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# A CASE ANALYSIS OF POLICY IMPLEMENTATION: THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969\*

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Policy adopted by the legislature is not self-executing. Administrators must apply policy to problems. In so doing they exercise discretion as to how and to what extent their actions comply with statutory provisions. The discretion exercised by administrators varies from policy to policy. For any particular policy, the availability and use of discretion depend on internal agency factors and external patterns of support and pressure. Because of these interactions in the administrative system during the implementation process, actual policy impacts may differ significantly from the legislative articulation of objectives.<sup>1</sup> This essay summarizes a number of factors that affect implementation of the National Environmental Policy Act (NEPA) of 1969.<sup>2</sup> The findings are synthesized from the literature on NEPA that studies the statute's impact upon environmental decisions and the process of decisionmaking.

On the whole, federal agencies have reluctantly and incompletely complied with NEPA's requirements. Barriers and restraints have discouraged the Council on Environmental Quality (CEQ), the Office of Management and Budget (OMB), Congress and private interest groups from playing a significant role in policing agency implementation. Yet a number of incentives have encouraged federal courts to assume an aggressive role. But as the major tool for achieving the goals of NEPA, establishing a national policy on the environment, and reforming administrative decisionmaking in environmental management, judicial activism has serious limitations. This essay concludes that the interaction of these institutional limitations accounts for the gap between NEPA's statutory promise and its policy performance.

## SECURING IMPLEMENTATION: AGENCY REACTIONS

Federal agency implementation of NEPA and response to the

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1. See, e.g., Pressman & Wildavsky, *Implementation* (1973).

2. 42 U.S.C. § § 4321 *et seq.* (1970).

requirement in Section 102(2)(C) for environmental impact statements (EIS), has been reluctant and incomplete. Evidence contained in General Accounting Office (GAO) reports, Congressional hearings, and scholarly research supports this pessimistic conclusion about NEPA's effectiveness during its first few years of existence.

At the request of the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant Marine and Fisheries Committee, the GAO reviewed the efforts of seven agencies and concluded that agency implementation was neither systematic nor uniform. The EIS was not being utilized as an integral component of these agencies' decisionmaking processes.<sup>3</sup> The GAO also evaluated the adequacy of six selected EIS's and found insufficient attention to environmental impacts and alternatives and to comments of reviewing agencies, which limited the usefulness of the EIS in agency decisionmaking.<sup>4</sup>

Review of EIS's by Leonard Ortolano and William Hill,<sup>5</sup> a study team at the University of Colorado,<sup>6</sup> and Gordon A. Enk<sup>7</sup> substantiate the GAO findings. Impact statements, they found, were generally inadequate, prepared as project justifications rather than decisionmaking instruments, and prepared at a stage at which it was difficult to modify or reverse plans. The Environmental Impact Assessment Project of The Institute of Ecology (TIE) has discovered serious and persistent problems in impact statements which limit their usefulness for decisionmaking and planning.<sup>8</sup> Furthermore, H. Paul Friesema and Paul Culhane found treatment of social impacts in EIS's inadequate.<sup>9</sup>

During Congressional hearings agencies have indicated their displeasure with the new demands made of them. The agencies argue that NEPA's procedural mandates reduce their capacities to discharge agency duties. While praising NEPA's goals and objectives, they quickly point out areas in which compliance with NEPA require-

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3. Comptroller General, Report on Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969 (1972).

4. Comptroller General, Report on Adequacy of Selected Environmental Impact Statements Prepared Under the National Environmental Policy Act of 1969 (1972).

5. Ortolano & Hill, *An Analysis of Environmental Statements of Corps of Engineers' Water Projects* (Technical Information Service 1972).

6. Kreith, *Lack of Impact*, 15 *Environment* 26-33 (1973); Kennedy & Hanshaw, *The Effectiveness of Impact Statements: The US Environmental Policy Act of 1969*, 37 *Ekistics* 19-22 (1974).

7. Enk, *Beyond NEPA: Criteria for Environmental Impact Statement Review* (Institute on Man and Science 1973).

8. Statement of Malcolm Baldwin in *Complying with NEPA: Practice, Problems and Potential*, 29 *Bus. Lawyer* 1349-52 (1974).

