where environmental impacts are unknown. Yet it is likely that courts will continue to allow portions of an activity to continue where the court perceives a high need for these portions to be completed and a low probability of unacceptable environmental harm. These courts should at least recognize the dangers inherent in this approach and allow exceptions to an injunction only in exceptionally clear cases. Partial injunctive relief is especially applicable to cases involving programs, which by definition consist of many individual actions. The power of the courts to enjoin all or part of a government action when a NEPA violation is found would apply both to individual projects and to programs because a program is itself an action. In theory the courts could use the same approach in granting equitable relief in program cases as they use in cases involving individual projects. However, whether a court should as a rule grant a total injunction against the program or whether it should limit the scope of the injunction by a consideration of the facts of a particular case depends upon the nature of the violations the injunction is designed to remedy.

If the procedural requirements of NEPA have been satisfied and if, after reviewing the merits of an agency action, the court concludes that the program as proposed will violate the substantive requirements of NEPA, it must enjoin the entire program to prevent violations of the statute. In such a case it is the program itself, not the procedures used in its planning, that is violative of NEPA. 210

The considerations involved are different when there is a violation of NEPA procedural requirements. An agency is required by NEPA to obtain information on the environmental effects of and alternatives to a proposed action and to consider this information when making a decision on that proposal. 211 When compliance with the procedural requirements has been found wanting, no decision can be made on whether the program itself violates the NEPA substantive standards. This second decision will come, if the issue is raised, only after the program decision-making procedures have been followed and the necessary information to make such a decision is available.

Since the information needed to assess the environmental im-

210. Even if the entire program were enjoined, an agency would be free to propose certain program components as individual actions. However, the actions must be completely independent of the enjoined program. The principles that determine whether groups of actions require a program statement would be applied to determine whether the individual actions constitute a new program or are to be deemed the same program. See text at notes 7-56 supra.

pacts of the program is not available, there are several dangers in allowing an agency to proceed with the proposed program. The most important danger is that the agency may blindly engage in an activity that causes substantial and irreparable damage to the environment. Even if such harm does not directly result, the agency may become so committed to the program that it cannot modify or abandon it even if it eventually discovers that the environmental costs of proceeding are great.\textsuperscript{212} Another hazard is that the continued government activity increases the agency’s investment in the program and thereby alters the balance of costs and benefits to favor completion.\textsuperscript{213} Because of these dangers some courts have enjoined all component activities of a program found to be in violation of NEPA procedural requirements.\textsuperscript{214} These courts consider all activities that have as a primary purpose the advancement of the program to be program components.\textsuperscript{215} Such a total injunction would prevent the government from making additional commitments that might preclude a meaningful and unprejudiced agency decision in the future on the merits of the program.

Completely enjoining a large, complex program, however, is likely to result in considerable expense to both government and the private parties involved because of lost work time, increases in construction costs, and damages for various breaches of contract. Since one of the factors that determines the desirability of an injunction is the balance of interests among the public and private parties, an increase in program expense will shift the balance toward the withholding of injunctive relief. However, two factors militate against attaching too much weight to this increase. First, it is certainly correct that “[d]elay is a concomitant of the implementation of the procedures prescribed by NEPA,”\textsuperscript{216} and, therefore, that increases

\textsuperscript{212} For example, in Scientists’ Institute for Pub. Information, Inc. v. Atomic Energy Commn., 481 F.2d 1079 (D.C. Cir. 1973), the court held that the environmental effects of the entire breeder-reactor-program had to be considered at the outset because, by the time the breeder-reactor-technology will have become operational, there would be a need for a new method of energy production, and because, since only the breeder reactor will have been perfected, the government would have no choice but to use it whatever the environmental costs.


\textsuperscript{214} See, e.g., People v. Laird, 353 F. Supp. 811 (D. Hawaii 1973); Stop H-3 Assn. v. Volpe, 349 F. Supp. 1047 (D. Hawaii 1972) (enjoining design and construction of a highway because even continuing the design work alone involved a significant expenditure of money that would increase the government stake in building the highway as planned).


in cost resulting from a delay necessary to achieve the goals of NEPA should not dissuade a court from enjoining an activity to prevent environmental damage that may later prove too costly to correct.\textsuperscript{217} Second, it must be remembered that the sole cause of the delay is the agency failure to comply with the requirements of NEPA. As was mentioned above,\textsuperscript{218} prohibiting an agency from continuing an activity in violation of NEPA may be the only judicial remedy that will force agencies to consider adequately environmental impacts during the initial decision-making process.

