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## Does NEPA Require an Impact Statement on Inaction?

The legal distinction between action and inaction has occasioned deep confusion for generations.<sup>1</sup> Unfortunately, statutory language and judicial interpretation have extended this confusion to the National Environmental Policy Act of 1969 (NEPA).<sup>2</sup> Section 102(2)(C) of the Act requires that "all agencies of the Federal Government shall . . . 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 of — (i) the environmental impact of the proposed action . . . ."<sup>3</sup> Virtually every phrase has generated litigation.<sup>4</sup>

While "federal action" clearly includes projects proposed and conducted by a federal agency,<sup>5</sup> it also includes federal participation

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1. The distinction has exerted the most influence in the law of torts. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 314, 323 (1977); *Kuntz v. Utah Power & Light Co.*, 526 F.2d 500 (9th Cir. 1975); *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973); *Thorne v. Deas*, 4 Johns. 84 (N.Y. 1809). "These distinctions are not simplified by the semantic fact that any action can be described in negative terms, such that doing nothing amounts to the failure to do something, and doing something amounts to the failure to do nothing." Note, *Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes*, 80 MICH. L. REV. 1271, 1297 n.147 (1982).

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347, 4361 (1976).

3. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976). The relevant text of § 102 reads:

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.

4. See F. ANDERSON, *NEPA IN THE COURTS* (1973); Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 256-57 (1976); Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 267-69, 273-74 (1976).

5. A determination would still have to be made that the action is a "major" one that "significantly affects the quality of the human environment." Courts have differed as to whether these two phrases create two independent tests, or whether federal actions which "significantly" affect the environment are inherently "major." See F. ANDERSON, *NEPA IN THE*

in state or private activity,<sup>6</sup> and federal approval of state or private activity that could not lawfully proceed without such approval.<sup>7</sup> Plaintiffs in NEPA litigation have advanced the theory that acquiescence by a federal agency in nonfederal activities known to the agency and subject to prohibition at its discretion belong in the category of federal action. Courts, however, have been reluctant to accept such an interpretation of section 102(2)(C) for fear of overburdening federal agencies with EIS preparations.<sup>8</sup>

This Note considers the question of whether NEPA requires an EIS in cases of official refusal to exercise discretionary agency au-

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COURTS 89-96 (1973); Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENVTL. AFF. L. REV. 63, 68-69 (1980/81) [hereinafter cited as Shea]; Note, *Inaction as Action Under Section 102(2)(C) of the National Environmental Policy Act of 1969*, 58 TEX. L. REV. 393, 396 n.27 (1980) [hereinafter cited as Note, *Inaction as Action*].

6. See, e.g., *San Antonio Conservation Socy. v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), *cert. denied*, 406 U.S. 933 (1972); *No East-West Highway Comm., Inc. v. Whitaker*, 403 F. Supp. 260 (D.N.H. 1975); *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972); *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972).

7. See, e.g., *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972) (approval by the Dept. of Interior of a lease of Indian lands); *Greene County Planning Bd. v. Federal Power Commn.*, 455 F.2d 412, 418 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) (authorization by the FPC of a transmission line construction project of the Power Authority of the State of New York); *Jones v. United States Dept. of Hous. and Urban Dev.*, 390 F. Supp. 579, 591-92 (E.D. La. 1974) (HUD approval of transfer of ownership of housing project). See also *Scientists' Inst. for Pub. Information, Inc. v. Atomic Energy Commn.*, 481 F.2d 1079, 1089 (D.C. Cir. 1973), where the District of Columbia Circuit Court of Appeals held that the Commission's breeder reactor program was "developing a technology which will permit utility companies to take action affecting the environment by building LMFBFR [liquid metal fast breeder reactor] power plants." Thus the court held that "there is 'Federal action' within the meaning of the statute [NEPA] not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment." 481 F.2d at 1088.

8. See *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980) (Dept. of Interior's acquiescence in Alaska wolf-kill on federal land did not require EIS). The wolf-kill case was also litigated in the Ninth Circuit with the same result. *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979). See *Molokai Homesteaders Coop. Assn. v. Morton*, 506 F.2d 572, 580 (9th Cir. 1974) (EIS not required where Dept. of Interior failed to object to a leasing program); *Chesapeake Bay Found. v. Virginia State Water Control Bd.*, 453 F. Supp. 122 (E.D. Va. 1978) (No EIS was required on the failure of the Environmental Protection Agency (EPA) to object to a state grant of a National Pollutant Discharge Elimination System permit under the Federal Water Pollution Control Act (FWPCA). The decision rested, however, on the ground that FWPCA state programs are established under state law and function in lieu of a federal program, with no delegation of federal authority. 453 F. Supp. at 126-27.).

In *Gemeinschaft zum Schutz des Berliner v. Marienthal*, 12 Env. Rep. Cas. (BNA) 1337 (D.D.C. 1978), plaintiffs sought to require the U.S. Army to prepare an EIS due to its failure to object to construction of an apartment building by the German government. Although the Army had authority to intervene, the court found no major federal action. This decision, however, may have been prompted by the court's recognition that "judicial interference in the German government's actions . . . raises serious foreign policy implications."

See also Fergenson, *The Sin of Omission: Inaction as Action Under Section 102(2)(C) of the National Environmental Policy Act of 1969*, 53 IND. L.J. 497 (1978) [hereinafter cited as Fergenson] (arguing against the inclusion of inaction as major federal action under NEPA). But see Note, *Inaction as Action*, *supra* note 5 (arguing that inaction should be included as action under NEPA); see note 91 *infra* and accompanying text.

thority. Part I develops the competing theories for resolving this question. The current judicial attitude, which has excluded important cases with far-reaching environmental effects from the EIS requirement, plainly frustrates the statute's procedural purposes. Regulations promulgated by the Council on Environmental Quality define "major federal action" to include the failure to act under certain circumstances, and offer one alternative to the current approach. But the regulations condition the classification of inaction as action upon reviewability under the Administrative Procedures Act, significantly limiting the regulation's scope. This approach would expand NEPA's reach to an extremely important category of cases, while the limits on the review of agency inaction contained in the APA suggest that following the regulations would impose no more than reasonable burdens on agency decisionmaking. The regulations, therefore, suggest the minimal degree to which agency inaction with significant effects on the environment should require an EIS. But the problematic nature of reviewability under the APA, and the danger of neglecting environmental values in the type of case likely to escape the EIS requirement under the regulations, suggest the need for a more comprehensive regime for incorporating environmental concerns into agency decisions not to act. The superior approach would be to view the plaintiff's request for an exercise of authority as a "proposal for . . . major federal action." This interpretation harmonizes the language and purpose of the statute, subject to no objection other than the apprehension of paralyzing agencies with the burden of responding to obstructionist demands for impact statements. This apprehension, however, inheres in any interpretation that honors NEPA's purpose to account for environmental values in the formulation of public policy. Part II, therefore, turns to a consideration of standards for limiting the application of Section 102(2)(C) in cases where the government declines to take a proposed major action. These standards should dispel any fear that requiring an EIS when the government refuses to take "major federal action" will mire policy implementation in a legal morass.

## I. APPLYING SECTION 102(2)(C) IN CASES OF AGENCY INACTION

### A. *The Current Judicial Approach: Exempting Inaction from the EIS Requirement*

The application of section 102(2)(C) to agency inaction arises when the agency is requested to exercise its authority to prevent nonfederal activity that may threaten the environment.<sup>9</sup> *Defenders of*

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9. Inaction that implicates NEPA will be defined as (1) federal agency authority to prohibit planned nonfederal activity (2) which would significantly affect the environment and (3)

*Wildlife v. Andrus*<sup>10</sup> offers a concrete illustration of the problem. Plaintiffs sought to compel the Department of the Interior to prepare an EIS on a wolf-kill the State of Alaska planned to conduct on federal land.<sup>11</sup> The Department of Interior had apparent preventive powers under the Federal Land Policy and Management Act of 1976, yet failed to exercise its authority. The District of Columbia Circuit Court of Appeals found no federal action because the Department's acquiescence did not constitute an "overt act."<sup>12</sup> The court held that NEPA requires no EIS in such a case, thus allowing the Interior Department to acquiesce in an arguably destructive nonfederal project without the full environmental analysis provided by an EIS. Had the Department proposed to conduct the extermination program itself, an EIS would clearly have been mandated. Reliance on an action/inaction distinction removed the former case from the EIS requirement despite its identical environmental impact, even when "inaction" resulted from a conscious decision not to act.<sup>13</sup>

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agency acquiescence in the nonfederal activity. See Note, *Inaction as Action*, *supra* note 5, at 393.

The necessity of major *federal* action supplies the first element of the definition. Without agency authority to control or stop the nonfederal project or program, no federal involvement would exist to activate NEPA. "For action to be subject to NEPA . . . it must be shown to be 'federal.'" *Friends of the Earth v. Coleman*, 518 F.2d 323, 327 (9th Cir. 1975); *Defenders of Wildlife v. Andrus*, 9 E.R.C. 2111, 2113 (D.D.C. 1977) ("For plaintiffs to prevail on their NEPA . . . claims, there must be some authority to prevent the wolf kill on these federal lands. Absent such authority, there could be no federal action for purposes of the applicability of NEPA . . .").

NEPA's requirement of *major* federal action mandates the second element. Since the action here is a refusal to exercise authority, however, "major" in this context is probably a function of the effect on the environment of the nonfederal activity. Thus, in an inaction case, determinations of "major" and "significantly affecting the . . . environment" are identical. See note 5 *supra*.

The third element arises from NEPA's requirement of major federal *action*. The word "action" at a minimum requires a decision by the federal agency. "Without a Federal decision — whether that decision be to act or to refrain from acting — there can be no 'major Federal action' under NEPA." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1247 n.6 (1980) (quoting letter from Nicholas Yost, General Counsel of the Council on Environmental Quality to the Department of Justice (January 10, 1979)). In a case of inaction, the action upon which an EIS would be prepared is the acquiescence in the nonfederal activity, following a conscious decision.

10. 627 F.2d 1238 (D.C. Cir. 1980).

11. The planned kill involved 60% of the wolves in an area of 35,000 square miles in the interior of Alaska. 627 F.2d at 1240.

12. 627 F.2d at 1245.

13. The court in *Defenders of Wildlife v. Andrus* contended that agency planning must "ripen" into a proposal for action before NEPA can reasonably apply; thus a decision not to act is properly left outside the scope of the statute. 627 F.2d at 1243-44. The Supreme Court decisions in *Andrus v. Sierra Club*, 442 U.S. 347 (1979), and *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), provided the authority for that contention. The application of those decisions to the questions of agency inaction is inappropriate because those cases dealt with completely different factual settings. *Andrus v. Sierra Club* held that NEPA does not require the preparation of an EIS for appropriations requests. 412 U.S. at 364-65. *Kleppe* involved national coal development projects, some in the Northern Great Plains region. The Court held that a regional EIS was not required on the coal development projects in the Northern Great Plains because a distinct regional program was not proposed. 427 U.S. at 398-409. Furthermore, the

The court appeared to base this result on the statutory language,<sup>14</sup> but the “plain meaning”<sup>15</sup> of “action”<sup>16</sup> is exceedingly un-

Court noted that EISs had already been prepared on both the national program and the individual local projects. 427 U.S. at 400 n.10.