9. Friesema & Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 *Nat. Res. J.* (1976).

ments creates difficulties. They complain that NEPA procedures are too costly, time-consuming, inflexible, cumbersome, and detailed. Compliance, the agencies say, results in unreasonable and unnecessary delays. For the most part the agencies do not challenge the innovative spirit of NEPA, just its procedural, mechanical guts contained in the action-forcing provisions of Section 102.<sup>10</sup>

A number of analysts have looked within the decisionmaking process to explain why agency reluctance to implement NEPA could have been expected. Steven Fishman contends that established policies, procedures, programs, and philosophy limit agency responsiveness to any new environmental policy. NEPA demands innovation, creativity and adaptation, all of which involve the risk of failure. Since failure threatens achievement of a basic administrative goal—institutional survival—an agency will cling to the patterns which have proven successful. Hence, the agency will praise NEPA's policy goals, but the administrative response will be to exert the least effort possible.<sup>11</sup>

Richard Liroff also notes the importance of institutional survival and organizational maintenance. He argues that in order to secure organizational well-being, each agency establishes predictable patterns of relationships with its clientele—a “negotiated environment.”<sup>12</sup> An agency will not willingly disrupt these basic institutional relationships; it prefers to reinforce and preserve its negotiated environment.

The quest for institutional survival is also linked to an agency's statutory mission, as that mission is defined by Congress. An agency that successfully performs its mission can expect continuing and expanding support for its services. NEPA asks agencies to criticize their own programs and to suggest alternatives outside their own jurisdiction. It expects agencies to question the very missions that are the basis for their existence. For this reason the chairman of the Administrative Conference of the United States argues that agencies' propensities to fulfill their missions will always prevail.<sup>13</sup> While NEPA may affect the details of a project, it is unlikely to reverse project plans or result in major modifications of agency programs, even though they cause environmental disruption.

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10. See, e.g., *Joint Hearings on the National Environmental Policy Act Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs*, 92nd Cong., 2nd Sess. (1972).

11. Fishman, *A Preliminary Assessment of the National Environmental Policy Act of 1969*, 1973 Urban L. Annual 209-41.

12. Liroff, *Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969*, 3 Loyola U. L. J. 29-33 (1972).

13. Joint Hearings, *supra* note 10, at 397.

Joseph Sax is also pessimistic about NEPA's ability to promote environmentally innovative thinking. NEPA has failed, he says, because behavioral "rules of the game" take precedence over NEPA's procedural reforms. According to Sax, an agency's operational responsibilities make it choose the solution which offers the most certainty for Congressional funding. A politically sensitive agency will also attempt to avoid alienating its friends and constituents. The solution preferred by an agency will probably not be challenged by staff, hired professional consultants, or sister agencies. These behavioral institutional patterns, concludes Sax, make it highly unlikely that agency self-reform will occur.<sup>14</sup>

Structural characteristics of a bureaucratic institution also affect agency implementation of NEPA. In his comparison of the water resource development programs of the Corps of Engineers and the Soil Conservation Service (SCS), Richard Andrews finds variances attributable, in part, to internal differences in bureaucratic organization. The Corps, concludes Andrews, was initially more responsive to NEPA than the SCS because

"it was a larger and more autonomous agency; because the broader range of its activities permitted more flexibility to change priorities without threat to its organizational survival; and because it builds larger projects whose budgets can more easily accommodate the expense of additional environmental studies."<sup>15</sup>

Deficient in these organizational resources, the SCS's adaptation was more difficult and more restrained.

Helen Ingram<sup>16</sup> and Richard Liroff<sup>17</sup> emphasize the importance of an agency's communication system. Incremental decisionmaking and a restricted communications system, the authors maintain, enable decisionmakers to search for information which is consistent with their perceptions, attitudes, beliefs and goals, and to filter out information which is not. The selective perception which incremental decisionmaking reinforces also affects the processing of information. It narrows the kinds and numbers of alternatives considered, and the permissible range of choice. The ingredients necessary for the long-range, full option, rational decisionmaking that NEPA requires are absent.

Both behavioral and structural institutional variables affect agency

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14. Sax, *The (Unhappy) Truth About NEPA*, 26 Okla. L. Rev. 239-48 (1973).

15. Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 Nat. Res. J. 301 (1976).