Nonetheless, the costs associated with a delay may be so substantial relative to the anticipated environmental harm that a complete injunction is unwarranted. In such a case it would seem appropriate for a court to exclude from the scope of the injunction any program component that does not substantially compromise the environmental safeguards of NEPA. The touchstone in determining which components of the program should be excluded is whether proceeding with a component would likely preclude a meaningful decision on implementation of the program itself after a full consideration of the program environmental impact.\textsuperscript{219} Even a component that in itself causes no environmental harm may so shift the balance in favor of program completion that it should not be allowed to proceed.\textsuperscript{220}

An excellent example of the proper exclusion of a particular project from a program injunction is Society for Protection of New Hampshire Forests \textit{v.} Brinegar.\textsuperscript{221} In this case the court found a violation of NEPA in the agency's failure to prepare a comprehensive impact statement for the entire proposed route of an interstate highway. Included in the work planned for the immediate future was the construction of twin bridges that were designed to replace a single bridge that was in a dangerous state of disrepair and to expand its capacity to accommodate the planned highway.\textsuperscript{222} The court enjoined all work on the highway except the construction of one of the planned twin bridges.\textsuperscript{223}


\textsuperscript{218} See text at note 203 supra.


\textsuperscript{220} See People \textit{v.} Laird, 353 F. Supp. 811, 821 (D. Hawaii 1973) ("Work allowed to proceed because it does not have a specific environmental impact would increase the government's 'stake' in the project and thereby influence the decision-making process when it is time to reevaluate the project in light of the environmental considerations"); Stop H-3 Assn. \textit{v.} Volpe, 349 F. Supp. 1047 (D. Hawaii 1972).

\textsuperscript{221} 381 F. Supp. 282 (D.N.H. 1974).

\textsuperscript{222} 381 F. Supp. at 288.

\textsuperscript{223} 381 F. Supp. at 289-90.
Because of the dangerous state of the existing bridge, the court recognized that it was likely that a new bridge would be needed even if the proposed interstate highway were never constructed. Thus, the government would not suffer any loss on account of the bridge if the program were abandoned and hence, the bridge's construction would not change the balance of the competing interests to favor the completion of the program. This exception made by the New Hampshire Forests court was an extremely narrow one. Although the twin bridges were planned as a part of a program, one was allowed to be constructed because it was a necessary project when considered alone. The other, even though its direct environmental impact would apparently have been acceptable, was enjoined because it was not necessary apart from the highway program and thereby represented an additional commitment to the implementation of that program.

Because the agency in New Hampshire Forests apparently argued for only a small number of exceptions to the injunction, the court was able to consider directly and to rule upon each request. However, even a program such as the building of a highway involves an infinite number of component parts that arguably could be continued without diminishing the protection of the environment. Had the agency chosen to request exemption for a large number of individual actions, the hearing on the remedy would have been extremely time-consuming. Thus, if courts are efficiently to consider possible exceptions to a program injunction, they need to use a procedure that removes the court from the process of considering every program component for which an exemption is requested.

To accomplish an efficient review where many exceptions to the injunction are sought, the court should enjoin all work on all program components and order the agency involved to set up a review procedure to determine whether any particular component parts should be allowed to proceed. Under such a review procedure, the agency should first assess the environmental impact of the activity and make a preliminary decision on whether it ought to proceed. The agency should then inform the plaintiffs and other interested people of this preliminary decision; these parties could respond to the agency, which in turn might modify its preliminary decision as it deemed necessary.

225. See 381 F. Supp. at 288-89. The court also heard arguments, which it rejected, that the government be allowed to proceed with land acquisition.
226. Of course, if the agency wishes only to obtain an exemption for a small number of activities, the court could easily decide the issue at trial. The procedure this Note proposes would only be helpful in the case of a complex program in which there were many activities that the agency desired to continue pending full NEPA compliance.
If the plaintiffs or third parties are not satisfied that the final agency decision was consonant with the purpose of the injunction, they could resolve the matter in the district court, which would have retained jurisdiction. However, even if there is no opposition to the agency determination, the district court must still review the agency decision on its merits. Only when the court has accepted the decision that the continuation of a particular project will not thwart the purposes of the injunction should the exception be allowed.

The injunction ought to set the standards by which the agency is to make its decision. In deciding whether a particular action may proceed without violating the purpose of the injunction, the agency should consider the following factors:

1. whether continuation of the individual activity will itself result in a significant, adverse environmental impact; the nature and extent of any impact; and whether the environmental damage could be repaired at a reasonable cost if the project were modified or abandoned as a result of complete NEPA program compliance;

2. whether continued work on the individual activity pending NEPA compliance would physically foreclose subsequent adoption of alternatives that might be dictated by the completed NEPA review;

3. the effect of delay upon the varying public interests; and

4. whether the additional commitment of resources might preclude a meaningful decision reached on the NEPA review by

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227. The district court may, in its discretion, allow third parties to intervene to contest the agency decision. See Fed. R. Civ. P. 24(b).

