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The National Environmental Policy Act of 1969[1] (NEPA) articulates "a national policy [to] encourage productive and enjoyable harmony between man and his environment."[2] The Act requires that a detailed statement concerning environmental consequences accompany all "major Federal actions significantly affecting the quality of the human environment."[3] The Environmental Impact Statement (EIS) provides the procedural means to implement substantive NEPA policy[4] — it informs the public of federal agency decisions affecting the environment, facilitates public input into such decisions, and ensures that decision-makers give adequate consideration to environmental concerns.[5] Accordingly, most NEPA litigation has focused on the preparation and adequacy of the EIS.[6]

Courts recognize an implied private right of action under NEPA.[7] Several recent decisions, however, have denied relief where

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1. 42 U.S.C. §§ 4321-4361 (1976 & Supp. IV 1980).

2. 42 U.S.C. § 4321 (1976).

3. 42 U.S.C. § 4332. The language of the section reads:

(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.

Since this Note deals with completed projects, the word "project" will be used as the functional equivalent of "major Federal action."

4. Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434, 438 (5th Cir. 1981); Warm Springs Dam Task Force v. Gribble, 431 F. Supp. 320, 323 (N.D. Cal. 1977).

5. *See* notes 28-42 *infra* and accompanying text.

6. *See* F. ANDERSON, NEPA IN THE COURTS, 15-23 (1973).

7. *See* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commn., 449 F.2d 1109 (D.C. Cir. 1971); S.C.R.A.P. v. United States, 346 F. Supp. 189 (D.D.C. 1972), *application for stay pending appeal denied sub nom.* Aberdeen & R.R.R. v. S.C.R.A.P., 409 U.S. 1207 (1972), *revd. and remanded on other grounds,* 412 U.S. 669 (1973). *See generally* F. ANDERSON, *supra* note 6, at 16-17; W. RODGERS, ENVIRONMENTAL LAW 716-18 (1977). *But see* Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir. 1981) (denial of private cause of action). *Noe* relied in part on Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (denying an implied cause of action for damages under § 17(a) of the Securities Exchange Act of 1934), and Cort v. Ash, 422 U.S. 66 (1975) (denying an implied cause of action under 18 U.S.C. § 610 which prohibits corporations from making contributions in specified federal elections). The Supreme Court, however, has reviewed NEPA suits since *Redington* and *Cort* were decided,

the defendant completed the project before the plaintiff discovered the inadequacy of the EIS.[8] In each case, the completed project deviated significantly from its description in the EIS, and the changes were incorporated into the project without study or evaluation of any additional adverse environmental impact.[9] These cases present what Judge Coffin described as a dilemma between "[t]he prospect that a violation of NEPA is insulated from remedy once the project is completed" and "the implications of affording post-completion relief where hindsight reveals inadequacies in an environmental impact statement."[10]

This Note argues that the private cause of action under NEPA retains its utility despite the completion of the project sued upon. Part I describes the procedural implementation of the policy concerns underlying NEPA through the EIS process for proposed actions, and the EIS supplementation process for project changes made after the original EIS has been prepared. Part II examines current law applicable to projects completed in violation of NEPA[11] and concludes that the denial of post-completion relief conflicts with the underlying goals of NEPA. Part III analyzes extension of relief to completed projects, and proposes court-ordered EIS supplementation for projects completed in violation of NEPA.

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and has not foreclosed an implied private cause of action. *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519 (1978). Further, *Noe* cited Mountainbrook Homeowners Assn. v. Adams, 10 ENVTL. L. REP. (ENVTL. L. INST.) 20352 (4th Cir. May 16,1980), and City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979), for support of its position. These cases, however, only denied post-completion relief, not the implied private cause of action. *See generally* Hart and Miller Islands Area Environmental Group v. Corps of Engineers, 505 F. Supp. 732, 737-38 (D. Md. 1980) (analyzing the implied cause of action generally in light of recent Supreme Court decisions).

8. *See* Richland Park Homeowners Assn., Inc. v. Pierce, 671 F.2d 935 (5th Cir. 1982); National Wildlife Fedn. v. Appalachian Regional Commn., 677 F.2d 883 (D.C. Cir. 1981); Romulus v. County of Wayne, 634 F.2d 347 (6th Cir. 1980); Florida Wildlife Fedn. v. Goldschmidt, 611 F.2d 547 (1980); Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977).

9. In City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979), the defendant prepared an EIS for an airport runway extension, incorporating a city promise that no jets would use the runway. The city changed its regulations to allow certain jet aircraft after the new runway was completed. In Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977), the Soil Conservation Service implied that compatible fill would be used in a dune restoration project. The Service used incompatible fill which substantially altered the dune's appearance. In Mountainbrook Homeowners Assn. v. Adams, 492 F. Supp. 521 (W.D.N.C. 1979), *aff'd. mem.*, 620 F. 2d 294 (4th Cir. 1980), the plaintiffs alleged that disposal of waste rock from a highway project, which did not comply with the procedures specified in the EIS, adversely affected the environment.

10. Ogunquit Village Corp. v. Davis, 553 F.2d 243, 245 (1st Cir. 1977).

11. NEPA is violated if an agency significantly changes a project during construction without supplementing the EIS. *See* Ogunquit Village Corp. v. Davis, 553 F.2d 243, 245 (1st Cir. 1977). *See also* notes 43-45 *infra*.