Hence the dicta in these decisions arose in a context entirely different from the consideration of the inaction problem. The unreasonableness of preparing an EIS on every appropriations request or on every possible geographical subset of a national program is fairly clear: in the former case the burden would be oppressive and in the latter the effort would be largely redundant and wasteful. The same objections do not apply a priori to agency inaction.

Two fallacies inhere in the *Defenders of Wildlife* opinion's application of the ripeness argument to inaction: (1) a decision not to interfere with nonfederal action, being the agency's final decision, cannot “ripen” any further into a proposal for action; and (2) because an agency decides not to intervene does not mean that there is no proposed action on which to prepare an EIS. Rather, an EIS could be prepared on either the environmental effects of allowing the nonfederal action to proceed, or on the environmental impact of prohibiting the private activity, *i.e.*, the “major federal action” proposed by the plaintiffs. See notes 72-74 *infra* and accompanying text. The result would be the same in either case, because section 102(2)(C) of NEPA requires consideration of “alternatives to the proposed action” in the EIS. 42 U.S.C. § 433(2)(C)(iii). It follows that whether the EIS focuses on the impact of inaction, or on the action rejected by the agency, it will always involve a comparison of the environmental consequences of action and inaction. Thus, the argument that an agency's planning must “ripen” into a proposal for action before NEPA applies depends on authority and reasoning quite inapplicable to the agency inaction context.

14. The court candidly “acknowledge[d] the truth” of plaintiff's argument that “the purpose of the statute is to ensure that environmentally informed decisions are made, not simply that the environmental consequences of all federal programs are considered,” but did “not understand it to change the language of the statute.” 627 F.2d at 1243. Other than this openly “literal and formalistic” reading of the statute, 627 F.2d at 1245, Judge McGowan relied only on a prudential fear of overtaxing federal agencies to justify the requirement of an “overt act” 627 F.2d at 1246, although the result in the case at bar could have rested on whether or not the Secretary of the Interior actually had authority to prevent the wolf-kill. 627 F.2d at 1247-50. Thus, a principled interpretation of the statutory language which would incorporate cases of inaction without unduly burdening federal agencies would satisfy the court's objections to requiring an EIS in the absence of an “overt act.”

15. The starting point for statutory construction, is, of course, the language itself. See, *e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *United States v. Alpers*, 338 U.S. 680, 681-82 (1950); *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942). Generally, the words of statutes reflect their ordinary meanings. See *Consumer Prod. Safety Commn. v. GTE Sylvania*, 447 U.S. 102, 108-09 (1980); *Malat v. Riddell*, 383 U.S. 569, 571 (1966) (*per curiam*).

16. Dictionary definitions of “action” vary considerably:

- 1: a deliberative or authorized proceeding
- 1b(2): an act or decision by an executive or legislative body
- 2a: the bringing about of an alteration by force or through some natural agency
- 3: the process of doing; exertion of energy
- 4: a voluntary act of will that manifests itself externally . . . or that may be completed internally (as in contemplation)
- 5a: a thing done — deed.

*Webster's Third New International Dictionary* 21 (1971). Black's Law Dictionary defines action as “[c]onduct; behavior; something done; the condition of acting; an act or series of acts.” BLACK'S LAW DICTIONARY 26 (5th ed. 1979). These definitions are either self-referential (“an act”) or too vague to exclude inaction (“a voluntary act of will”). The definition most likely assumed by the Congress is that adopted by the Administrative Procedure Act, that “‘agency action’ includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.” 5 U.S.C. § 551(13) (1976) (emphasis supplied).

A second possible choice of meaning is “the bringing about of an alteration by force or through some natural agency.” This definition would limit the section to projects performed by an agency and thus would exclude inaction. Judicial interpretation of major federal action

clear.<sup>17</sup> Congress evidently understood the potential scope of the Act only imperfectly,<sup>18</sup> and NEPA's formal legislative history correspondingly offers little guidance.<sup>19</sup> But there is nothing unclear

as including mere approval by a federal agency of nonfederal programs and projects already has rejected this interpretation. See note 7 *supra*.

Action as "a thing done" leaves considerable ambiguity. A thing done could include an agency project or simply an agency decision acquiescing in a nonfederal program. The generality of the words permits a varied interpretation of this definition.

Action could be defined as decisions resulting in an exercise of agency authority — "overt acts." The "overt act" definition was espoused in *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980). The court gave as examples of overt acts requiring an EIS the issuance of a lease or a right-of-way permit, or the approval of a mining plan. Although this definition can be supported on policy grounds, *e.g.*, relief for federal agencies from the burden of preparing EISs, it is not obviously superior to the first definition postulated.

17. Mechanistic reliance on statutory language susceptible to alternative interpretations is ill-calculated to advance the intent of Congress. The plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence [of legislative intent] if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (per Holmes, J.). "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) (per Hand, J.). The grand generality of NEPA's language, interpreted as a mandate for the courts to fashion environmental common law, significantly reinforces deference to statutory purpose over statutory language. See, *e.g.*, *Hanly v. Mitchell*, 460 F.2d 640, 642 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) (The Act is a "statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing"); *F. ANDERSON*, *supra* note 4, at 56 ("Congress' rather general language necessarily places on agencies and courts the burden of spelling out the precise scope of the Act."). The courts, moreover, have consistently given NEPA a liberal interpretation to effectuate its purposes, particularly in light of the congressional directive to fulfill NEPA's mandate to "the fullest extent possible." 42 U.S.C. § 4332 (1976); *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Commn.*, 449 F.2d 1109, 1118 (D.C. Cir. 1971). See *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972) (NEPA construed broadly to cover protection of quality of life for urban residents); *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Engineers*, 486 F. Supp. 707, 712 (W.D. Pa. 1980) (standing requirements liberally applied to allow workers threatened with job loss to sue under NEPA); *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, 389 F. Supp. 689, 700 (D.D.C. 1974) (notice provisions for SEC rulemaking interpreted liberally to protect general public in the context of NEPA); *Citizens Organized to Defend the Environment, Inc. v. Volpe*, 353 F. Supp. 520, 540 (S.D. Ohio 1972) ("major Federal action" broadly construed). *Cf.* *United States v. Standard Oil Co.*, 384 U.S. 224, 225-26 (1966) (importance of a clean environment warrants a broad interpretation of the Rivers and Harbors Act of 1899); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 84 n.4 (2d Cir. 1975) (liberal interpretation of Clean Air Act and Federal Water Pollution Control Act Amendments of 1972). ("[T]he sympathetic and imaginative discovery" of NEPA's purpose virtually dictates including at least certain agency failures to act within the meaning of "major federal action.") See notes 28-33 *infra* and accompanying text.

18. "Most members of Congress . . . probably did not appreciate the potential scope and significance of the measure [NEPA]." *Dreyfus & Ingram*, *supra* note 4, at 243. See *ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE* 17 (1976).

19. See H.R. REP. NO. 378, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2751; H.R. REP. NO. 765, 91st Cong., 1st Sess., reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2767; S. REP. NO. 296, 91st Cong., 1st Sess. (1969).

An argument has been advanced that a reference in a committee report on NEPA to public "indignation and protest over the actions or, in some cases, the lack of action of Federal agencies" shows that Congress "knew how to say 'inaction' when that is what it meant." *Ferguson*, *supra* note 8, at 511 (quoting the report of the Senate Committee on Internal and Insular

about the underlying procedural purposes of the Act, and exempting cases of agency inaction from the EIS requirement plainly frustrates those objectives.

In Section 101, NEPA announces a national environmental policy whose broad purpose is "to create and maintain conditions under which man and nature can exist in productive harmony . . . ." <sup>20</sup> Section 102 sets up administrative procedures designed to implement that policy. <sup>21</sup> Section 102(2)(C) requires that all federal agencies prepare an EIS before embarking on any "major federal actions significantly affecting the . . . environment . . . ." <sup>22</sup> This provision serves two related functions. First, the preparation of an EIS more fully informs agency decision-makers, by requiring that they consider environmental values *before* the choice of policies is made. <sup>23</sup>

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Affairs, S. REP. NO. 296, 91st Cong., 1st Sess. 8 (1969)). The quote upon which this argument relies appeared in a general discussion of the purpose of NEPA. An assertion that the quote indicates congressional intent to exclude inaction from the coverage of § 102(2)(C) is strained at best. The quote was followed by examples of public concern and then by the statement that "S. 1075 is designed to deal with many of the basic causes of these increasingly troublesome and often critical problems of domestic policy." S. REP. NO. 296, 91st Cong., 1st Sess. 8 (1969). Thus, the Report may be read as a congressional attempt to deal with the problem of lack of action, not an intent to exclude it from the bill. Other examples in the legislative history confirm this interpretation. See 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 *foregone* and unnecessary degradation incurred." (emphasis added)).

Seizing upon isolated references to NEPA's legislative history, however, does little to advance an argument one way or another on the question of requiring an EIS in cases of inaction. As in many cases of statutory construction, the legislators probably did not specifically consider the inaction possibility. See F. ANDERSON, *supra* note 4, at 1-2 (Congress never gave full consideration to the agency-level operation of the statute); Dreyfus & Ingram, *supra* note 4, at 254 (deriving the intent of Congress with respect to section 102 from the legislative history amounts to "voodoo"). But statutes are not limited to the specific examples in the minds of the legislators at the time of passage. See *McGill v. Environmental Protection Agency*, 593 F.2d 631, 635 (5th Cir. 1975):

It would be sophistry for us to divine a congressional intent on a subject it did not consider. Nor would it be permissible for us simply to withhold judgement on the basis that there is no law to apply. Instead we must attempt, at least in part intuitively, to determine how we think Congress would have voted had the question been raised legislatively. See also J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 165 (1909) ("[T]he difficulties of so-called interpretation arise when the Legislature had no meaning at all . . . when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.").

20. National Environmental Policy Act of 1969, § 101(a), 42 U.S.C. § 4331(a) (1976).

21. Section 102 presents "action-forcing procedures which will help to ensure that the policies enunciated in section 101 are implemented." 115 CONG. REC. 40,419 (1969) (exhibit 2, a section by section analysis of the proposed NEPA, offered by Senator Jackson in presenting NEPA conference report).