16. Ingram, *Information Channels and Environmental Decision Making*, 13 Nat. Res. J. 150-69 (1973).

17. Liroff, *supra* note 12, at 26-29.

reactions to NEPA. In sum, these characteristics include the bureaucratic organization's constricted communications structure, its flow and use of information, its basic quest for institutional survival, its statutory mission and financial incentives to perform that mandate, its negotiated accommodations with clientele groups, its support from staff, consultants and sister agencies, and its capabilities in terms of size, budget and staff competencies. Although these characteristics vary among agencies they usually work together to make the agencies resistant to change.

#### SECURING IMPLEMENTATION: THE ROLE OF EXTERNAL ACTORS AND ISSUES

Despite internal pressures discouraging agency implementation, actors and issues in the agencies' external environment often affect the scope and direction of agency implementation. To assure that NEPA's policy objectives and decisionmaking reforms are implemented, Congressional oversight committees, the courts, CEQ, OMB, and private interest groups might be expected to play a vigorous role. Yet except for the courts, these political actors have not played major roles in NEPA's implementation.

CEQ lacks statutory authority to force agency compliance and inclination to forge an aggressive oversight role for itself. The Council has been most effective in persuading agencies voluntarily to adopt its guidelines and in reviewing environmental impact statements to determine weaknesses in agency implementation procedures. However, CEQ's oversight role is limited because it does not have authority to veto actions of agencies or compel adoption of its guidelines.<sup>18</sup> It does not have sufficient staff to review EIS's.<sup>19</sup> It has also been criticized for failing to devise objectives and guidelines for developing impact assessment methods.<sup>20</sup> Unable to sanction agencies for noncompliance, CEQ has relied upon environmental litigants and the courts to accomplish what it could not.<sup>21</sup> As the courts have handed down stringent rules, CEQ has incorporated them into its revised guidelines.

During NEPA's formulative stages, there were indications that

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18. Liroff, *The Council on Environmental Quality*, 3 Environmental L. Rep. 50051-70 (1973); Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 12-13* (1973); Andrews, *The Council on Environmental Quality: An Evaluation*, 27 J. Soil & Water Conservation 8-11 (1972).

19. Miller, *Four-Year Score on the Environment*, 38 Progressive 24 (1974); *Complying with NEPA*, *supra* note 8, at 1320.

20. Lapping, *Environmental Impact Assessment Methodologies: A Critique* 4 Environmental Affairs 124 (1975).

21. Liroff, *supra* note 18, at 50052.

OMB would play an important role in securing agency compliance. It was expected that OMB, through its legislative clearance authority, would monitor agency compliance with NEPA's requirement that EIS's be prepared for proposed legislation. However, OMB has not made NEPA environmental clearance part of its general clearance activities. Lacking OMB supervision, the agencies have had little incentive to prepare EIS's for legislative proposals, and few lawsuits have been filed to compel their preparation. As a consequence, very few EIS's for legislative proposals have been filed.<sup>2 2</sup>

Messages from Congressional oversight committees are conflicting. One of the sponsors of NEPA, Representative John Dingell (D-Mich.), chairman of the Fisheries and Wildlife Subcommittee of the House Merchant Marine and Fisheries Committee, is an ardent supporter of NEPA. During oversight hearings in 1970 and 1972, Dingell's subcommittee prodded the agencies to comply more fully with NEPA and encouraged CEQ to do more to improve agency procedures.<sup>2 3</sup> The aggressiveness of Dingell and his subcommittee, however, is not shared by other Congressional oversight committees. Many of these committees have been more concerned about their agencies' performance of their missions than about their compliance with NEPA. During 1972, Congressional backlash against NEPA became so severe that environmentalists formed an ad hoc "Save NEPA" coalition to lobby against a spate of proposed NEPA amendments.<sup>2 4</sup> Finding considerable support in Congress for less than full NEPA compliance, the agencies are not responsive to the few Congressional voices which urge more vigorous implementation.

Differences in public opinion regarding environmental protection also enable the agencies to relax their application of NEPA. In the late 1960's the environmental crisis was a dominant public issue. NEPA symbolized the belief that environmental quality was a public problem requiring governmental action. Shortly after enactment of NEPA the environmental crisis began to give way to the energy and

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22. Anderson, *The National Environmental Policy Act: How It Is Working, How It Should Work*, 4 Environmental L. Rep. 10003-07 (1974).

23. *Hearings on the Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2nd Sess. (1970); *Report on the Administration of the National Environmental Policy Act*, H.R. Rep. No. 316, 92nd Cong., 1st Sess. (1971); *Hearings on the Administration of the National Environmental Policy Act—1972 Before Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92nd Cong., 2nd Sess. (1972).