I. THE EIS REQUIREMENT

NEPA resulted from a consensus that the dangers posed to the environment by human behavior required new institutional structures to incorporate ecological values in the process of forming public policy.[12] This need arose less from the political perceptions of a particular historical period than from inherent dynamics of private decision-making.[13] Just as the failure to internalize social costs leads to the economic undervaluation of public goods, so too the absence of concentrated constituencies friendly to the general interest in a clean environment leads to its political undervaluation.[14] NEPA responds to this failure of the democratic process by requiring decisonmakers first to consider, and then to justify, the environmental consequences of their actions. NEPA does not attempt to dictate the result of any particular decision; rather, the Act establishes a policy regime in which decision-making must take account of environmental values. This procedural approach leaves to the political process

12. *See, e.g., National Environmental Policy: Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 205 (1969) (Statement of Senator Jackson, sponsor of S. 1075, the bill which ultimately became NEPA) ("There was, however, general agreement by all concerned [at the hearings] that there is a need to restructure the Federal government to provide a focal point for environmental considerations."); S. REP. No. 296, 91st Cong., 1st Sess. 20 (1969) ("In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors. As a result, unless the results of planning are radically revised at the policy level — and this often means the Congress — environmental enhancement opportunities may be forgone and unnecessary degradation incurred."); *id.* at 9 ("Virtually every agency of the Federal Government plays some role in determining how well the environment is managed. Yet, many of these agencies do not have a mandate, a body of law, or a set of policies to guide their actions which have an impact on the environment.").

13. "Externality" is the economic term which refers to an excess of social over private cost. Because public goods, such as air and water, are financially free, their pollution imposes no corresponding cost on private polluters. The public at large bears the social cost, encouraging pollution so long as it yields a positive marginal private return. *See generally* W. BAUMOL & W. OATES, THE THEORY OF ENVIRONMENTAL POLICY (1975); J. DALES, POLLUTION, PROPERTY AND PRICES (1968); A. FREEMAN, R. HAVEMAN & A. KNEESE, THE ECONOMICS OF ENVIRONMENTAL POLICY 72-76 (1973).

14. This is not to say that effective political groups do not support environmental causes, but rather that because individuals devote their political resources to further their private interests, policy-makers who respond to political incentives will incorporate the same undervaluation of the environment that characterizes their constituents. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 405 (1977). One need not endorse Posner's model of legislation, however, to realize that those who benefit from particular government programs have a stake in them sufficient to justify political defense of that interest. Only rarely will any *individual's* stake in an environmental issue rise to the level that might justify significant political activity.

NEPA's legislative history reflects this concern, not that decision-makers are hostile to, but instead are indifferent to, environmental considerations. *See, e.g.,* S. REP. No. 296, *supra* note 12, at 9 ("One of the major factors contributing to environmental abuse and deterioration is that actions — often having irreversible consequences — are undertaken without adequate consideration of, or knowledge about, their impact on the environment."); *id.* at 20 ("Many of the environmental controversies of recent years have, in large measure, been caused by the failure to consider all relevant points of view in the planning and conduct of Federal activities. . . . Too often planning is the exclusive province of the engineer and cost analyst.").

the determination of whether the government has properly weighed those values against the other social values with which they compete.[15]

Section 102(2)(C) of NEPA[16] requires[17] federal agencies to comply with a detailed study and disclosure procedure ("EIS process")[18] upon undertaking any major[19] federal[20] action which significantly affects the environment. This process begins with the preparation of a draft EIS.[21] The draft EIS, like the final EIS, must describe the

15. *See, e.g.,* Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) ("The detailed statement serves to gather in one place a discussion of the relevant impact of alternatives so that the reasons for the choice of alternatives are clear."); Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973) ("[T]he requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972) ("The complete formal impact statement represents an *accessible* means for opening up the agency decision-making process and subjecting it to critical evaluation by those outside the agency, including the public.") (emphasis in original); Environmental Defense Fund v. Corps of Engineers of the U.S. Army, 325 F. Supp. 728, 759 (E.D. Ark. 1971) (Congress intended NEPA "to make such decisionmaking more responsive and more responsible.").

16. 42 U.S.C. § 4332 (1976 & Supp. IV 1980).

17. The language of NEPA § 102(2) (42 U.S.C. § 4332) has been interpreted to mean that the agency *must* prepare an Environmental Impact Statement (EIS) for any major federal action. The agency has no discretion over the requirements of the EIS process. *See, e.g.,* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commn., 449 F.2d 1109, 1115, (D.C. Cir. 1971); Daly v. Volpe, 350 F. Supp. 252, 257 (W.D. Wash. 1972), *injunction dissolved*, 376 F. Supp. 987 (W.D. Wash. 1974), *aff'd.*, 514 F.2d 1106 (9th Cir. 1975). *See generally* F. ANDERSON, NEPA IN THE COURTS 49-55 (1973). The agency retains discretion, however, over whether an EIS statement is required — that is, whether the action is a "major federal action" within the meaning of the Act. *See generally* F. ANDERSON, *supra*, at 56-141.

18. 42 U.S.C. §§ 4341-4347 (1976) establishes the Council on Environmental Quality ("CEQ") and describes its composition and function. The CEQ promulgated guidelines detailing the requirements of the EIS. *See* 40 C.F.R. § 1502 (1980). These guidelines, however, are merely advisory, and do not have the force of law. Aertsen v. Landrieu, 637 F.2d 12, 18 (1st Cir. 1980); Sierra Club v. Lynn, 502 F.2d 43, 58 (5th Cir. 1974), *cert. denied*, 421 U.S. 994, 422 U.S. 1049 (1975); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 424 (5th Cir. 1973). *Cf.* Note, *Intent or Impact: Proving Discrimination Under Title VI of the Civil Rights Act of 1964*, 80 MICH. L. REV. 1095, 1101-10 (1982) (discussing the distinction between legislative regulations, which are binding on courts, and interpretative regulations, which are merely entitled to deference by the courts, in the context of Title VI of the Civil Rights Act of 1964).