22. See note 3 *supra* and accompanying text.

23. See, e.g., *Environmental Defense Fund, Inc. v. Hoffman*, 565 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); *Virginians for Dulles v. Volpe*, 541 F.2d 442, 445 (4th Cir. 1976) ("The object of [NEPA] is to require agencies to consider environmental issues when making deci-



This purpose reflects the congressional perception that those responsible for public decisions too often ignored environmental values undefended by any self-interested constituency.<sup>24</sup> Second, the dissemination of the EIS contributes to the accountability of decision-makers. NEPA does not mandate particular results, or empower the courts to substitute their judgment for that of executive agencies.<sup>25</sup> Rather, the Act leaves to the political process the evaluation of the informed value choices made by the responsible officials.<sup>26</sup> The EIS requirement advances the functioning of the democratic process by identifying the environmental values at stake in particular decisions, and communicating to the public how those values fared in the ultimate formulation of policy.<sup>27</sup>

The courts have liberally construed the statute to effectuate these purposes. Section 102 mandates compliance "to the fullest extent

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sions."); *Sierra Club v. Morton*, 510 F.2d 813, 821 (5th Cir. 1975) ("NEPA's procedural requirements do not exist to dictate form but to insure that judgments are no longer based on old values."); *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1973); *Scientists' Inst. for Public Information, Inc., v. Atomic Energy Commn.*, 481 F.2d at 1079-88 ("The statutory phrase 'actions significantly affecting the quality of the environment' is intentionally broad, reflecting the Act's attempt to promote an across-the-board adjustment in federal decision making so as to make the quality of the environment a concern of every federal agency."); *Environmental Defense Fund v. Corps of Engineers of the United States Army*, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) ("NEPA was intended to effect substantive changes in decisionmaking."); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) ("As we view it then the purposes of NEPA are realized by requiring the agencies to assess environmental consequences in *formulating policies*, and by insuring that the governmental agencies shall pay heed to environmental considerations by compelling them to follow out NEPA procedures." (emphasis added)). For a general explication of NEPA's purposes, see Note, *EIS Supplements for Improperly Completed Projects, A Logical Extension of Judicial Review Under NEPA*, 81 MICH. L. REV. 221, 223-26 (1982) (lack of self-interested political support for environmental values leads Congress to adopt procedural requirements to ensure consideration of otherwise neglected ecological concerns; EIS process informs decisionmaking, advances democratic accountability, and provides a record for judicial review).

24. The legislative history supports this conclusion. See S. REP. No. 296, *supra* note 19, 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."); note 19 *supra*. While of little guidance on narrow questions of definition, the legislative history unmistakably indicates the legislative intent to ensure the consideration of environmental values in the formation of public policy.

25. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 555 (1978). But the reviewing court can enjoin a project where the agency has given "clearly insufficient weight" to environmental concerns, pending an adequate EIS. See, e.g., *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060, 1072-73 (8th Cir. 1977).

26. See, e.g., *Minnesota Publ. 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).

27. E.g., *City of Davis v. Coleman*, 521 F.2d 661, 670 n.12 (9th Cir. 1975) ("The narrow purposes of the EIS requirement are to inform the public and agency decisionmakers of the environmental consequences of federal action . . ."); *Iowa Citizens for Environmental Quality, Inc. v. Volpe*, 487 F.2d 849, 851 (1973) ("The environmental impact statement required by NEPA is to serve as a basis for consideration of environmental factors by the agency involved

possible.”<sup>28</sup> The legislative history indicates that this language imposes a strict burden on the agencies and that “no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.”<sup>29</sup> Courts have often looked to this language in giving the EIS requirement a broad scope.<sup>30</sup> In *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission*,<sup>31</sup> one of the first cases to interpret NEPA, the District of Columbia Court of Appeals ruled that the procedural provisions of section 102 “establish a strict standard of compliance.”<sup>32</sup> According to the court, “the requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for

and is to provide a basis for critical evaluation by those not associated with the agency.”); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

In *Silva v. Lynn*, 482 F.2d 1282 (1st Cir. 1973), the court set out three basic purposes of the EIS requirement:

- 1.) “First, it permits the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard. 482 F.2d at 1284.
- 2.) “Second, it serves as an environmental full disclosure law, providing information that Congress thought the public should have concerning the particular environmental costs involved in a project.” 482 F.2d at 1285.
- 3.) “Finally, and perhaps most substantively, the 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.” 482 F.2d at 1285.

28. See note 3 *supra*.

29. The purpose of the new language [“to the fullest extent possible”] is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency’s operations expressly prohibits or makes full compliance with one of the directives impossible. . . . Thus, it is the intent of the conferees that the provision “to the fullest extent possible” shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section “to the fullest extent possible” under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

H.R. REP. NO. 765, 91st Cong., 1st Sess. 9-10, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2767, 2770.

30. See *Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975); *Louisiana v. Federal Power Commn.*, 503 F.2d 844, 874-75 (5th Cir. 1974); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973); *Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Commn.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972); *No East-West Highway Comm. v. Whitaker*, 403 F. Supp. 260, 270 (D.N.H. 1975); *Thompson v. Fugate*, 347 F. Supp. 120, 124-25 (E.D. Va. 1972).

The broad scope appropriate to the EIS requirement has been analyzed as follows:

Some direct light on the scope of § 102(2)(C) is shed by the examples of degradation in NEPA’s legislative history. These examples, coupled with the clear intent of Congress to lay a substantial share of the blame at the feet of ineffectual federal environmental efforts, argue implicitly for the widest possible application for the action-forcing clause. . . . Support for vigorous implementation of § 102(2)(C) and for a wide reading of its provisions is contained in the introductory language of § 102 requiring compliance “to the fullest extent possible.”

F. ANDERSON, NEPA IN THE COURTS 10 (1973). See also ANDREWS, *supra* note 18, at 17-18; Shea, *supra* note 5, at 70.

31. 449 F.2d 1109 (D.C. Cir. 1971).

32. 449 F.2d at 1112.

the agencies, a standard which must be rigorously enforced by the reviewing courts."<sup>33</sup>

The court's later refusal to extend this reasoning to cases of inaction abdicates the judicial responsibility to vindicate the important purposes underlying the EIS requirement. The environmental impact of inaction can be as significant as that caused by agency projects. A federal agency may know of impending nonfederal activity which may affect the environment and which the federal agency has authority to stop. Its decision not to intervene, thereby allowing the activity to proceed, results in an environmental impact identical to that which would occur if the federal agency itself conducted the activity.<sup>34</sup> This anomaly illustrates the frustration of NEPA policies inherent in exempting inaction cases from the EIS provision: in both cases a policy choice may imperil environmental values, but in the inaction case the procedural requirements of the Act would not ensure the consideration of those values by the responsible officials.

Section 102's purpose is "to get all the cards on the table prior to 'any irreversible and irretrievable commitments of resources.'"<sup>35</sup> In the case of the Alaskan wolf-kill, the facts regarding the environmental impact of the wolf extermination program were absent from the Interior Department's decision to acquiesce in the program. The "cards" were not on the table before the potentially irreversible and irretrievable decision to allow the extermination of the wolf packs.<sup>36</sup> Thus the Department arrived at an important environmental decision without a formal assessment of the environmental consequences of its decision,<sup>37</sup> and without informing the public of the weight ac-

33. 449 F.2d at 1114. See notes 118-20 *infra* and accompanying text.

34. Note, *Inaction as Action*, *supra* note 5, at 405 n.76.

35. *Essex County Preservation Assn. v. Campbell*, 399 F. Supp. 208, 214 (D. Mass. 1975) (quoting 42 U.S.C. § 4332(2)(C)(v) (1976)), *aff'd*, 536 F.2d 956 (1st Cir. 1976).

36. According to one court, "[a] primary purpose of NEPA is to consider long-range effects and examine environmental consequences before there are 'irreversible and irretrievable commitments of resources.'" *Chelsea Neighborhood Assns. v. United States Postal Serv.*, 389 F. Supp. 1171, 1182 (S.D.N.Y. 1975).

"[I]rreversible and irretrievable commitment of resources," NEPA § 102(2)(C)(v), is as likely to result from a nonfederal activity as from a federal project. If such a commitment of resources is going to occur on federal land, as in the wolf-kill case, then a federal agency with power to prohibit such an impact should be required to include environmental factors in the decision on whether or not to allow the activity to proceed.

37. An EIS must be prepared at the earliest possible time "so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5 (1981) (Council on Environmental Quality regulations). See Goplerud, *NEPA at Nine: Alive and Well, or Wounded in Action?*, 55 N.D. L. REV. 497, 515-16 (1979). Thus an action/inaction distinction is totally inappropriate because the very function of an EIS in an inaction case is to assist in the decision on whether or not to intervene in the nonfederal activity. Arguing that an EIS is not required on the decision not to intervene (i.e., inaction) is to argue that the EIS is irrelevant to the decisionmaking process. The purpose of the EIS is to educate the federal agency and the public, and poten-

corded to those consequences by political decisionmakers theoretically accountable to the polity. This frustration of accountability assumes greater importance in inaction cases, because in contrast to the initiation of new programs, the decision to maintain the status quo does not trigger public comment and political debate. An informal decision is likely to reflect the values of a small group of individuals and probably will escape the public scrutiny which inevitably results from the preparation and distribution of an EIS.<sup>38</sup>

These concerns have lead the courts to require, unanimously, an EIS when federal approval of a lease or license must precede nonfederal activity significantly affecting the quality of the environment. An agency's decision whether to grant a permit for nonfederal activity affecting the environment at least requires study to determine whether the effect on the environment would be significant. For example, in *Natural Resources Defense Council, Inc. v. Morton*,<sup>39</sup> the court required the Bureau of Land Management (BLM) to prepare an EIS on the decision to grant a permit for livestock grazing on federal land. But the need to include environmental factors in an agency decision on whether or not to stop a nonfederal activity with potentially significant environmental impact is as great as the need to incorporate such factors in a decision to grant a permit for similar activity. If the BLM had not required a permit, but became aware of proposed grazing and enjoyed authority to stop it, the decision not to challenge the grazing would not require an EIS under the *Defenders of Wildlife* definition of major federal action. The distinction between these two cases does not depend on the importance of the decision being made or on the need to consider environmental impacts, but on the formality of the permit process.

The exclusion of inaction from major federal action also furnishes the opportunity for deliberate evasion of NEPA's requirements. A federal agency attempting to carry out an environmentally sensitive project can allow a state agency to carry out the project in return for federal implementation of a less controversial project desired by the state agency. This situation arose in *No East-West High-*

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tially to change the decision of the agency when the environmental impacts of the alternate courses become clear. See note 27 *supra* and accompanying text.

38. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 566 (1965):

There is considerable justification for an insistence on procedural and formal requisites, since policymaking by a small group of political appointees may be objectionably nonrepresentative.

Deference to administrative decision making assumes procedures which assure a fair hearing to the affected interests and a demonstration that the action is grounded on a bona fide intention to implement the legislative purposes.

Thus, the EIS ensures a "fair hearing" for environmental concerns and exposes how well the agency is following NEPA's mandate in its informal decisions.

39. 527 F.2d 1386 (D.C. Cir. 1976), *affg.* 388 F. Supp. 829 (D.D.C. 1974), *cert. denied*, 417 U.S. 913 (1976).

*way Committee, Inc. v. Whitaker*,<sup>40</sup> a suit alleging construction of a highway in violation of NEPA. The plaintiffs demanded preparation of an EIS on a segment of a state/federal highway project that was being constructed solely by the state. The district court held that construction of the segment constituted major federal action, since

A failure to so apply NEPA would create a situation where our nation's highways would be built on a "patchwork basis" with the states constructing those highway portions which are the most environmentally controversial with their own funds, and using federal funds to construct those portions which pose no environmental threat.<sup>41</sup>

The potential for avoiding the requirements of NEPA on certain environmentally controversial projects defeats the goals of informing decisionmakers and the public about the impacts of federal action.<sup>42</sup> "Stubborn problems" and "serious criticism" could simply be "swept under the rug."<sup>43</sup>

This analysis suggests that exempting cases of official inaction from the EIS requirement is unrequired by NEPA's language and repugnant to its purpose. It remains to arrive at an alternative interpretation through the principled exercise of legal method. The Note therefore proceeds to a consideration of alternative interpretations.