24. See generally Barfield, *Exemptions from NEPA Requirements Sought for Nuclear Plants, Pollution Permits*, 4 Nat'l J. 1025-34 (1972); Gillete, *National Environmental Policy Act: Signs of Backlash Are Evident*, 176 Science 30-33 (1972); Zeldin, *Will Success Spoil NEPA?*, 74 Audubon 105-11 (1972).

inflation crises. Modifications in environmental protection legislation, including NEPA, are more frequently and forcibly espoused as necessary if future energy demands are to be met. Presidential policies echo this sentiment. Energy and economic initiatives have priority over the environmental quality mandates of NEPA. The levels of support that NEPA's clientele (environmentally concerned citizens and groups) have been able to muster are slowly eroding. In this climate of changing public opinion, the agencies appear hopeful of finding public acquiescence in, if not support for, their reluctance to embrace environmental values and continued advancement of projects which are environmentally disruptive.

Economically based and development-oriented interest groups such as miners, farmers and ranchers, loggers, utilities, and business groups have not been ardent supporters of NEPA. Many depend upon the federal government for grants of money, contracts, permits and licenses, which are "major federal actions" subject to NEPA's scrutiny. These interest groups are the agencies' clientele and integral components of the agencies' negotiated environment. They have routine access to the agencies, which in turn often seek their help. They exert considerable influence in agency decisionmaking,<sup>25</sup> and their opposition to NEPA contributes to and reinforces the agencies' unhappiness with NEPA.

Environmentalists, on the other hand, are seldom part of the negotiated environment of the agencies. Environmentalists often articulate policy demands directly contrary to the agencies' missions, and they sometimes advocate actions which threaten the agencies' institutional survival. Administrators do not as a general rule seek their counsel. Access is not routine.<sup>26</sup> Unable to persuade decision-makers to comply with NEPA, environmentalists litigate. In this respect, environmentalists are like many other groups that depend upon the judicial process to pursue their policy interests because they cannot attain their goals from elected political institutions or the bureaucracy. To achieve their goals, they must resort to litiga-

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25. For discussions of the access and influence of the large economic interest groups, see Truman, *The Governmental Process* (1955); Zeigler, *Interest Groups in American Society* (1964).

26. A substantial body of literature also supports the conclusion that access for all groups is not institutionalized and that not all groups are represented or exert influence in the agencies' decisionmaking process. See, e.g., T. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (1969); Schattschneider, *The Semi-Sovereign People* (1960). On the access difficulties of environmental groups, see Large, *Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 *Wis. L. Rev.* 62-113; H. Cortner, *Disadvantaged Groups in an Energy-Environment Conflict: The Southwest Power Controversy* (Ph.D. dissertation, 1973).



tion.<sup>27</sup> In the case of NEPA, the courts are using their authority to protect and advance the interests of the environmentalists.

#### SECURING IMPLEMENTATION: FACTORS ENCOURAGING JUDICIAL ACTIVISM

Several factors have encouraged the courts to take a leading role in implementing NEPA. The first is the ambiguous, indeterminate language of the act. NEPA's provisions are general and vague. Uncertainties in statutory language usually present many litigable issues, and NEPA has more than its share of indefinite language.

To resolve statutory construction disputes, the courts use two rules of decision.<sup>28</sup> The first approach, "argument via plain meaning," focuses on the literal meaning of the statute. The second, "argument via legislative history," looks behind the words of the statute to determine what its framers meant. In NEPA's case the "plain meaning" of the Act is not readily apparent; the first approach offers little assistance.

The legislative history approach is not much more helpful. NEPA passed Congress without accumulating the extensive legislative record one would expect for such an important piece of legislation. One of two Senate staff members who drafted the initial version of Section 102, Daniel Dreyfus, noted that "there wasn't much wrangling in the [conference] committee" over the language of Section 102, and although the staff attempted to generate public interest in the provisions, there was a "gross lack of appreciation for the significance of that language." He expected the EIS's to be "brief, general statements averaging about two pages in length."<sup>29</sup> Floor debate in each house on the conference report was minimal, and the report was passed by a simple voice vote. Most importantly, little was said about how NEPA's action-forcing provisions were to be enforced. The paucity and inconclusiveness of data on Congressional intent and enforcement expectations is a second factor which encourages the courts to interpret NEPA freely.