19. What constitutes a *major* action must be assessed with a view towards the cumulative impact of the proposed action, related projects in the area, and further actions contemplated. *See* City of Rochester v. United States Postal Serv., 541 F.2d 967, 972 (2d Cir. 1976). Whether a specific action is major may depend on the amount of federal funds expended, number of people affected, length of time consumed, and extent of government planning involved. *See* Como-Falcon Coalition, Inc. v. United States Dept. of Labor, 465 F. Supp. 850, 857 (D. Minn. 1978), *modified on other grounds,* 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

20. What constitutes a *federal* action has been construed liberally. Federal action includes not only actions directly undertaken by a federal agency or funded by the federal government, but those permitted or approved by the federal agency. *See* Chelsea Neighborhood Assn. v. United States Postal Serv., 516 F.2d 378, 382-86 (2d Cir. 1975); Sierra Club v. Morton, 514 F.2d 856, 875 (D.C. Cir. 1975), *cert. dismissed,* 424 U.S. 901 (1976), *revd. on other grounds sub nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976); 40 C.F.R. § 1508.18 (1980) (" 'major Federal action' includes actions . . . which are potentially subject to Federal control and responsibility"); N. ORLOFF, THE ENVIRONMENTAL IMPACT STATEMENT PROCESS 9 (1978).

21. *See* 40 C.F.R. § 1502.9(a) (1980).

proposed action, its reasonably foreseeable impact on the environment, unavoidable adverse environmental effects, reasonable alternatives, long range effects on productivity, and any irreversible commitment of resources involved in the proposed action.[22] The agency must circulate the draft EIS to other agencies and interested private parties,[23] who may offer comments and suggestions. Finally, the agency must revise the draft EIS, addressing responsible comments and suggestions,[24] and distribute the final product to all interested parties.[25] An EIS which does not satisfy these requirements must be revised.[26] If necessary, courts will enjoin projects pending compliance with the EIS process.[27]

The EIS process promotes three fundamental NEPA objectives. First, the EIS enhances the quality of agency decisions.[28] The EIS requirement assures not only that the agency itself will evaluate the proposed project and practical alternatives in light of environmental costs,[29] but also that other federal agencies and private parties can provide input into the decision-making process.[30] Only where the "agency decisionmaker has before him . . . all possible approaches to a particular project . . . is it likely that the most intelligent, optimally beneficial decision will ultimately be made."[31] And only where the law formally requires a decison-maker to acknowledge

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22. 42 U.S.C. § 4332(c) (1976 & Supp. IV 1980).

23. *See* 40 C.F.R. § 1503.1 (1980).

24. *See* 40 C.F.R. § 1503.4 (1980).

25. *See* 40 C.F.R. § 1502.19 (1980).

26. *See* 40 C.F.R. § 1502.9(a) (1980).

27. *See, e.g.,* State of Alaska v. Andrus, 580 F.2d 465, 485 (D.C. Cir.), *vacated in part and remanded on other grounds sub nom.* Western Oil & Gas Assn. v. Alaska, 439 U.S. 922 (1978) (presumption in favor of injunctive relief); Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033, 1037 (8th Cir. 1973) ("injunction is the vehicle through which the congressional policy behind NEPA can be effectuated"); Environmental Defense Fund v. Armstrong, 352 F. Supp. 50, 60 (N.D. Cal. 1972).

Where the cost of the delay outweighs the harm sought to be prevented, injunction is generally not allowed. *See, e.g.,* Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 435 (5th Cir. 1981); State of Alaska v. Andrus, 580 F.2d at 485-86.

28. Sierra Club v. Morton, 510 F.2d 813, 819-20 (5th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974); Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 350-51 (8th Cir. 1972); Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commn., 449 F.2d 1109, 1114 (D.C. Cir. 1971).

29. *See, e.g.,* State of Alaska v. Andrus, 580 F.2d 465, 474 (D.C. Cir.), *vacated in part and remanded on other grounds sub nom.* Western Oil & Gas Assn. v. Alaska, 439 U.S. 922 (1978); Environmental Defense Fund, Inc. v. Hoffman, 566 F.2d 1060, 1071 (8th Cir. 1977); County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1384 (2d Cir.), *cert. denied,* 430 U.S. 922 (1977).

30. *See, e.g.,* Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1299-300 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972).

31. Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commn., 449 F.2d 1109, 1114 (D.C. Cir. 1971).

otherwise undefended environmental values will the general interest in those values influence the choice of policies.

Second, the EIS allows the democratic process to function more efficiently by fully informing the public of federal agency decisions affecting the environment.[32] Congress intended NEPA, at the very least, "to make such decisionmaking more responsive and more responsible" to the electorate.[33] In this sense, NEPA operates as a "full disclosure law."[34] NEPA does not dictate the choice of policies; but it does mandate that those who weigh environmental values must answer to the electorate for the balance that they strike.

Finally, the EIS serves as a record for substantive review. In the event that an agency decision is challenged for noncompliance with NEPA, the EIS establishes the reasons for that decision and the extent to which environmental values influenced the policy formation process.[35]

In addition to NEPA's procedural requirements, section 101 of the Act[36] imposes substantive requirements on decision-makers. NEPA requires an agency to take a "hard look" at environmental concerns and consider the environmental consequences of its decision,[37] though the agency need not elevate environmental concerns above other policy considerations.[38] A reviewing court may not substitute its own judgment for that of a federal agency,[39] though a

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32. *See* cases cited *supra* note 30.

33. Environmental Defense Fund v. Corps of Engineers of the United States Army, 325 F. Supp. 728, 759 (E.D. Ark. 1971).

34. Silva v. Lynn, 482 F.2d 1282, 1284 (1st Cir. 1973).

35. *See* Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 507 (4th Cir. 1973); Ely v. Velde, 451 F.2d 1130, 1138-39 (4th Cir. 1971).

36. 42 U.S.C. § 4331 (1976), provides in relevant part:

> (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 —
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> (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 permit 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.

37. Sierra Club v. Cavanaugh, 447 F. Supp. 427, 431 (D.S.D. 1978). *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980) (per curiam).

38. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

39. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,

court may enjoin[40] a project where the agency has given "clearly insufficient weight" to environmental concerns,[41] or has made its decision in an "arbitrary or capricious" manner.[42] This judicial gloss on the Act effectuates the statute's purpose, not to ensure certain policy outcomes, but to guarantee that otherwise neglected environmental interests receive the respect they merit from public decisionmakers.

Both procedural and substantive NEPA requirements continue throughout implementation of the proposed action. Council on Environmental Quality[43] guidelines require an agency to supplement an EIS if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns."[44] The EIS supplement[45] promotes the same NEPA objective for project changes as

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Inc., 435 U.S. 519, 555 (1978); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam); Environmental Defense Fund v. Hoffman, 566 F.2d 1060, 1073 (8th Cir. 1977); Environmental Defense Fund v. Corps of Engineers of the United States Army, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

40. The remedy for substantive noncompliance with NEPA is a court order enjoining the proposed project. *See* Environmental Defense Fund v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972). In practice, however, no court has enjoined a project for substantive noncompliance with NEPA. *See, e.g.*, Environmental Defense Fund v. Corps of Engineers of the United States Army, 492 F.2d 1123 (5th Cir. 1974); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Environmental Defense Fund v. Corps of Engineers of the United States Army, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Environmental Defense Fund v. Tennessee Valley Auth., 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd. per curiam*, 492 F.2d 466 (6th Cir. 1974); Conservation Socy. of Southern Vermont, Inc. v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973), *revd. on other grounds*, 531 F.2d 637 (2d Cir. 1976); Lathan v. Brinegar, 506 F.2d 677, 692-93 (9th Cir. 1974) (allowing review only under the Administrative Procedure Act). *See generally* F. ANDERSON, *supra* note 6, at 258-65; W. RODGERS, *supra* note 7, at 738-50. The *threat* of substantive review, however, has prompted agencies to change significantly and even abandon projects thought to be too environmentally costly. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS EXPERIENCE BY SEVENTY FEDERAL AGENCIES (Appendix D) (1976).

41. *See* Environmental Defense Fund v. Hoffman, 566 F.2d 1060, 1072-73 (8th Cir. 1977); National Indian Youth Council v. Andrus, 501 F. Supp. 649, 666 (D.N.M. 1980), *aff'd. sub nom.* National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981).

42. The Administrative Procedure Act allows a court to set aside an "arbitrary [or] capricious" agency decision. 5 U.S.C. § 706 (1976). This standard applies to NEPA litigation. *See, e.g.*, Environmental Defense Fund v. Corps of Engrs. of the United States Army, 470 F.2d 289, 298-99 (8th Cir. 1972), *cert. denied*, 412 U.S. 971 (1973); Nucleus of Chicago Homeowners Assn. v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967; Chelsea Neighborhood Assns. v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975); Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974); South Louisiana Env. Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980). This standard is intended to avoid substituting judicial values for agency values except in the most egregious cases. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

43. *See* note 18 *supra*.

44. 40 C.F.R. § 1502.9(c)(1)(i) (1981).

45. The EIS supplementation process has been treated under a rule of reason. Only reasonable detail is required. Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 442 (5th Cir. 1981). *Cf.* Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975) (§ 102(2)(c) compliance governed by *"rule of reason"*).

the EIS does for the project as originally conceived.[46] Yet despite federal agencies' continuing obligations under the Act, courts limit review of NEPA violations to projects not complete at the time of trial. Courts have failed to recognize that the utility of the EIS as a means of implementing NEPA policy does not vanish upon completion of a project.

II. Completed Projects: Shortcomings in the Current Review Standard

The courts have consistently denied relief for noncompliance with the EIS process where the project sued upon has been completed.[47] Often, an agency will modify a project during construction without studying or evaluating the environmental impact of the changes.[48] Changes decided upon through such a process can cause needless environmental damage of the sort Congress intended NEPA to prevent.[49] Denial of post-completion relief undermines the

46. *See* National Indian Youth Council v. Andrus, 501 F. Supp. 649, 656, 660 (D.N.M. 1980), *aff'd. sub nom.* National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981). The EIS supplement must contain the same sort of information contained in the original EIS. 40 C.F.R. § 1502.9(c)(4) (1981).

47. Courts have reached this result in a variety of ways. *Compare* Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977) (acknowledging a NEPA violation, but declining to fashion a remedy) *with* City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979) (undertaking contract analysis and concluding that the EIS did not bind defendants) *and* Mountainbrook Homeowners Assn., Inc. v. Adams, 492 F. Supp. 521 (W.D.N.C. 1979), *aff'd. mem.*, 620 F.2d 294 (4th Cir. 1980) (denying any implied cause of action under NEPA).

48. In Mountainbrook Homeowners Assn. v. Adams, 492 F. Supp. 521 (W.D.N.C. 1979), *aff'd.*, 620 F.2d 294 (4th Cir. 1980), the project itself was ongoing but the portion sued upon—waste rock disposal — was finished. Indeed, this problem may arise any time an agency modifies a discrete portion of a project in an environmentally damaging manner without supplementing the EIS.

49. *See* notes 43-46 *supra* and accompanying text. Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977), is illustrative.