### B. *Administrative Interpretation*

The most obvious alternative interpretation of section 102 simply deems "actions" to include inactions.<sup>44</sup> If defensible, such an interpretation would fulfill the statutory purpose of accounting for envi-

40. 403 F. Supp. 260 (D.N.H. 1975).

41. 403 F. Supp. at 279. Two other cases reaching the same result in almost identical fact situations are *Sierra Club v. Volpe*, 351 F. Supp. 1002, 1007 (N.D. Cal. 1972), and *Thompson v. Fugate*, 347 F. Supp. 120, 124 (E.D. Va. 1972).

42. See notes 25-27 *supra* and accompanying text.

43. *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973). See note 27 *supra*.

44. An alternative possibility is to view the agency's *decision* not to act as itself major federal action. See *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm.*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) (There is federal action "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment." (footnote omitted)); Note, *Inaction as Action*, *supra* note 5. This, however, is an obvious fiction. If decisions amount to action by virtue of their consequences, then the decision to decide would in turn require an environmental impact statement, for it could potentially "significantly affect the environment." Indeed, the "decision" to issue a "recommendation or report" may itself significantly affect the environment, if consequences and not conduct form the test for action. Adoption of this approach thus results in a paradoxical regress requiring an infinite number of impact statements. Conversely, the decision divorced from its consequences — the deliberations of the administrators — cannot possibly "significantly affect the quality of the human environment."

Such an interpretation would also require an EIS on traditional agency action to consider every possible alternative use of the resources consumed by the proposed action, since the decision to take that action is necessarily, given budgetary constraints, a "decision" *not* to pursue all alternative uses of the available resources. It will not do to say that absent notice of those possibilities there is no action, because the agency always has notice of the "decision" it prepares to make. Since every decision to act in one way amounts to a decision not to act in

ronmental values in the formation of public policy. The Council on Environmental Quality has issued regulations explicitly adopting this approach. The regulations define major federal action as "actions with effects that may be major and which are potentially subject to Federal control and responsibility."<sup>45</sup> Furthermore, action includes "the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action."<sup>46</sup> This regulation incorporates the awareness that decisions leading to agency acquiescence in a nonfederal activity may have significant environmental consequences and therefore should trigger the EIS requirement.<sup>47</sup> As one commentator has ob-

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countless other ways, the decisional analysis offers only an incoherent solution to the problem of agency inaction.

By contrast, the approaches suggested here do not indulge such limitless semantic scope. By deeming discrete inactions reviewable under the APA, or particular alternative proposals actually put forward by private parties, as the "action" requiring an EIS, the interpretations defended by this Note remain limited to requiring the analysis of reasonable and well-defined policy alternatives.

45. 40 C.F.R. § 1508.18 (1981).

46. 40 C.F.R. § 1508.18 (1981). The relevant section reads in full:

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

47. The court in *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), discussed the new regulations, although they had not yet taken effect at the time the fact situation being litigated arose. The court quoted extensively from a letter from Nicholas Yost, General Counsel of the Department of Justice (Jan. 10, 1979). The letter enunciated the principle that

An EIS need not be prepared . . . where no Federal decisions are required and none have been made. Without a Federal decision — whether that decision be to act or to refrain from action — there can be no "major Federal action" under NEPA.

The letter proceeded to compare that principle with the CEQ's new regulations:

Section 1508.18 of the NEPA regulations is consistent with this principle. The reference in that Section to "a failure to act" was not intended by the Council to require the preparation of an EIS where no Federal decision was required and none had been made. The phrase "failure to act" was intended rather to describe one possible outcome in those situations where a Federal decision had been or was required to be made.

We recognize that the practical effect of a decision not to act and no decision at all is the same in the circumstances of this case. In both cases, State activities on Federal lands may proceed.

627 F.2d at 1238 n.6. The court adopted the position that the agency in this case was not required to decide, and furthermore that no decision had in fact been made. *See* note 95 *infra*.

This strained reliance on the existence of a formal, mandated decision is unwarranted. As noted by one commentator, "[w]hen administrative inaction has the same impact on the rights of a party as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an affirmative decision denying relief." Shea, *supra* note 5, at 78 (footnote omitted). *See* *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970). Just as an agency cannot avoid judicial review by casting its decision in terms of inaction, agencies should not be allowed to evade the requirements of NEPA by a similar ploy. Moreover, by petitioning for formal rulemaking pursuant to the APA, environmentalists can compel the agency to reach a formal decision on an action it has hitherto avoided. *See* notes 63-67 *infra* and accompanying text.

served, "[b]ecause the EIS is often the primary source of environmental input [*sic*] into agency decisionmaking, the Council's regulations seek to define these terms [major federal action] as broadly as possible, while still adhering to Congress's intent."<sup>48</sup>

NEPA created the Council on Environmental Quality (CEQ)<sup>49</sup> and empowered it by executive order to publish regulations interpreting NEPA.<sup>50</sup> Courts accord considerable deference to the interpretation of a statute by an administrative agency charged with its enforcement or implementation.<sup>51</sup> The CEQ adopted new regulations in response to President Carter's executive order making the Council's regulations binding on all federal agencies.<sup>52</sup> In *Andrus v. Sierra Club*,<sup>53</sup> the Supreme Court upheld one of the new regulations and stated that "CEQ's interpretation of NEPA is entitled to substantial deference."<sup>54</sup> This judicial deference gives the CEQ's regu-

48. Note, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347, 357 (1979).

The Note continues:

Thus, courts have found that federal cooperation, approval, or indirect funding represents a sufficient level of federal involvement to require the preparation of an EIS. The regulations codify this broad approach . . . .

*Id.* at 358. Another commentator has argued that "[t]his definition [§ 1508.18], insofar as it reaches actions and inactions potentially federal, appears to go beyond the definition of agency action used in the Administrative Procedure Act." Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843, 860-61 (1980) (footnote omitted).

49. 42 U.S.C. § 4341-4347 (1976).

50. Exec. Order No. 11,991, 3 C.F.R. § 123 (1978), reprinted in 42 U.S.C. § 4321, app. at 592-93 (Supp. III 1979).

The order explicitly gives the CEQ authority to publish regulations and requires federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements." 3 C.F.R. at 124. The CEQ, however, has no enforcement authority over other federal agencies.

51. *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 103 (1973) ("The point is rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how other branches of Government have addressed the same problem."); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 330-31 (1938) ("Thus administrative interpretation, contemporary with the legislation, and the legislative history have weight 'when choice is nicely balanced.'"); *Hassett v. Welch*, 303 U.S. 303, 307 (1938) ("Ascertainment of the intended application of the . . . [revenue acts] involves a reading of them in light of . . . administrative interpretation.").

52. The CEQ regulations referred to were issued in November 1978 and became effective on July 30, 1979. The regulations are codified at 40 C.F.R. § 1500-1508 (1981).

53. 442 U.S. 347 (1979).

54. 442 U.S. at 358.

The Supreme Court justified this deference on the grounds that

The Council was created by NEPA, and charged in that statute with the responsibility "to review and appraise the various programs and activities of the Federal government in light of the policy set forth in . . . this Act . . . , and to make recommendations to the President with respect thereto."

442 U.S. at 358 (quoting 42 U.S.C. § 4344(3) (1976)). This holding is reflective of the attitude that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

The regulation upheld by the Court provided that no EIS was required on federal budget

lations significant weight in resolving questions of statutory interpretation, including the definition of major federal action.<sup>55</sup>

Applying the Council's definition requires determining whether the failure to act is reviewable under the APA.<sup>56</sup> This, however, is easier said than done. The difficulty involves the APA's exclusion from judicial review of "agency action . . . committed to agency discretion by law."<sup>57</sup> The courts have construed this exception very narrowly;<sup>58</sup> a legally sufficient commitment to agency discretion

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appropriations, which was a reversal of the previous CEQ position on the issue. This inconsistency would appear to reduce the value of the regulations under the Supreme Court policy of according only limited weight to "administrative guidelines" which "conflicted with earlier pronouncements of the agency." *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976). See *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Campbell v. Brown*, 245 F.2d 662, 666 (5th Cir. 1957). The Court, however, found that since "CEQ's reversal of interpretation occurred during the detailed and comprehensive process, ordered by the President, of transforming advisory guidelines into mandatory regulations applicable to all federal agencies," any potential loss in persuasiveness from the recent change was negated. 442 U.S. at 358.

55. Since the regulations and *Andrus v. Sierra Club* have appeared, few cases have considered the import of the new status of the Council's interpretation of NEPA. Several courts have reiterated the substantial deference to be accorded to the regulations, but none have applied the regulations to a difficult issue of statutory interpretation. *National Indian Youth Council v. Watt*, 664 F.2d 220, 224-25 (10th Cir. 1981); *Atlanta Coalition of the Transportation Crisis, Inc. v. Atlanta Regional Commn.*, 599 F.2d 1333, 1347 n.19 (5th Cir. 1979); *City and County of Denver v. Bergland*, 517 F. Supp. 155, 200 (D. Colo. 1981); *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994, 998 (D.N.H. 1979).

One commentator has specifically argued that the CEQ regulations should be given great weight in deciding the proper definition of major federal action. "Neither applicable legislative history nor a Supreme Court opinion on this question exists. Substantial deference therefore seems appropriate." Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843, 861 (1980).

For general discussions of the new CEQ regulations, see Comment, *Improving NEPA: New Regulations of the Council on Environmental Quality*, 8 B.C. ENVTL. AFF. L. REV. 89 (1979); Note, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347 (1979); Note, *Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements*, 13 U. MICH. J. L. REV. 367 (1980).

56. See note 46 *supra*. While agency inaction arguably might also fall into the first part of the CEQ definition, i.e., for "actions with effects that may be major and which are potentially subject to federal control," this approach in fact concentrates not on agency inaction, but on the federal control the agency potentially could exercise. Such an interpretation is defended later in this Note. See notes 110-113 *infra* and accompanying text. Insofar as the agency's failure to act is itself the "major federal action" for which plaintiffs demand the preparation of an EIS, the regulation specifically provides that the circumstances in which the failure to act amounts to major federal action are limited to those where the APA provides for judicial review. Given the complexities of the APA itself, it is at best superficial to pounce on the CEQ regulation's inclusion of "the failure to act" as indicating an unqualified EIS requirement for agency inaction. But see Note, *Inaction as Action*, *supra* note 5, at 403 n.65.

57. 5 U.S.C. § 701(a)(2) (1976). Superficially this exception would appear to eviscerate the CEQ's provision for failures to act, since an EIS can only influence decisions over which the agency has discretion. But the narrow interpretation given to this exception leaves many actions within the effective power of administrative agencies still subject to judicial review, and hence within the CEQ's category of failures to act which amount to "major federal actions" for NEPA purposes.

58. See, e.g., *Morris v. Gressette*, 432 U.S. 491, 501 (1977); *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) ("This is a very narrow exception."); *Abbot Laborato-*



depends on the absence of any legal standards for the reviewing court to apply.<sup>59</sup> Agency inaction, however, ranks prominently among the types of cases held to have satisfied the discretion exception.<sup>60</sup> These cases generally involve agency refusals to investigate<sup>61</sup> or prosecute<sup>62</sup> behavior arguably in violation of existing law, rather than the failure to promulgate new rules.