Unassisted and unrestrained by NEPA's language and history, the courts have considerable latitude to interpret the Act. However, judicial discretion can operate to restrict a statute's impact: courts can refuse to recognize justiciable issues, they can throw problems back to administrative agencies for resolution, or they can narrowly

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27. R. Cortner, *The Apportionment Cases* (1972).

28. The two approaches are described in Spaeth, *An Introduction to Supreme Court Decision Making* 54-56 (1972).

29. Barfield & Corrigan, *White House Seeks to Restrict Scope of Environment Law*, 4 *Nat'l J.* 338, 340 (1972).

construe the statute. They have rejected these options in interpreting NEPA, choosing to play an aggressive role by entertaining challenges to agency interpretation of the statute and recognizing that the statute imposes many judicially enforceable procedural duties. According to Frederick Anderson, the "courts' leading role in requiring compliance with NEPA may be traced in large measure to their current willingness to review all agency action more closely than they did only a few years ago."<sup>30</sup> Judicial receptivity to NEPA can be viewed as part of a general evolutionary trend in judicial decision-making. By accepting NEPA cases and reviewing agency action regarding NEPA, courts are not engaging in unprecedented behavior. This expanding role of the courts is a third factor which enables them to assume an active role in NEPA implementation.

Fourth, NEPA itself expands the courts' scope of review of agency behavior. The foremost authority on administrative law, Kenneth Culp Davis, summarizes the changes.

NEPA calls into play many basic principles of administrative law. It does not break or bend any of them but, like a magnet, it applies a new force. NEPA teaches a good lesson about delegation. It seems to make reviewable some action that would be unreviewable without NEPA. It introduces an unfamiliar problem about the scope of review. Some administrative action that has never been subject to a requirement of a statement of findings and reasons is pulled into that requirement, and some information must be disclosed under NEPA that is exempt from required disclosure under the Information Act. NEPA provides new testing for emerging ideas about fair informal procedure and for the most difficult portion of the problem of requirement of opportunity to be heard.<sup>31</sup>

NEPA goes beyond the traditional rules of administrative law which govern judicial review of agency decisionmaking. To this extent "administrative law under NEPA often differs from administrative law without NEPA."<sup>32</sup> These more expansive rules for judicial review increase the number of points of entry for litigants to challenge agency actions in court.

Finally, courts cannot unilaterally seek to implement the law; cases and controversies must be brought to the courts. Individuals and groups must be willing and have sufficient resources to engage in litigation. NEPA does not lack litigants who seek to enforce it. Because of agency unresponsiveness, environmentalists have been compelled to pursue their policy goals in the courts. According to

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30. Anderson, *supra* note 18, at 15.

31. K. Davis, *Administrative Law: Cases-Text-Problems* 587 (1973).

32. *Id.*, at xiii.

Werner Grunbaum, they have been successful 50 per cent of the time in the district courts and 45 per cent of the time on appeal.<sup>33</sup> Their success breeds more litigation. When the threat of suit does not gain agency compliance or when compliance with a previous ruling is less than desired, environmentalists may return to court. Even if the litigation process only succeeds in delaying a proposed project, the environmentalists have scored a partial victory. Delay forces officials to take a closer look at the environmental ramifications of the proposed federal action. Thus, judicial activism in implementing NEPA gives environmentalists increased access to and influence over administrative decisionmaking.

In summary, an ambiguous statute which invites litigation, a scanty legislative history, the general tendency of the courts to expand judicial review, the administrative law-expanding character of NEPA, and a constant supply of litigants combine to create an atmosphere conducive to judicial activism in implementation of NEPA.

#### THE INFLUENCE AND RESULTS OF JUDICIAL ACTIVISM

The influence and results of judicial activism can be seen in a number of areas. Because most litigation has focused on the EIS requirement, courts have played an important role in EIS formulation and review. The courts have been called upon to resolve issues surrounding the applicability of the EIS requirement, and once applicability is determined, issues surrounding preparation of the statement. These issues include: (1) whether a "major federal action" is involved; (2) whether the action will "significantly affect" the environment; (3) which agency should file the EIS; (4) when the statement must be filed; (5) who must prepare the statement; and (6) what the statement must contain.<sup>34</sup> Judicial decisions on these questions have made the courts important promulgators of guidelines and criteria for EIS preparation and review.