In *Ogunquit*, the Soil Conservation Service (the "Service") restored a large sand dune in Ogunquit, Maine. The dune and adjacent beach, which were composed of fine white quartz sand, created a large tourist industry for the village. In its EIS, the Service made no mention of the type of fill to be used for the restoration, though the EIS suggested that only compatible fill would be used. 553 F.2d at 245 (quoting from the trial court record). During construction, the Service exhausted the supply of inexpensive compatible fill and substituted gravel and coarse yellow sand. As a result, "the famous white Ogunquit dune [became] an ugly yellow bunker," which largely destroyed Ogunquit's tourist industry. 553 F.2d at 244-47. The aesthetic destruction of the Ogunquit dune might have been avoided had the service invited public comment on its decisions to complete the dune restoration with incompatible fill; economic exigencies did not dictate the decision to use incompatible fill. The project was completed for $443,015, nearly $400,000 under budget. In fact, the Service could substantially, if not completely, repair the dune within the amount originally allocated. 553 F.2d at 245. Despite its significant departure from the original plans, the Service failed to supplement the EIS, thereby precluding meaningful public input into a decision significantly affecting the Ogunquit community. The First Circuit, fearing a flood of belated litigation, denied post-completion relief and called for congressional action specifying procedures for "consideration and resolution of post-completion problems." 553 F.2d at 247. Ultimately, the court feared a "large, and unplanned expenditure of public funds in undoing and redoing what has [already] been done." 553 F.2d at 245.

policies animating NEPA. The reasons so far advanced for this result fail to justify insulating government noncompliance from any remedy whatsoever.

A. *Denying Post-Completion Relief Frustrates NEPA Policies*

Courts denying post-completion relief undermine NEPA policy. First, denial of post-completion relief conflicts with the NEPA goal of improving the quality of agency decision-making.[50] The present rule encourages agencies to use the completed-project shield intentionally[51] or negligently to make environmentally unsound project changes.[52] Even if a plaintiff can discover project changes,[53] he may be unable to bring a lawsuit before the completion of the project.[54] If decision-makers know that project changes may escape review, they may have no incentive to comply strictly with the requirements of NEPA. Accordingly, post-completion review may be the only means of ensuring agency compliance with NEPA for projects modified during construction.

More commonly, the perception that the filing of the original EIS concludes the agency's responsibility to consider environmental values restores the pre-NEPA status quo. Project directors will therefore decide upon changes in response to political incentives without even the formal obligation to consider environmental consequences.[55] Moreover, the absence of post-completion review will preclude both the reconsideration of previous project changes and the remaining possibilities for mitigating their adverse environmen-

50. *See* notes 28-31 *supra* and accompanying text.

51. *Ogunquit* implied that a bad faith departure from the EIS might warrant relief. 553 F.2d at 246. A "bad faith" standard for relief, however, presents two problems. First, proof of the agency's state of mind will be difficult. Unless the burden of proof is placed on the agency, no suit could likely succeed, especially in light of the somewhat amorphous character of an institutional mental state. Second, as a practical matter, an agency's casual indifference to environmental concerns, rather than hostility to the environment, presents the greater threat to NEPA. *See* notes 12-15 *supra* and accompanying text.

52. *Cf.* Columbia Basin Land Protection Assn. v. Schlesinger, 643 F.2d 585, 591-92 n.1 (9th Cir. 1981) (If completion makes a project immune to suit, an agency "could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine.").

53. As a practical matter, citizens have the burden of finding out about proposed projects under NEPA. *See* N. ORLOFF, *supra* note 20, at 1-9. Denial of post-completion relief places the additional burden on potential plaintiffs of continually monitoring an agency's subsequent actions. It is not clear that Congress intended to so burden NEPA plaintiffs. *See* Note, Ogunquit Village Corp. v. Davis *and Judicial Relief Under the National Environmental Policy Act: The Completed Project Problem*, 64 VA. L. REV. 629, 636-37 (1978).

54. *See, e.g.,* Ogunquit Village Corp. v. Davis, 553 F.2d 243, 244 (1st Cir. 1977) (The Service began using incompatible fill in December of 1974. When the Village protested in January of 1975, the project had been completed.); Mountainbrook Homeowners Assn. v. Adams, 492 F. Supp. 521, 529 (W.D.N.C. 1979) (Plantiffs challenged waste rock disposal. Testimony at trial revealed that no more waste rock would be dumped at the lots in question, thus that portion of the project was complete.), *affd. mem.,* 620 F.2d 294 (4th Cir. 1980).

55. *See* notes 12-15 *supra* and accompanying text.

tal impacts.[56] Post-completion review would more effectively advance NEPA's purpose of improving agency decision-making by ensuring due consideration of environmental values.

Second, denial of post-completion relief frustrates the full disclosure function of the Act.[57] Given the heightened awareness of environmental concerns in the last two decades, a federal agency may be reluctant to disclose voluntarily changes likely to increase public opposition to a project.[58] The courts' refusal to review an agency's decision to modify a project effectively deprives the public of any "means for opening up the agency decision-making process and subjecting it to critical evaluation."[59] Thus, even if the agency considers environmental questions not pressed upon it by the formal requirements of the Act, the absence of post-completion review nullifies the political accountability of decision-makers for the weight they accord environmental values.

B. *Countervailing Considerations Do Not Justify the Frustration of NEPA Policies*

Given that the denial of post-completion relief seriously jeopardizes important NEPA purposes, only significant contrary concerns can justify the current case law. The courts that have denied relief have relied upon equitable, prudential, and statutory justifications for this result. Several courts have rejected post-completion relief because of the equitable principle that the completion of activity which cannot be undone renders moot any question of enjoining that activity.[60] More recently, some courts have limited the purposes of NEPA to the planning stage of government projects.[61] And the First Circuit, in *Ogunquit Village Corp. v. Davis,*[62] expressed a prudential concern for burdening the implementation of public policy with after-the-fact litigation.

The equitable concern is unpersuasive because it depends upon the assumption that the only possible relief is to enjoin a project already completed. Such a remedy would rarely justify its costs, and

56. *See* notes 88-93 *infra* and accompanying text.

57. *See* notes 32-34 *supra* and accompanying text.

58. *See generally* Note, Ogunquit Village Corp. v. Davis *and Judicial Relief Under the National Environmental Policy Act: The Completed Project Problem*, 64 VA. L. REV. 629, 636 (1978).

59. Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972).

60. *E.g.,* City of Romulus v. County of Wayne, 634 F.2d 347 (6th Cir. 1980); Florida Wildlife Fedn. v. Goldschmidt, 611 F.2d 547 (5th Cir. 1980); Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377 (9th Cir. 1978).