The courts have recently evinced an increasing willingness to review agency refusals to implement policies proposed by private parties.<sup>63</sup> These courts have read the exception for actions "committed

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ries v. Gardner, 387 U.S. 136, 140 (1967) ("Judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); Barlow v. Collins, 397 U.S. 159, 165 (1970) (exception does not apply unless "Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion"); Jaymar-Ruby, Inc. v. Federal Trade Commn., 651 F.2d 506, 510 (7th Cir. 1981) ("the Supreme Court has enunciated a strong presumption against precluding judicial review").

59. The Supreme Court applied this standard in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and it has been followed ever since. "The legislative history of the Administrative Procedure Act indicated that it [the exception for agency discretion] is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (citing S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

60. See, e.g., *Southern R.R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) (agency refusal to investigate excessive rate charges); *Morris v. Gressette*, 432 U.S. 491 (1977) (attorney general's refusal to object to voter registration plan under Voting Rights Act); *City of Chicago v. United States*, 396 U.S. 162 (1969). A number of reasons support this pattern. First, decisions not to act may result from institutional limits on the agency's resources, and even where those seeking to compel agency action can demonstrate a good case for action, only the agency is in a position to know the opportunity costs of any given exercise of its powers and funds. Second, the question of what rules to make, out of the infinite number of possibilities, does not present a concrete question suitable for judicial review, but rather a general question concerning the exercise of plenary authority, more susceptible to legislative or administrative expertise than to judicial intervention. Further, absent a particular rulemaking focus, no adequate record will bring before the court the information necessary to test the reasonableness of the administrative proceedings. All of these arguments are cogently developed — and then rejected — in *Natural Resources Defense Council, Inc. v. Securities and Exchange Commn.*, 606 F.2d 1031, 1045-47 (D.C. Cir. 1979).

61. See, e.g., *Southern R.R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Union Mechling Corp. v. United States*, 566 F.2d 722 (D.C. Cir. 1977); *Kixmiller v. Securities and Exchange Commn.*, 492 F.2d 641, 645 (D.C. Cir. 1974).

62. For cases exempting the exercise of prosecutorial discretion, see *Georgia v. Mitchell*, 450 F.2d 1317 (D.C. Cir. 1971); *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Powell v. Katzenback*, 359 F.2d 234 (D.C. Cir. 1965).

63. See *WWHT, Inc. v. Federal Communications Commn.*, 656 F.2d 807, 814 (D.C. Cir. 1981) ("We reject the suggestion that agency denials of requests for rulemaking are exempt from judicial review."); *Natural Resources Defense Council, Inc. v. Securities and Exchange Commn.*, 606 F.2d 1031 (D.C. Cir. 1979) (explicitly considering the APA issue and reviewing agency refusals to adopt rules requiring corporations to disclose the environmental consequences of their operations in disclosure statements required by the securities laws); *National Black Media Coalition v. Federal Communications Commn.*, 589 F.2d 578 (D.C. Cir. 1978) (reviewing agency refusal to adopt rules without discussion of the APA issue); *Action for Children's Television v. Federal Communications Commn.*, 564 F.2d 458 (D.C. Cir. 1977) (reviewing agency inaction without discussion of APA issue). This development appears largely confined to the District of Columbia Circuit. That Circuit's role as a leader in the development of administrative law, however, highlights the importance of these decisions.

to agency discretion” not to include refusals to act following full formal consideration of the proposed rule.<sup>64</sup> This interpretation greatly expands the scope of the CEQ’s definition, for section 4(e) of the APA requires each agency to permit interested individuals to petition for a rulemaking decision.<sup>65</sup> Established administrative law doctrine subjects to judicial review an agency’s refusal to consider a matter of obvious public importance, notwithstanding the exception for legal commitment to agency discretion.<sup>66</sup> Consequently, an

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64. This is the synthesis adopted in *Natural Resources Defense Council, Inc. v. Securities and Exchange Comm.*, 606 F.2d at 1047. Judge McGowan reasoned that where a formal agency proceeding focused narrowly on a specific set of proposed rules, the particularity of the issue and the adequacy of the record would blunt the objections against judicial review of agency inaction. The most compelling of those objections, however, that only the agency knows where its limited resources will do the most to fulfill its statutory mandate, is made sharper by a full agency consideration of the possibility of employing those resources other than as it does.

65. 5 U.S.C. § 555(e) (1976). The agency may deny the requested rulemaking without holding formal proceedings, pursuant to 5 U.S.C. § 553(b)(3)(B), “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” See S. REP. NO. 752, 79th Cong., 1st Sess. (1945), reprinted in *ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY*, 79th Cong., 1944-46, S. Doc. No. 248, at 201-02 (1946) (“The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings.”). 5 U.S.C. § 555(e), however, requires the provision of notice and a brief statement of the grounds for decision whenever a request “made in connection with any agency proceeding” is denied.

66. See *Union Mechling Corp. v. United States*, 566 F.2d 722, 725 (D.C. Cir. 1977) (“Of course, in order to have its decision escape review, the Commission must actually exercise its discretion. If an agency simply ignores issues whose relevance to the public interest is obvious, the agency’s decision may be reversed.” (citation omitted)). The APA, in addition, requires notice and a brief explanation for the denial of a petition for rulemaking. See note 65 *supra*.

Independent of statutory requirements to respond to requests for action, the Supreme Court has long held agency inaction reviewable by the courts. In *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) the court overruled the doctrine of the nonreviewability of “negative orders” and held reviewable a failure of the Federal Communications Commission to classify *Rochester Telephone* as an exempt carrier under section 2(b) of the Communications Act of 1913. The court stated that “[n]egative” has really been an obfuscating adjective in that it implied a search for a distinction — which does not involve the real consideration on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability.” 307 U.S. at 141-42.

Thus *Rochester Telephone* permits review of an action which “is attacked because it does not forbid or compel conduct by a third person.” 307 U.S. at 130. This formulation of reviewable actions covers the definition of inaction, as long as the “doctrines of primary jurisdiction and administrative finality” are satisfied. 307 U.S. at 142. The doctrine of primary jurisdiction is “primarily applicable to controversies concerning so-called regulated industries” (e.g., the operations of the Interstate Commerce Commission and the Civil Aeronautics Board). JAFFE, *supra* note 39, at 124. Hence the doctrine has little relevance to the normal NEPA suit involving the Departments of Interior, Defense, Transportation, the former Department of Housing and Urban Development, and the Environmental Protection Agency (Suits against these five agencies accounted for 69% of all NEPA cases in 1978. COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY* — 1979, 588).

The doctrine of administrative finality is particularly relevant to inaction cases in which there is probably no concrete agency order. Two non-NEPA cases, however, held agency inaction reviewable by the courts in spite of the lack of a formal agency order. In *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), the court held that the failure of the Secretary of Agriculture to suspend the registration of DDT under the Federal Insecticide, Fungicide, and Rodenticide Act as requested by the plaintiffs was reviewable. The court

agency's refusal to implement policies put forward by an environmental group could escape review (although deferential standards of review would almost surely preclude a finding that the refusal to act amounted to an abuse of discretion)<sup>67</sup> only if the agency fully and fairly considered the proposal before rejecting it, but did not hold hearings or other formal proceedings on the proposed rule.

This synthesis suggests an attractive interpretation of the CEQ's regulation. Environmentalists seeking agency action should petition under the APA for the promulgation of appropriate rules.<sup>68</sup> The agency's refusal to adopt the proposed rules would amount to a reviewable decision if it either ignored the proposed rules or conducted formal proceedings to consider them. Yet the agency could, for "good cause," dispose of frivolous petitions by responding that after a full consideration of their merits it had found that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>69</sup>

This procedure, coupled with the NEPA-related limiting devices discussed in Part II, would reconcile the need to consider the environmental consequences of agency inaction with judicial apprehensions of limitless and obstructionist legal maneuvering. Unfortunately, this integration of administrative and environmental

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stated that "when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief." 428 F.2d at 1099 (footnote omitted).

In *Medical Committee for Human Rights v. Securities and Exchange Commn.*, 432 F.2d 659 (D.C. Cir. 1970), the court held that the failure of the SEC to require Dow Chemical Company to include in a proxy statement a resolution forbidding the company from making napalm was reviewable. The court required a showing of final effect from the inaction and a degree of formality in the inaction. It found that the Commission's decision had a final effect and that "no significance whatsoever inheres in the fact that the administrative determination is couched in terms of a 'no action' decision rather than in the form of a decree binding a party to perform or refrain from some particular act." 432 F.2d at 668. The requirement of formality was mandated by section 25(a) of the Securities Exchange Act of 1934 under which review of SEC orders is authorized. This requirement would not be applicable in the usual case of review under section 706(1) of the APA.

These cases demonstrate that review of many cases of inaction is possible under current administrative law. Thus many cases of inaction would constitute "failure to act" which is "reviewable under the Administrative Procedure Act" as provided in the CEQ definition of major federal action.

67. As Judge Edwards noted in a recent decision, "[w]e have no doubt that, except in the rarest cases, the decision to institute rulemaking is one that is largely committed to agency discretion; however, this begs the question with respect to judicial review." *WWHT, Inc. v. Federal Communications Commn.*, 656 F.2d 807, 815 (D.C. Cir. 1981).

68. See note 65 *supra*. Since "rule" under the APA includes, among other things, "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," it will not be difficult to describe any proposed policy in a petition for rulemaking. 5 U.S.C. § 551(4). In the *Defenders of Wildlife* case, for example, the plaintiffs could have petitioned the BLM to adopt a rule prohibiting the killing of wolves on federal lands.

69. See note 65 *supra*.

law is as fragile as it is elegant. The extremely recent application of judicial review to agency inactions that follow formal proceedings may prove inconsistent with the Supreme Court's interpretation of the discretion exception, for many agency refusals to act reflect a policy calculus of the very sort that leaves "no law" by which the reviewing courts may evaluate the agency's decision.<sup>70</sup> And notwithstanding the vagueness of the reviewability criterion, some inactions with major environmental consequences, such as administrative or criminal enforcement decisions, clearly fall within the exception to reviewability for purely discretionary decisions.<sup>71</sup> The consideration of environmental values in agency decisions not to act should rest on a more secure legal foundation than this approach provides, even though it establishes a compelling, if complex, minimum standard for requiring impact statements in cases of agency inaction.

### C. *Actions Rejected by Agencies as Proposed Major Federal Action*

The complexity and paradoxes of action/inaction distinctions, especially when grounded in the changing and sometimes inconsistent jurisprudence of the APA, suggest that an analytical focus on the inaction contemplated by the agency is misplaced. Concentrating on the action proposed by those demanding that the agency prepare an EIS offers a clearer and more comprehensive approach to the problem of applying NEPA in cases of agency inaction. This Note proposes that a private petition for rulemaking pursuant to the APA should be deemed "a proposal" for federal action, and that the consideration of such a proposal requires the agency to prepare an EIS if the action proposed would otherwise satisfy the criterion for "major federal action."