228. The interim review process established by the Atomic Energy Commission in response to Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Commn., 449 F.2d 1109 (D.C. Cir. 1971), provides a model for the suggested procedure. The AEC granted construction permits for nuclear reactors before the enactment of NEPA. With the enactment of NEPA, the AEC began to conduct NEPA reviews for nuclear reactors only in the event an operating license was requested. Calvert Cliffs held this procedure inadequate under NEPA because construction on nuclear reactors continued without environmental consequences having been considered. 449 F.2d at 1128-29. The AEC established an interim procedure to determine whether construction permits should be suspended pending completion of the required NEPA review. 10 C.F.R. Part 50, app. D, ¶ E (1972). For a discussion of the substantive standards to be applied by the AEC in making this determination, see note 230 infra & text at notes 229-30 infra.

Under the AEC procedure, within thirty days of the required publication in the Federal Register of any AEC determination, any person other than the licensee could request a hearing concerning the determination. Hearings would be held pursuant to such requests at the discretion of the AEC. 10 C.F.R. Part 50, app. D, ¶ E.4 (1972). The procedure suggested by this Note would provide interested parties an opportunity to comment without going through a formal process of requesting a hearing, which the agency might refuse to grant. This change will both insure that the agency takes account of objections to its decision and expedite the process by making it less formal.

229. See text at notes 190-94 supra.
shifting the balance among benefits, costs and environmental im-
acts.\textsuperscript{230}

The final consideration is the heart of the interim review process. If the continuation of an individual activity will commit the agency to the program or if it will preclude certain options so that the agency is not as free to modify its plans as it was before the action was taken, that action should be enjoined until there is compliance with the NEPA procedures. As the following examples will demonstrate, the number of activities that the review process should exempt will normally be small.

Had the interim review process been used in \textit{New Hampshire Forests},\textsuperscript{231} the result achieved in that case would not have been disturbed. The following conclusions are reached upon application of the four criteria: (1) The court apparently was satisfied that the environmental impact caused by the construction of the single bridge was within acceptable limits; however the environmental damage would be permanent and not subject to repair if the highway were modified or abandoned; (2) The building of this one bridge did not physically prevent the government from rerouting the highway; (3) Because the existing bridge was in a dangerous condition of disrepair, there was a current public need for a new bridge; (4) Because of the public need for a new bridge, the single bridge would not be wasted even if the highway program were abandoned, nor would the construction shift the balance of interests in favor of the proposed program. A consideration of these four factors shows that allowing the construction of the bridge to proceed would not impair the enforcement of NEPA.

However, in \textit{New Hampshire Forests} the government also asked that it be permitted to acquire land for other parts of the highway program even though it was enjoined from constructing the highway.\textsuperscript{232} Application of the interim review standards in this case leads to these conclusions: (1) The environmental impact of the purchases of the land would probably be slight and any impact caused by mere government ownership could be reversed by the sale of the

\textsuperscript{230} The procedure established by the AEC for interim review of continued construction of nuclear reactors pending complete NEPA review, see note 228 \textit{supra}, included the first three factors. See 10 C.F.R. Part 50, app. D, ¶ E.2 (1972). However, in approving the consideration of these three factors, the court in Coalition for Safe Nuclear Power v. United States Atomic Energy Commn., 463 F.2d 954, 956 (D.C. Cir. 1972), added the final element, which it declared to be the most important. For similar standards for interim review of AEC projects made necessary by NEPA, see 38 Fed. Reg. 19853, 19854 (1973); 39 Fed. Reg. 11326, 11327 (1974).

\textsuperscript{231} 381 F. Supp. 282 (D.N.H. 1974). For a discussion of the facts of this case, see text at notes 221-25 \textit{supra}. For the purposes of this example, it is necessary to assume that a permanent rather than a preliminary injunction is being granted.

\textsuperscript{232} See 381 F. Supp. at 288-89.
233. There are numerous instances in which the purchase and resale of land could cause environmental harm. For example, if the land were taken by condemnation from private owners who were protecting its environmental quality and who, upon modification of the highway program, sold to someone who would create an adverse environmental impact, the net environmental effect would be significant. In New Hampshire Forests, there was no indication from whom the land would be acquired.


It might be argued that the government could resell the land if it decided to re-route the highway and, thus, could eliminate any cost incurred in abandoning the program due to prior land acquisition. However, it is not clear that the government could always recover all of the money it had spent in acquiring the land. The value of the land might drop when it is learned that the land is not needed for the highway. Also, the cost of selecting the proper land and negotiating the sale would not be recoverable.


236. 381 F. Supp. at 282.