61. *See* Richland Park Homeowners Assn., Inc. v. Pierce, 671 F.2d 935 (5th Cir. 1982); National Wildlife Fedn. v. Appalachian Regional Commn., 677 F.2d 883 (D.C. Cir. 1981); Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980).

62. 553 F.2d 243 (1st Cir. 1977). *See* note 49 *supra*.

might well cause more environmental damage than simply tolerating the NEPA violation. By contrast, requiring a supplemental EIS imposes minimal costs, and significantly advances the policies of the Act.[63]

The statutory objection appears more formidable. Several circuits have subscribed to the view that because "the basic function of an EIS is to serve as a forward-looking instrument to assist in evaluating 'proposals' for major federal action," the courts should "decline, absent a showing of bad faith, to require an EIS as an after-the-fact justification for a multi-phase development project already substantially completed."[64] While plausible, this view of NEPA does not survive close scrutiny.

Post-completion EIS supplementation, in contrast to dismantling an entire project, *is* forward-looking. Such a remedy would enhance environmental planning across three dimensions. First, EIS supplementation would require decision-makers to take a "hard look" at the available options for mitigating the adverse environmental impacts of their prior failure to comply with NEPA.[65] Second, the knowledge that the courts may require a post-completion supplement would put officials on notice that the environmental awareness NEPA seeks to foster does not expire with the filing of the original EIS; the potential need to justify project changes in light of environmental values will induce project directors to consider those values when they otherwise might not. Finally, post-completion supplementation increases the accountability of public officials.[66] Denying the public the information required to shape future environmental planning through the political process because the provision of that information is not "forward-looking" protects officials responsible for NEPA violations in the name of the Act itself. This ironic result follows from a narrow, technical view of the policy formation process, a vision limited to the perspective of "the engineer and the cost analyst."[67] The Act, and its judicial development, leave little doubt that the statute's essential purpose is to broaden the policy-making process to encompass due consideration of environmental values.[68]

Prudential fears that post-completion relief will interfere with the efficient operation of the government, or burden the courts with excessive after-the-fact litigation, do not justify so profound a frustration of the statutory purpose. Court-ordered EIS supplementation does not conflict with the congressional judgment that substantive

63. *See* notes 50-59 *supra* and accompanying text.

64. Aertsen v. Landrieu, 637 F.2d 12, 19 (1st Cir. 1980).

65. *See* notes 88-92 *infra* and accompanying text.

66. *See* notes 57-59 *supra* and accompanying text.

67. *See* note 14 *supra*.

68. *See* notes 12-15 *supra* and accompanying text.

decision-making authority belongs to federal agencies.[69] The EIS is intended "to compel the decision maker to give serious weight to environmental factors in making discretionary choices,"[70] though not as a means for courts to substitute their value judgment for substantive agency decisions.[71] The EIS supplement remedy is procedural: it merely requires an agency to proceed now in the manner it should have before the project was completed.

Nor would the EIS supplement remedy depend upon more vague or difficult principles than familiar NEPA litigation; the courts could apply the same standards of substantive review to completed projects that they now apply to incomplete projects.[72] Substantive review would extend to agency decisions made pursuant to the EIS supplement.[73] Courts may grant relief where an agency's decision not to mitigate the adverse environmental effect of a completed project has given clearly insufficient weight to environmental considerations, or was made in an arbitrary or capricious manner. The remedy for an arbitrary or capricious decision not to mitigate, or to mitigate in a way that gives clearly insufficient weight to environmental concerns, would be a court order to mitigate in the most efficient manner.[74]

Although the availability of the EIS supplement remedy may increase the amount of NEPA litigation, the increased caseload need not be burdensome. Courts could apply CEQ standards and grant relief only where the agency makes "substantial changes"[75] in the

69. 42 U.S.C. § 4332 (1976). *See* Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972); Concerned About Trident v. Schlesinger, 400 F. Supp. 454, 480-83 (D.D.C. 1975), *revd. in part on other grounds sub nom.* Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977) (per curiam).

70. Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975).

71. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").

72. *See* notes 39-42 *supra* and accompanying text.

73. This, of course, would impose no greater judicial oversight of administrative agencies than NEPA already requires prior to the completion of a project. The supplement would primarily address impact mitigation alternatives such as add-ons, use restrictions, or partial or complete dismantling. The decision reviewed would be whether and how to mitigate, and the standard of review would be the same as for any other substantive decision.

74. Again, however, the specifics of mitigation measures should be decided by the agency and submitted for final court approval. This will allow substantive review without imposing the court's values on the administrative process. *See, e.g.,* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (Court "cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken.'" (quoting Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972))).

This would require the court to retain jurisdiction until it approves a proper plan, but courts of equity have historically done so. *Cf.* Environmental Defense Fund v. Hoffman, 566 F.2d 1060, 1071 (8th Cir. 1977) (imposing on the defendant "a continuing obligation to comply with" the procedures specified in the EIS).

75. 40 C.F.R. § 1502.9(c)(1)(i) requires agencies to "prepare supplements to either draft or final environmental impact statements if . . . [t]he agency makes substantial changes in the proposed action that are relevant to environment concerns . . . ." *See also* Essex County Preservation Assn. v. Campbell, 536 F.2d 956, 960-61 (1st Cir. 1976) (change in highway construction plans which would change use patterns required EIS supplement). *Cf.* Environmental

project whose effects the agency did not study in the original EIS.[76] This rule would preclude challenges to minor lapses in planning, as well as to changes that have an insignificant effect on the environment.[77] Further, the doctrine of laches applies to NEPA litigation.[78] Thus no relief may be granted where a plaintiff's inexcusable delay results in prejudice to the defendant.[79] Accordingly, extension of relief to projects completed in violation of NEPA need not, as the *Ogunquit* court feared, "open up a vast number of projects to a flood of belated litigation."[80]

III. A Proposed Remedy for Completed Projects

Most courts that deny post-completion relief simply refuse to order a federal agency to complete its projects as specified in the EIS.[81] Several courts, however, have considered less drastic post-completion remedies, though none has awarded such relief.[82] The inability

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Defense Fund v. Hoffman, 566 F.2d 1060, 1071 (8th Cir. 1977) (where a mitigation procedure discussed in the EIS is later not adopted, a cause of action to halt construction pending NEPA compliance would arise).