This interpretation clearly provides for the incorporation of environmental values in decisions to reject proposals for agency action. It also fully satisfies the statutory language and the CEQ regulations. NEPA does not require that the agency preparing the EIS *favor* the "proposal for . . . major federal action."<sup>72</sup> The CEQ regulations provide very generally that a "proposal" exists when an agency "is actively preparing to make a decision on one or more alternative means of accomplishing [its] goal and the effects can be meaningfully evaluated."<sup>73</sup> At the time the agency prepares to reject a pri-

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70. Whether the Interior Department's decision to implement the vague mandate of the FLMPA by favoring caribou over wolves can be tested against legal standards evident on the face of that statute presents an exceedingly unclear question. A similar question persists with respect to whether an agency's decision to devote its scarce enforcement resources to cases other than those of interest to the plaintiffs litigating the agency's failure to act can be subjected to some legal test of fidelity to statutory purpose.

71. See notes 60, 62 *supra*.

72. See note 3 *supra*.

73. 40 C.F.R. § 1508.23 (1981).

vate petition for rulemaking, it prepares to decide among competing alternatives, action and inaction. Typically, as in *Defenders of Wildlife*, the environmental effects are then predictable. And the regulation's definition of "major federal action" as "action with effects that may be major and which are *potentially* subject to Federal control" reinforces the validity of treating policies proposed by individuals but disfavored by the agency itself as a "proposal" for "major federal action."<sup>74</sup>

Such an interpretation does not conflict with established NEPA jurisprudence. The permit cases, for example, clearly involve agency decisions on "major federal actions" proposed by private parties, *i.e.*, the developers seeking to utilize federal lands.<sup>75</sup> And the common law of NEPA unanimously agrees that the heart of the Act's procedural regime mandates the consideration of environmental values without requiring specific substantive decisions.<sup>76</sup> It follows that an agency's opposition to a proposal for major federal action does not distinguish a case from the permit cases, where the agency favors the private request for federal action.<sup>77</sup> Indeed, official indifference to environmental values strengthens, rather than weakens, the case for an EIS.<sup>78</sup> Of course, consideration of the "environmental impact" of the proposed action would, under NEPA, also require consideration of the available alternatives — in these cases, the status quo. Thus the proposed approach would result in agency consideration of the same environmental comparisons, without depending on metaphysical distinctions between action and inaction. Provided that the action proposed by the plaintiffs satisfies the requirements for "major federal action," the same standards relied on to define the actions requiring impact statements when favored by agencies could also de-

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74. 40 C.F.R. § 1508.18 (1981). The court in *Defenders of Wildlife v. Andrus* stated that because section 102(2)(C) requires an EIS on a "recommendation or report" on "proposals" for major federal actions, "only when an agency reaches the point in its deliberations when it is ready to propose a course of action need it be ready to produce an impact statement." 627 F.2d at 1243. The court thereby excluded a case of inaction from section 102(2)(C). Neither NEPA nor the regulations define "recommendation or report." It is difficult, however, to imagine a meaningful definition which would exclude an agency's written explanation under the APA for its refusal to undertake major federal action as anything but a "recommendation" against the proposed action, and as an unfavorable "report" upon the proposal. Indeed, one of the virtues of the proposed interpretation is that the APA would require a formal response to requests for agency rulemaking. See note 65 *supra*.

75. See note 7 *supra*; Note, *Inaction as Action*, *supra* note 5, at 404 ("All courts faced with the questions have construed a federal agency's grant of a license or lease to a state or private party to be MFA." (footnotes omitted)).

76. See notes 23-24 *supra* and accompanying text.

77. The agency cannot itself initiate the proposal to approve a private request for a lease or license; it follows that the fact that the proposed action originates outside the agency is not dispositive of its status as a "proposal" for major federal action. In short, it appears impossible to distinguish a private request for permission to conduct private activity significantly affecting the environment from a private request to prevent the same environmental effects.

78. See notes 23-24 *supra*.

fine the need for an impact statement when the agency inclines against implementing the proposed action.

#### D. *NEPA's Purposes and the Costs of Procedural Solutions*

Congress, through section 102, ordered that "to the fullest extent possible," all laws, regulations and policies be administered consistent with NEPA's broad policy goals.<sup>79</sup> Exempting inaction cases from federal action, and thus from the EIS requirement, often frustrates these goals and conflicts with NEPA's procedural emphasis.<sup>80</sup> Such an interpretation allows federal agencies, on an informal basis, to make decisions not to act in the face of nonfederal activity which they could prevent and which could lead to far-reaching environmental effects. In other cases, exclusion of inaction from the EIS requirement would furnish opportunities for purposeful evasion of NEPA's mandate to consider carefully environmental effects before initiating agency projects.<sup>81</sup> Given the availability of statutory interpretations more faithful to NEPA's purposes, the courts should revise their approach to agency inaction. The CEQ's inclusion of reviewable agency inaction in the category of "major federal action" offers a fully justified, but limited, step in this direction. A more natural reading of the statute would focus on the action proposed by those seeking judicial review of the agency's refusal to prepare an EIS, rather than on the inaction favored by the agency. Such a reading of section 102 offers the most coherent solution to cases of agency inaction, by simultaneously honoring the language and purposes of the Act.

Naturally, some limitations on the scope of section 102 in inaction cases is necessary to prevent NEPA from becoming an intolerable burden on federal agencies,<sup>82</sup> and it is to that issue that Part II now turns. But given NEPA's broad goals, its language when read in light of these goals, its legislative history, and CEQ interpretations of 102(2)(C), courts should resolve any uncertainty in the definition of major federal action liberally,<sup>83</sup> so that decisionmakers bear in mind the environmental consequences not only of their actions, but of their inactions.

## II. LIMITING PRINCIPLES

In a case involving a federally proposed project, the agency first

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79. See notes 3, 20 *supra* and accompanying text.

80. See note 37 *supra* and accompanying text.

81. See notes 40-43 *supra* and accompanying text.

82. See *Iowa Citizens for Envtl. Quality, Inc. v. Volpe*, 487 F.2d 849, 852 (8th Cir. 1973); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

83. See note 17 *supra*.

looks to the process outlined in the CEQ regulations<sup>84</sup> to determine if implementation of the project would constitute major federal action requiring an EIS. First, the agency tries to categorize the action. The regulations direct agencies to prepare an EIS if the action is one which "normally requires an environmental [impact] statement."<sup>85</sup> Alternatively, an agency may decide not to prepare an EIS, or even an environmental assessment,<sup>86</sup> if it determines that the action deserves a categorical exclusion,<sup>87</sup> that is, if the action belongs in a "category of actions which do not individually or cumulatively have a significant effect on the human environment."<sup>88</sup> Second, in the event an action is not easily categorized, the agency must prepare an environmental assessment, which provides a preliminary environmental analysis of the project.<sup>89</sup> The agency then decides, based on the assessment, whether to commence EIS preparation or to issue a "finding of no significant impact" [FONSI] to the interested public.<sup>90</sup>

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84. In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

- (1) Normally requires an environmental statement, or
- (2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9).

40 C.F.R. § 1501.4 (1981). Agencies may also adopt their own procedures to supplement those of the CEQ. 40 C.F.R. § 1507.3 (1981).

85. 40 C.F.R. § 1501.4(a)(1) (1981).

86. See notes 88-89 *infra* and accompanying text.

87. See 40 C.F.R. § 1501.4(a)(2) (1982); see also note 84 *supra*.

88. "Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. . . . 40 C.F.R. § 1508.4 (1981).

89. "Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by 102(2)(E) [42 U.S.C. § 4332(2)(E) (1976)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9 (1981).

90. See 40 C.F.R. § 1501.4(e) (1981).

The CEQ regulations define a finding of no significant impact as follows:

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

In an inaction case, the primary activity under consideration is, by definition, nonfederal. Yet once an agency is aware of the nonfederal activity, and determines it has the authority to stop it, it could apply the CEQ regulations in a similar manner. Inclusion of inaction under NEPA has prompted the objection that the task of identifying possible instances of inaction on which to prepare EISs, and the need to prepare statements when necessary, will overwhelm the agencies subjected to these requirements.<sup>91</sup> This Note suggests three principles to help agencies deal with requests for EISs in inaction cases. First, if the courts do no more than follow the CEQ's interpretation, the limitations on the reviewability of agency inaction under the APA will limit the need for impact statements to those private requests for agency action sufficiently plausible to merit formal consideration. Second, unless an agency is formally notified of prospective nonfederal activity, and has the authority to prevent it, no EIS should be required. Third, the agency should, in the first instance, determine its own jurisdiction under a categorical exclusion procedure analogous to that applied under the CEQ regulations to review the substantive nature of the activity.<sup>92</sup>

These principles directly respond to the practical objections to requiring an impact statement in cases of agency inaction. Their implementation will eliminate the need for agencies to identify inaction cases, and will allow agencies to dispose of any frivolous requests quickly. Those requests that remain will create extra work for agencies,<sup>93</sup> but will ensure that agencies carefully consider issues that the

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40 C.F.R. § 1508.13 (1981).

91. The objections to the broad definition of major federal action were best expressed in *Defenders of Wildlife v. Andrus*:

No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so. Nor does it suffice to say that an agency's burden would be kept to a reasonable level by the fact that no impact statement is needed when the inaction could have no significant environmental results, for we have held that an agency which decided not to issue an impact statement must provide a written explanation for its reasons for that decision. . . . It would be an imaginative and vigorous agency indeed which could identify and prepare all the statements and explanations appellees' reading of NEPA would have the statute demand.

627 F.2d at 1246. One commentator has raised the objection that allowing inaction as a form of major federal action would improperly involve courts in initial determinations of agency jurisdiction. *See Fergenson, supra* note 8, at 518-23. This objection is considered in note 115 *infra*.

92. *See* notes 87-88 *supra* and accompanying text.

93. The number of additional EISs which will be required in inaction cases is impossible to estimate. A major source of inaction cases is likely to be new state proposals for major actions on federal lands which an agency has power to control. The number of such major projects is probably limited, but the potential environmental impacts are great.

The burden of preparing additional EISs is mitigated by the new requirements of the CEQ regulations on the length of EISs. The regulations seek to streamline the EIS process by restricting the documents to 150 pages for a normal EIS and 300 pages for an EIS "of unusual scope or complexity," and by instituting other procedures for reducing paperwork and delay. *See* 40 C.F.R. §§ 1500.4, 1500.5 (1981). The costs of preparing EISs in 1974 was estimated at 1.2 percent of the annual budget of the Corps of Engineers. The Nuclear Regulatory Commis-



Congress, through NEPA, deemed essential to the rational formulation of public policy.