In Cady v. Morton, 527 F.2d 786 (9th Cir. 1975), the court dealt with the effect of allowing individual actions on future decisions concerning whole programs. It ordered that the ultimate decision on whether to proceed with the program must be made without regard for any commitments resulting from the individual action. The program in Cady consisted of a lease by the Crow Indians, approved by the Bureau of Indian Affairs, of Indian-owned mineral rights to nearly 31,000 acres of land. No environmental impact statement was made before the making of the lease. The individual action in Cady was the private lessee's mining plan for 770 acres of the 31,000 acres covered by the lease, and the lessee's subsequent contracts agreeing to supply utilities with such large amounts of coal that fulfilling the contracts would necessarily require mining a large portion of the 31,000 acres. The Bureau of Indian Affairs had issued an environmental impact statement concerning solely the lessee's plan for 770 acres. When this statement was challenged, the Cady court ordered the government to prepare a program impact statement concerning the entire lease of land. The order included the condition, however, that once the statement was prepared, the government would have to make its decision as to approval of the
The characteristic that distinguishes the land acquisition from the building of the bridge in *New Hampshire Forests* is that the bridge construction is severable from the total program while the land acquisition is not. In other words, the bridge would be constructed even if there were no highway program, but there would be no land acquisition in the absence of the program. In cases where the primary concern is to prevent additional government investments from altering the balance of costs and benefits, those projects that can be said to be severable from the program will be most properly exempted from the injunction by this process of interim review.

In other cases, however, even an action that is severable may not qualify for an exemption. Consider, for example, a case in which the component activities of the program are so geographically related that only a limited number of projects can be put into effect without creating an unacceptable environmental impact. The purpose of the program statement in such a case is to determine the point at which the cumulative effects would become unacceptable and to identify those projects that would most fully accomplish the agency goal with the least damage to the environment. Because of the geographical limit on the total number of projects, a commitment to one project necessarily means that certain other projects may not be undertaken. Without a comprehensive environmental evaluation, it is possible that the best projects, in terms of accomplishing the agency goal with the least environmental cost, would not be included in the limited number allowable because another project was begun first. Consequently, approval of a single activity would be counter to the fourth criterion, which requires that a meaningful program decision not be precluded, and thus, no activity should be exempted from the program injunction.

Following the above procedure in determining the scope of injunctive relief will save considerable court time by shifting the entire lease without regard for the commitments entered into by the lessee. If the added investment created by work done before there is program compliance is actually disregarded, the type of injunction issued in *Cady* would accomplish the purpose of preserving the possibility of a meaningful decision on whether to continue with the program. However, such disregard by the government might have been possible in *Cady* only because the investment to be disregarded was made by private parties, not by the government. In cases where the investment would be made by the government, it seems unlikely that an agency could disregard the time and money committed to the program prior to an environmental analysis. Presumably, no agency would want to be accused by the public or by governmental budget administrators of wasting money by investing in projects that later were abandoned.

237. The United States Court of Appeals for the District of Columbia Circuit believed that such a program existed in *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975). The Supreme Court, however, reversed the Court of Appeals by holding that there was no program of geographically related projects. *Kleppe v. Sierra Club*, 96 S. Ct. 2718 (1976).
sponsibility for the initial decision on each action to the agency. Moreover, because an agency need not present to the court arguments on each project it desires to be exempted, the agency does not have to determine by the time of the trial activities with which it might possibly want to proceed should an injunction be granted. As the need arises, the agency can begin the review process for any particular program components.

Significantly, placing the responsibility on the agency for making the initial determination on exempting components from the injunction is consistent with the scheme of the NEPA procedural requirements that places the initial responsibility for decision-making upon the agency itself. At the same time, the district court, by retaining jurisdiction, will be in a position to review directly the interim agency determination. Thus, the use of this proposed procedure offers the same protection for environmental goals that are set forth by NEPA itself.


239. The additional step of a master designated to approve or disapprove the agency's preliminary decision could be incorporated into the proposed procedure. However, both practical and statutory considerations militate against the use of a master in this context. First, the addition of a master to the process would cause unnecessary delay and expense. See Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942). The master commonly must follow normal adversary procedures and, therefore, his proceedings would tend to be a mere duplication of a trial. See Developments, supra note 205, at 1067-68. Second, because the parties must be allowed the right to appeal the master's finding to the court, which would retain jurisdiction, the master's decision would not be a final resolution of any issues.

Finally, it is possible that the Federal Rules of Civil Procedure preclude the use of a master to approve or disapprove preliminary agency decisions. Rule 53(b) states that "save in matters of account and of difficult computation of damages, a reference [to a master] shall be made only upon a showing that some exceptional circumstance requires it." This rule has been narrowly interpreted. See La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (court congestion, length of trial, and complexity of issues are not exceptional circumstances that warrant reference to a master). Thus, rule 53 probably does not permit the use of a master in applying the type of court injunction proposed by this Note. See Developments, supra note 205, at 1068.