76. If the original EIS does not contain enough information to enable the decision-makers to consider fully the environmental consequences of any proper modifications, a court-ordered EIS supplement is appropriate. *Cf.* South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1013 n.7 (5th Cir. 1980) (EIS is sufficient if it permits reasoned evaluation and decision.); Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1299-300 (8th Cir. 1976), *cert. denied,* 430 U.S. 922 (1977); Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commn., 449 F.2d 1109, 1115 (D.C. Cir. 1971) (An EIS is valid only if the Federal agency preparing it complies with a process of "individualized consideration and balancing of environmental factors . . . .").

77. NEPA "does not . . . impose an impossible standard on the agency." Environmental Defense Fund v. United States Army Corps of Engineers, 492 F.2d 1123, 1131 (5th Cir. 1974); *see* Carolina Environmental Study Group v. United States, 510 F.2d 796, 798, 801 (D.C. Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1282-83 (9th Cir. 1974).

78. *See, e.g.,* Environmental Defense Fund v. Alexander, 614 F.2d 474, 479 (5th Cir.), *cert denied,* 449 U.S. 919 (1980); Save Our Wetlands, Inc. v. United States Army Corps of Engineers, 549 F.2d 1021, 1027-29 (5th Cir.), *cert. denied,* 434 U.S. 836 (1977).

79. Courts may consider, however, the type of action involved in considering the applicability of laches. Specifically it may be relevant whether the plaintiff represents the public interest, which would be best served by relief notwithstanding delay in bringing suit. *See* Steubing v. Brinegar, 511 F.2d 489, 495-96 (2d Cir. 1975). *See also* Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164, 1176 (8th Cir. 1972) (If project is subject to NEPA, agency should not be permitted to rely on delay in claiming exemption).

80. 553 F.2d at 245.

81. *See* cases cited at note 47 *supra*. *Cf.* Noe v. Metropolitan Atlanta Rapid Transit Auth., 644 F.2d 434 (5th Cir. 1981) (holding that NEPA creates no implied cause of action), *cert. denied*, 102 S. Ct. 977 (1982); City of Romulus v. County of Wayne, 634 F.2d 347 (6th Cir. 1980) (holding post-completion suits are moot).

82. *See, e.g.,* Ogunquit Village Corp. v. Davis, 553 F.2d 243, 245-46 (1st Cir. 1977) (The court suggested, *sua sponte*, the alternate remedy of requiring EIS supplementation, but rejected it, saying: "[h]ere too, however, we face the problem of setting forth the criteria determining when such relief is appropriate." 553 F.2d at 245-46. It gave little substantive analysis to the merits of such a remedy.); *cf.* City of Blue Ash v. McLucas, 596 F.2d 709, 712 (6th Cir. 1979) (implying that a challenge to EIS sufficiency, even after project completion, might warrant relief.).

of the courts to fashion a suitable remedy for projects completed in violation of NEPA insulates agency decision-making from both the public and the courts, enabling agencies to act without giving full consideration to environmental concerns — precisely the result NEPA sought to avoid.[83] But the problems posed by denying post-completion relief for NEPA violations can be resolved by extending to completed projects remedies available for incomplete projects. Courts should order federal agencies that have modified projects during construction to supplement the original EIS where it fails to describe accurately the completed project. Further, courts should, where proper, undertake substantive review of any agency decisions to proceed in a manner not specified in the EIS, as well as any subsequent decision made pursuant to the supplemented EIS.

Even though the project sued upon has been completed, court-ordered EIS supplementation promotes three basic NEPA goals: 1) to enhance the quality of agency decision-making;[84] 2) to inform the public of federal decisions affecting the environment;[85] and 3) to provide a record for substantive review.[86] These advantages mirror the deficiencies in the current approach to post-completion NEPA litigation.[87]

First, study of project changes already implemented will improve the quality of agency decisions affecting the environment, notwithstanding that the project sued upon has been completed. Where a completed project includes changes not studied in the original EIS, an EIS supplement will identify any additional adverse effect on the environment and alternative methods of minimizing such harm.[88]

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83. *See* notes 50-59 *supra* and accompanying text.

84. *See* notes 28-31 *supra* and accompanying text.

85. *See* notes 32-34 *supra* and accompanying text.

86. *See* text at note 35 *supra*.

87. *See* notes 50-59 *supra* and accompanying text.

88. The requirement that an EIS supplement consider ways to mitigate the adverse consequences of project changes is analogous to the requirement that the original EIS consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). Both requirements are intended to ensure that the best decision will be made by increasing the number of choices available to the decision-maker. *Cf.* cases cited at note 28 *supra* (one goal of the EIS process is to enhance the quality of agency decisions). Although some alternatives are no longer available after a project is completed (*e.g.*, different project site, abandoning the project), there usually remain economical means of mitigating a project's adverse environmental effects. For example, in Ogunquit Village Corp. v. Davis, 553 F.2d 243, 245 (1st Cir. 1977), only half of the allocated budget had been spent on the dune restoration. The adverse effects of the project could have been substantially mitigated within the original budget. 553 F.2d at 245. In City of Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979), the challenged project was an airport runway for which anti-jet regulations had been removed without EIS supplementation. Such regulation could easily have been reinstated if, upon adequate EIS study, it had been found beneficial to do so. In Mountainbrook Homeowners Assn. v. Adams, 492 F. Supp. 521, 525 (W.D.N.C. 1979), *aff'd. mem.*, 620 F.2d 294 (4th Cir. 1980), the challenged project allegedly did not follow specifications for contouring waste rock at disposal site. If such grading was cost-beneficial when originally considered, it would likely have remained so.