### A. *Agency Notice*

The fulfillment of NEPA's procedural purposes requires limiting the inactions that trigger the EIS provision to cases of an agency's deliberate decision not to act.<sup>94</sup> Thus, plaintiffs in inaction suits must demonstrate agency awareness of the nonfederal activity at issue. If an agency fails to prevent a nonfederal activity that it is aware of, and could prevent, then a conclusive presumption should arise that the agency decided not to intervene. That is, an assumption should be made that not to decide is to decide.<sup>95</sup> Such a presumption would prevent agencies from avoiding NEPA's mandate by ignoring nonfederal activities and making decisions by default. Independent of such a presumption, plaintiffs could avoid informal decisionmaking by a formal petition for agency action pursuant to the APA.<sup>96</sup>

Identifying instances of authority to prevent impending nonfederal activity will not overwhelm government agencies if they need only respond to private petitions in such cases, rather than fulfill a duty to discover them. Instead, plaintiffs will know that, in the event of litigation, agency awareness will constitute an element of the prima facie case of agency inaction improperly decided upon without an EIS. A formal request for the agency to enjoin temporarily the nonfederal activity arguably within its authority, pending completion of an EIS, offers one possibility of proving notice; a formal petition for rulemaking under the APA, however, would provide undeniable proof of notice and agency reaction.<sup>97</sup> Such a request would notify the agency of the nonfederal activity's existence and the

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sion put its NEPA expenditures for 1975 at \$14.9 million, or about 2.2 percent of the cost of one nuclear power plant. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES 45 (1976) [hereinafter cited as CEQ REPORT]. Thus the costs of EIS preparation are not overwhelming agencies, and the additional costs from inaction cases are unlikely to expand this financial burden significantly.

94. Thus, "conscious inaction" can be distinguished from "true inaction," where an agency does not intervene because it is unaware of the nonfederal activity. See Note, *Inaction as Action*, *supra* note 5, at 399-400.

95. "At some level, of course, an agency cannot avoid 'deciding' whether to act when, as here, it has been asked to act and has declined to do so. That is the point of the cliché that 'not to decide is to decide.'" *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1247 n.6 (D.C. Cir. 1980). Despite this recognition, the court refused to apply the EIS requirement because the appellees themselves had argued that the Secretary had not decided and because the court believed that the Secretary was not compelled to decide whether to intervene.

96. See note 65 *supra* and accompanying text.

97. A "request" will be used to refer to a communication from a private party seeking agency intervention in a nonfederal activity or, in lieu of such intervention, the preparation of an EIS on the agency's inaction.

possibility of intervention.<sup>98</sup> The agency would then worry only about specific requests for intervention, avoiding the burden of employing a separate staff to discover every possible exercise of authority which it is not pursuing.<sup>99</sup>

Although the notice requirement removes the burden of actively identifying inaction cases, it is difficult, if not impossible, to predict the number of requests which agencies will receive. Nonetheless, trends indicate that the number of requests is unlikely to prove unduly burdensome. CEQ data reveal that in 1975, agencies assessed about 30,000 administrative actions to determine whether EISs were required.<sup>100</sup> During the same year federal agencies filed over 6,000 draft EISs;<sup>101</sup> only 143 NEPA cases reached the courts.<sup>102</sup> Since environmental groups must choose their law suits carefully within financial limits,<sup>103</sup> they are unlikely to respond to the acceptance of a broad definition of major federal action by filing a wave of NEPA suits.<sup>104</sup>

Similarly, the filing of a request for intervention and an EIS with

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98. The requirement of notice by plaintiffs will not inhibit the bringing of legitimate suits for EISs on inaction. The requirement can be satisfied by showing receipt of a written request by the agency and hence the burden should not deter legitimate plaintiffs. Furthermore, a potential NEPA plaintiff would be unlikely to incur the expense of filing a suit to compel EIS preparation without first requesting the agency to prepare one voluntarily. The opinion in *Defenders of Wildlife v. Andrus* indicates that plaintiffs first asked the Department of Interior to prepare an EIS and only filed suit when the Department failed to respond. 627 F.2d 1238, 1240 (D.C. Cir. 1980).

99. Agencies can, of course, prepare EISs on cases of inaction which they themselves discover. The scheme of responding only to requests for EISs on inaction represents a minimum of compliance which agencies are free to exceed depending on the relative burden of responding to the external requests.

100. CEQ REPORT, *supra* note 93, at 32.

101. CEQ REPORT, *supra* note 93, at 32.

102. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 122 (1977). The number of suits filed under NEPA reached a high of 189 in 1974, but dropped to 119 in 1976, 108 in 1977, 114 in 1978, and 139 in 1979. Liroff, *NEPA Litigation in the 1970's: A Deluge or a Dribble?*, 21 NAT. RESOURCES J. 315, 321 (1981).

103. Liroff, *supra* note 102 at 325-26. Liroff notes that "the expense of a lawsuit and the courts' disdain for frivolous litigation discourages the abuse of the litigation opportunities afforded by NEPA." *Id.* at 325. On the expense of litigation, see Henson & Gray, *Injunction Bonding in Environmental Litigation*, 19 SANTA CLARA L. REV. 541, 551-52, 554 (1979); Higginbotham, *Does the System Cause Excessive Legal Fees?*, 14 FORUM 681 (1979); Note, *Environmental Financing Litigation*, 19 NAT. RESOURCES J. 679, 679 (1979) (the note cites costs and attorney's fees of \$100,976.14 awarded in the case of NRDC v. Costle, 12 Env't. Rep. Cas. (BNA) 1181 (D.D.C. 1978)); Comment, *After Alyeska: Will Public Interest Litigation Survive?*, 16 SANTA CLARA L. REV. 276, 310 (1976).

104. Plaintiffs would have to seek temporary injunctions to preserve the status quo while a case is decided. The standard for obtaining a temporary injunction alone screens out most frivolous suits at an early stage. See J. SAX, *DEFENDING THE ENVIRONMENT* 116 (1970). The plaintiff must show that he is likely to succeed when the case is decided on the merits; that he will suffer irreparable injury to legal rights if relief is not granted; that the harm to the defendant in the case of an injunction does not outweigh the harm to the plaintiff in case of no relief; and that the public interest is served by granting the injunction. Henson & Gray, *supra* note 103, at 545-46.

an agency requires a certain, albeit smaller, commitment of resources. The resources needed to document the nonfederal activity,<sup>105</sup> to develop a colorable claim of agency authority, and to prepare correspondence to the agency — much less a formal rule-making petition — may alone limit the number of requests filed. Part B outlines a procedure which would allow agencies to deal summarily with those requests which are actually filed but which seek intervention clearly outside the agency's authority. Federal agencies already assess 30,000 actions annually to determine the necessity of EISs. With the proposed safeguards, the agencies will probably not be overly burdened by the incremental increase due to requests in inaction contexts, even as they more effectively apply NEPA's mandate.

### B. *Agency Determination of Authority*

Although a notice requirement will eliminate the need for agencies to spend time actively identifying inaction cases, the requests that do appear will require consideration. Opponents of inclusion of inaction as action may argue that agencies will be overburdened by the need to produce detailed statements of reasons in those cases where they deny a request for an EIS.<sup>106</sup> The agencies often may issue these statements summarily, under the substantive categorical exclusion outlined in the CEQ regulations<sup>107</sup> — if the nonfederal activity belongs to a class of activities which “do not individually or cumulatively have a significant effect on the human environ-

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105. The requirement that a nonfederal activity must have a significant environmental impact should be reiterated here. This requirement flows directly from section 102(2)(C)'s language. 42 U.S.C. § 4332(2)(C) (1976). A change in the environmental status quo has been adopted by courts as a requirement of major federal action. *See, e.g.,* Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980) (“An EIS is not required, however, when the proposed federal action will effect no change in the status quo.”), *cert. denied*, 450 U.S. 965 (1981); Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) (“The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo.”), *cert. denied*, 445 U.S. 915 (1980); Sierra Club v. Andrus, 581 F.2d 895, 903 (D.C. Cir. 1978), (1979) (“[S]ection 102(2)(C) contemplates a ‘proposal’ for taking new action which significantly changes the status quo.”) *revd. on other grounds*, 442 U.S. 347. This requirement eliminates the fear that the bare existence of authority would be sufficient for invoking NEPA, a reservation expressed by the court in *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 (D.C. Cir. 1980), and given as a reason why action should not be defined broadly to cover inaction. 627 F.2d at 1247-48 (quoting letter from Nicholas Yost, General Counsel of the CEQ, to the Department of Justice (Jan. 10, 1979)); *see* notes 5, 9 *supra*.

106. Whenever an agency refuses a private request to prepare an EIS, the agency is expected to notify the private party of the reasons for the refusal. 40 C.F.R. § 1501.4(e)(1) (1981). *See Arizona Pub. Serv. Co. v. Federal Power Commn.*, 483 F.2d 1275, 1282 (D.C. Cir. 1973) (statement of reasons for a refusal to prepare an EIS is the minimum for compliance with NEPA). *But cf. Schere v. Volpe*, 466 F.2d 1027, 1032 (7th Cir. 1972) (statement of reasons for a refusal to prepare an EIS is not required, but would be preferred and would greatly assist judicial review).

107. *See* note 84 *supra* and accompanying text.

ment,”<sup>108</sup> the agency may apply a categorical exclusion and refuse to prepare an EIS. In such a case, the agency may, but need not,<sup>109</sup> prepare an environmental assessment and prepare a detailed statement of reasons for denial of the EIS request.

This Note proposes that determinations of authority in inaction cases also follow a summary procedure. The courts should fashion a “jurisdictional” categorical exclusion for any case where an agency plainly lacks the authority to prevent the nonfederal activity complained of. This process is usually unnecessary in the case of a federal project or program, since there the determination of agency authority happens well before EIS preparation, when the project or program is first proposed. The summary procedure makes this determination part of inaction cases, and simplifies an agency’s task of dealing with requests for intervention and EISs. When an agency receives a request, it should first consider whether it possesses the authority to prevent the nonfederal activity. If such authority exists, either inaction would constitute federal action or the proposed exercise of authority would itself amount to potential federal action, and the agency must then proceed to consider whether the nonfederal activity in question significantly impacts the environment.<sup>110</sup> If no authority exists, the agency can summarily deny the request and simply furnish the requesting party with the reason for the refusal to intervene and for the EIS denial. Difficult cases of interpreting statutory mandates may arise in inaction cases just as they do in cases of agency projects.<sup>111</sup> Nevertheless, the burden on an agency of determining whether it has authority to prevent a particular nonfederal activity should not overtax the agency’s resources. First, agencies continually determine their own statutory authority in their daily activities and reviewing courts accord their determinations substantial deference.<sup>112</sup> Second, many requests will lend themselves to

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108. See notes 86-88 *supra* and accompanying text.

109. 40 C.F.R. § 1508.4 (1981).

110. In other words, if an inaction request cannot be excluded for lack of authority, the agency must examine the environmental impact of the nonfederal project under the steps outlined above to determine if an EIS is needed. See notes 84-90 *supra* and accompanying text.

111. See, e.g., *Sierra Club v. Environmental Protection Agency*, 540 F.2d 1114 (D.C. Cir. 1976) (suit concerning the authority of EPA to regulate under the Clean Air Act), *cert. denied*, 430 U.S. 959 (1977).

The agency should not be intimidated by the fear of being bound by its decisions about its authority because an agency is not firmly subject to *stare decisis*. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 17.07 (3d ed. 1972); Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 543, 544 (1936-37). However, the agency would be unlikely to claim no authority as a matter of course because the courts may later invalidate a contrary decision on authority if the agency appears to have acted arbitrarily. See K. DAVIS, *supra*, at § 17.07; Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 138 (1957).

112. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (“That rule [of exhaustion of administrative remedies] has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.”

straightforward analysis.<sup>113</sup> Third, the research burden on agencies could be eased by placing a burden on those who request agency intervention and EIS preparation to come forward with a colorable claim of agency authority as part of the request.

The proposed procedure would minimize the agencies' apprehended burden of continually supplying explanations for EIS denials.<sup>114</sup> Allowing summary rejection of requests for intervention and an EIS based on an initial determination of no authority will enable the expeditious disposition of frivolous requests without the need for a detailed statement of reasons for the denial of each request.<sup>115</sup>

The courts can accord agency interpretations of their statutory authorizations varying weight, from force of law, to no weight, to some intermediate degree.<sup>116</sup> The standard for judicial review of agency decisions under NEPA has stirred debate, particularly since

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(footnote omitted)); *Maremont Corp. v. Federal Trade Commn.*, 431 F.2d 124, 127 (7th Cir. 1970) ("[J]urisdictional questions which are really determined by the facts of the case must first be decided by the agency which has been charged with enforcement."); *Securities and Exchange Commn. v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.) ("[I]t has long been established that the question of the inclusion of a particular person or entity within the coverage of a regulatory statute is generally for initial determination by an agency."), *cert. denied*, 398 U.S. 958 (1970); *In re Agent Orange Product Liability Litigation*, 475 F. Supp. 928, 932 (E.D.N.Y. 1979) (where agency has supervisory power over a regulatory scheme, unique technical expertise in the disputed area, and had already commenced hearings, it would be an abuse of discretion for the court to act before the plaintiffs brought their complaint to the agency).

The reason for this attitude of the courts "is that agencies tend to be familiar with, and sophisticated about, statutes that they are charged with administering. This expertise is assumed to result not only from the frequency of an agency's contact with the statute, but also from its immersion in day-to-day administrative operations that reveal the practical consequences of one statutory interpretation as opposed to another." Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329 (1979). See note 51 *supra* and accompanying text; note 130 *infra*.

113. For example, in *Defenders of Wildlife v. Andrus*, the plaintiffs alleged that the agency had authority to stop the wolf-kill under the Federal Land Policy and Management Act. The applicable section of the Act requires that "[t]he Secretary [of Interior] shall manage the public lands under principles of multiple use and sustained yield . . ." Federal Land Policy and Management Act of 1976, § 302(a); 43 U.S.C. § 1732(a) (1976). The regulations of the Department of Interior state that:

The Federal agencies may, after consultation with the States, close all or any portion of land under their jurisdiction to public hunting, fishing or trapping in order to protect the public safety or to prevent damage to Federal lands or resources thereon, and may impose such other restrictions as are necessary to comply with management objectives.

43 C.F.R. § 24.3(b) (1981). This regulation and the supporting statute demonstrate that the Department of Interior had authority to prevent the wolf-kill. See *Defenders of Wildlife v. Andrus*, 9 Env't. Rep. Cas. (BNA) 2111, 2115 (D.D.C. 1977).

114. For a discussion of the potential burdens, see *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980).

115. The categorical exclusion procedure also answers the objection that the inclusion of inaction under major federal action would result in courts becoming the initial judge of agency authority in contravention of the primary jurisdiction rule. See Fergenson, *supra* note 8, at 519-22. The agency is given a chance, upon request to prepare an EIS, to decide on its own jurisdiction. This decision can later be reviewed by a court if a suit is brought to compel preparation of the EIS. See *id.*

116. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 60 (2d ed. 1979).

NEPA is silent on the subject.<sup>117</sup> Recent Supreme Court cases indicate that while NEPA requires courts to ensure full compliance with the procedural elements of the EIS process, substantive decisions arrived at as a result of the EIS process merit reversal only when they are “arbitrary and capricious.”<sup>118</sup> This complies with the “principle of full inquiry,”<sup>119</sup> and the “hard look” doctrine<sup>120</sup> favoring inten-

117. Because of NEPA's silence, review usually is sought under the judicial review sections of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1976) (APA). Section 702 of the APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” Section 706 outlines standards for judicial review:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The APA is applicable to NEPA since the APA declares that a “[s]ubsequent statute may not be held to supersede or modify” the judicial review provisions “except to the extent that it does so expressly” 5 U.S.C. § 559 (1976), which NEPA does not. For cases applying the APA to NEPA, see, e.g., *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 226 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978); *Silva v. Lynn*, 482 F.2d 1282, 1283 n.1 (1st Cir. 1973); *Sierra Club v. Hassel*, 503 F. Supp. 552, 560 (S.D. Ala. 1980), *aff'd*, 636 F.2d 1095 (5th Cir. 1981); see *Shea, supra* note 5, at 76-81.

118. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978), Justice Rehnquist, speaking for the majority, endorsed the “arbitrary and capricious” standard and stated:

NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this court would have reached had they been members of the decisionmaking unit of the agency. (citation omitted). Two years later, in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980), the Court, in a per curiam opinion, stated that

*Vermont Yankee* cuts sharply against the . . . conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot “interject itself with the area of discretion of the executive as to the choice of the action to be taken.”

119. For a discussion of the “principle” of full inquiry, see B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* 104-07 (1981).

120. *E.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1975) (“The only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences . . .”); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 828 (D.C. Cir. 1972) (if the

sive judicial review to ensure that agencies fully analyze a problem before reaching a conclusion, while generally deferring to agencies' technical expertise on the merits of the substantive decisions reached.

Before entering the EIS writing process, however, agencies must make several threshold decisions under NEPA: whether the action is major, whether the action is federal, and whether the action significantly affects the environment.<sup>121</sup> While some courts review threshold decisions under the "arbitrary and capricious" standard,<sup>122</sup> many have moved to a somewhat stricter standard,<sup>123</sup> reversing when the agency did not act reasonably in reaching a decision.<sup>124</sup>

An argument can be made that the success of the proposed categorical exclusion procedure depends upon a severely limited scope of judicial review. This line of reasoning would posit that the summary procedure is designed so agencies can expeditiously deal with dubious requests for EISs in inaction situations. The incentive for private parties to litigate denials of requests will be low given an

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agency has taken a "hard look" at environmental consequences, court will not interject itself in the area of executive discretion); *Greater Boston Television Corp. v. Federal Communications Commn.*, 444 F.2d 841, 851 (D.C. Cir. 1970) (court should see if the agency has "taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision making" before it intervenes); *Stewart, Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1804, 1811 (1978).

121. See *Shea*, *supra* note 3, at 68-76; notes 5, 9 *supra* and accompanying text.

122. See, e.g., *Nucleus of Chicago Homeowners Assn. v. Lynn*, 524 F.2d 225, 229-30 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Maryland National Capital Park & Planning Commn. v. United States Postal Serv.*, 487 F.2d 1029, 1039 n.7 (D.C. Cir. 1973); *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

123. See, e.g., *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975); *Minnesota Pub. Interest Research Group v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); Comment, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 82-87 (1976).

124. The basis for this standard stems from the Supreme Court's decision in *National Labor Relations Bd. v. Hearst*, 322 U.S. 111 (1944), involving the interpretation by the Board of the term "employee" in the National Labor Relations Act. The Court held that the Board's determination was to be accepted if it had "warrant in the record" and a reasonable basis in the law." 322 U.S. at 131.

The reasonableness standard seems to be in accord with the Supreme Court's decision in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In reviewing the Secretary of Transportation's approval of federal financing for a highway through a public park, the Court established a two-step review of agency decisions under the Department of Transportation Act: reviewing under a reasonableness standard whether the agency acted within the scope of its authority, and then applying an arbitrary and capricious standard of review to the actual decision. 401 U.S. at 415-16.

Since *Overton Park* did not involve NEPA, however, it does not directly answer the threshold issues, and courts have differed as to its applicability. Compare, e.g. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 465-66 (5th Cir. 1973) (reading *Overton Park* to require higher standard of judicial review for threshold decisions than for later agency decisions), with *Faircrest Site Opposition Comm. v. Levi*, 418 F. Supp. 1099 (N.D. Ohio 1976) (applying arbitrary and capricious standard to all agency determinations). See *Shea*, *supra* note 5, at 88-99; Comment, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 83-84 (1976).

arbitrary and capricious standard. This would allow agencies to make decisions confident that they would not be challenged, or that in the event of litigation, they would generally be upheld. Moreover, the disincentive to litigate would reduce the possibility of overburdening an already crowded federal court docket.

Nevertheless, the success of the jurisdictional categorical exclusion does not depend on severely limited judicial review. First, while including inaction as action will increase the amount of requests for EISs, it should not lead to a host of frivolous requests.<sup>125</sup> Second, if denials in frivolous cases are challenged in court, they will probably be disposed of quickly by summary judgment. Finally, a more searching standard of review will ensure that the categorical exclusion proposal will not be abused. If courts are virtually bound by agency determinations, then agencies can decide when to prepare impact statements by setting high threshold levels below which NEPA would not apply.<sup>126</sup> Since NEPA was part of Congress' response to agency capture by special interest groups,<sup>127</sup> such abuse is not unthinkable. NEPA instructs all federal agencies to consider environmental matters in decisionmaking.<sup>128</sup> Given the inconvenience of EIS preparation assumed by the underlying objection to overburdening agencies, an impartial check may provide needed encouragement for agencies to handle requests for intervention and an accompanying EIS with open minds and in good faith.<sup>129</sup> Given agencies' familiarity with the statutes they administer, the courts will review with substantial deference any decision they make.<sup>130</sup> Particularly in the area of jurisdiction, courts are uniquely suited to providing such a check and ensuring that agency statutory interpretation does not circumvent the important goals Congress expressed when enacting NEPA.<sup>131</sup>

### CONCLUSION

The courts can apply the limiting principles suggested here to re-

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125. See notes 100-04 *supra* and accompanying text.

126. F. ANDERSON, NEPA IN THE COURTS 101 (1973).

127. See *id.* at 104; B. ACKERMAN & W. HASSLER, *supra* note 119, at 7.

128. F. ANDERSON, NEPA IN THE COURTS 106 (1973).

129. *Id.* at 104 (1973).

130. See *National Labor Relations Board v. Hearst*, 322 U.S. 111, 130 (1944) (Board's determination given deference because of its "everyday experience in the administration of the statute."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency interpretations relegated to a role of "guidance" based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); see notes 51, 112 *supra* and accompanying text.

131. See *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (Secretary's decision on scope of his authority entitled to a "presumption of regularity, . . . [b]ut that presumption is not to shield his action from a thorough, probing, in-depth review.")



move some of the objections that have been raised against requiring an impact statement in cases of agency inaction. Any such requirement in inaction cases will, of course, increase the federal agencies' workloads. Agencies would be required to prepare EISs which they formerly could have avoided. The agencies would also be required to answer more requests for EISs, which will involve answering questions concerning their statutory mandates. An increase in the workload of agencies, however, does not suffice to defeat the important congressional purposes behind NEPA. Since NEPA's inception, the courts have held that "[c]onsideration of administrative difficulty, delay or economic cost will not suffice to strip the section [102] of its fundamental importance."<sup>132</sup> Because the procedural requirements of that section become, if anything, more important when agencies decide not to exercise their authority, the courts should not hesitate to adopt statutorily reasonable and practically feasible approaches to applying the EIS requirement in cases of agency inaction.

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132. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).