Quite often, completed projects can be inexpensively modified to mitigate the environmental harm caused by the changes not studied in the original EIS.[89] Preparation of an EIS supplement,[90] like the original EIS,[91] requires the agency to study any changes and their impact on the environment, disclose its findings to the public, receive comments from other agencies and the public, and consider viable alternatives. This process increases the flow of information to the decision-maker, enabling a more fully informed consideration of what steps, if any, should be taken to mitigate the environmental harm caused by the project.[92] In short, the EIS supplement functions, as does the EIS,[93] as a decision-making tool notwithstanding the completion of the contested project.

Further, information regarding the additional environmental impact of previously unstudied changes may prove useful for planning similar or related projects.[94] Although the EIS and EIS supplement function chiefly to improve decisions concerning the project for which they were prepared,[95] the EIS also collects data for evaluating other federal actions.[96] Court-ordered EIS supplementation for

89. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commn., 606 F.2d 1261 (D.C. Cir. 1979). The court held that the Energy Research and Development Administration (ERDA) "violated NEPA by failing to consider specific design and safety features that could be incorporated into the planned [nuclear waste storage] tanks." 606 F.2d at 1272. The court remanded the case to the district court for entry of an order requiring ERDA to supplement the EIS, largely because "[i]t may still be possible, upon completion of an adequate EIS, for the agency to decide that it is worthwhile to modify the [nuclear waste storage] tanks." 606 F.2d at 1272. Even if the storage tanks at issue had been completed at the time of trial, an EIS supplement studying alternative design and safety features would remain useful in deciding whether this specific project should be modified.

90. 40 C.F.R. § 1502.9(c) (1980).

91. The EIS supplement fulfills substantially the same purposes as the EIS does. *See* Essex County Preservation Assn. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976); National Indian Youth Council v. Andrus, 501 F. Supp. 649, 660 (D.N.M. 1980), *aff'd. sub nom.,* National Indian Youth Council v. Watt, 644 F. 2d 220 (10th Cir. 1981).

92. *Cf.* notes 28-31 *supra* and accompanying text.

93. *See, e.g.,* Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

94. An EIS for a completed project may be useful where impact predictions and correlations apply to subsequent projects. Further, the comprehensive impact of several proximate projects may be different than the "sum" of the individual impacts. *See generally* Casenote, *Environmental Law — Environmental Impact Statements — Threshold Application of Comprehensive Planning Under NEPA*, 52 N.D. L. REV. 601, 606-08 (1976).

95. *See* cases cited at note 28 *supra*.

96. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commn., 606 F.2d 1261, 1272 (D.C. Cir. 1979) (study of safety and design features for nuclear waste disposal tanks would be useful for future projects); Society for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915, 917-18 (D.C. Cir. 1975) (suggesting post-completion EIS be used to determine future application of a bird extermination process); *cf.* Natural Resources Defense Council, Inc. v. Gallaway, 524 F.2d 79, 87 (2d Cir. 1975) (requiring EIS for dredging project to include information on cumulative impact of proposed and existing projects); Scenic Rivers Assn. of Okla. v. Lynn, 520 F.2d 240, 245 (10th Cir. 1975) (One of the purposes of the EIS "is to require the giving of attention to environmental problems regardless of whether the agency

projects completed in violation of NEPA would also promote this secondary information-gathering purpose of the Act.

Second, court-ordered EIS supplementation for NEPA violators furthers the full disclosure goal of NEPA.[97] Since the EIS supplement not only describes the project changes, but explains the reasons for such changes,[98] the supplement renders agencies accountable for decisions affecting the environment. The availability of this information enables the public to evaluate the federal government's performance.[99] Thus, even for irrevocable project changes, the EIS supplement promotes the full disclosure policy underlying NEPA.

Finally, the EIS supplement provides a record for substantive review in the event that a plaintiff challenges the project changes.[100] Here also, the EIS supplement achieves its purpose despite the completion of the challenged project.

CONCLUSION

NEPA clearly should not be applied identically to both complete and incomplete projects. Yet, if completion immunizes a project from suit, an agency "could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine."[101] Court-ordered EIS supplementation for projects completed in violation of NEPA would not only remove this shield, but would advance many of the purposes Congress intended the original EIS to serve.

NEPA should not, as the *Ogunquit* plaintiff contended, become the basis for enforcement of EIS regulations as promises. The Act was formulated not to bind agencies to their decisions, but to improve agency decisions and to bring the decision-making process within public reach. Extension of procedural and substantive review to completed projects offers an efficient means of achieving this goal.

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has authority to do anything about it".), *revd. on other grounds sub nom.* Flint Ridge Dev. Co. v. Scenic Rivers Assn. of Okla., 426 U.S. 776 (1976).

97. *See* notes 32-34 *supra* and accompanying text.

98. *See* Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971). Similarly, the original EIS explains the reasons for an agency's decision. *See* Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1299-300 (8th Cir. 1976), *cert denied,* 430 U.S. 922 (1977); City of Romulus v. County of Wayne, 392 F. Supp. 578, 586 (E.D. Mich. 1975), *vacated as moot*, 634 F.2d 747 (6th Cir. 1980).

99. The value of the full disclosure function of NEPA is well-accepted. *See* Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1300 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); Essex Preservation Assn. v. Campbell, 536 F.2d 956, 961 (1st Cir. 1976); Silva v. Lynn, 482 F.2d 1282, 1284 (1st Cir. 1973); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972).

100. *See* cases cited at note 35 *supra*.

101. Columbia Basin Land Protection Assn. v. Schlesinger, 643 F.2d 585, 591-92 n.1 (9th Cir. 1981).