To date, the most important impact of judicial activity has been to force compliance with NEPA's procedural provisions. A long-standing rule of judicial review is that review is foreclosed when "agency

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33. Grunbaum, *Judicial Attitudes Toward Environmental Quality in the Federal and State Courts* (unpublished paper, 1974); see the similar data compiled by Wichelman, *Federal Agency Implementation of the National Environmental Policy Act of 1969: Toward a Framework for Explaining Differential Response* (unpublished paper, March 1975).

34. Seeley, *The National Environmental Policy Act: A Guideline for Compliance*, 26 *Vand. L. Rev.* 295-325 (1973). See also Anderson, *supra* note 18; Yarrington, *The National Environmental Policy Act*, 4 *Environmental Rep.*, 17 (monograph 1974); Deutsch, *The National Environmental Policy Act's First Five Years*, 4 *Environmental Affairs* 3-80 (1975).

action is committed to agency discretion by law."<sup>35</sup> Consequently, courts are reluctant to rule on the merits of an agency's decision. The courts tend to focus instead on whether a decision was made in accordance with procedures prescribed by law. Courts seldom challenge the substance of the decision if it is made in accordance with prescribed procedures. However, several courts have moved beyond recognition of procedural duties to declare that NEPA establishes judicially enforceable substantive rights. Yet on the whole, the courts have shied away from substantive review of agency decisions in NEPA cases.<sup>36</sup>

Though judicial review generally does not reach to the substance of decisions, agencies have still cancelled or modified project plans in response to NEPA.<sup>37</sup> Allan Wichelman links the agencies' compliance with NEPA's procedural mechanisms to substantive changes within the agencies. He contends that the agencies' procedural response has triggered a variety of learning processes which facilitate agency adaptation to a new, internal environmental analysis structure and facilitate substantive modifications in agency attitudes and behavior. NEPA values, maintains Wichelman, are being integrated, albeit incrementally, into agency planning and decisionmaking.<sup>38</sup>

NEPA has created new points of access to agency decisionmaking for environmental groups and citizens. These access points have given the groups greater opportunity to be heard, to acquire information about proposed projects, and to obtain review of agency decisionmaking. Friesema and Culhane argue that participation in the EIS commenting process and in litigation can be and has been used to increase the environmental sensitivities of decisionmakers and to force environmental accountability upon the agencies.<sup>39</sup> In short, asserts Liroff, through litigation and the threat of litigation, "ecology groups have become significant actors in the agencies' environments."<sup>40</sup>

The courts have given NEPA and its principal action-forcing provi-

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35. Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1946).

36. For discussion of judicial recognition of substantive rights see, e.g., Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 Environmental L. Rep. 50028-43 (1973); Yarrington, *Judicial Review of the Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 S.D. L. Rev. 279-94 (1974); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harv. L. Rev. 735-758 (1975).

37. Council on Environmental Quality, *Environmental Quality—1973*, at 246-47 (1973); Council on Environmental Quality, *Environmental Quality—1974*, at 377-81 (1974).

38. Wichelman, *supra* note 32.

39. Friesema & Culhane, *supra* note 9. See also Friesema, *Environmental Group Fragmentation and Administrative Decision-Making* (unpublished paper, April 1975).

40. Liroff, *supra* note 12, at 36.

sions meaning, sustenance, and vitality. Judicial interpretation has made NEPA more than a vague and insignificant policy declaration. Courts have said whether NEPA applies and if so, when. They have also played the dominant role in enforcing compliance with the EIS requirement. They have formulated criteria for EIS preparation and evaluated the adequacy of completed statements. Whether the effect of judicial review is limited to procedural matters or whether it extends to assuring implementation of NEPA's substantive policy goals has been debated, and some support has been found for the latter position. Fear of being enjoined has compelled the agencies to implement NEPA. Evidence is emerging that NEPA values are gradually being integrated into agency decisionmaking and that environmental groups are assuming more salient roles in agency activities. Hence, it is not surprising that many associate NEPA and Section 102 successes with the successes of litigation. Throughout NEPA literature the conclusion is pronounced; to the extent implementation of NEPA requirements has been achieved, judicial activity has been the primary catalyst of change. Judicial policymaking has extended NEPA's meaning "beyond anybody's wildest dreams."<sup>41</sup>

#### PROBLEMS ASSOCIATED WITH JUDICIAL ACTIVISM AS THE PRIMARY INSTRUMENT FOR POLICY IMPLEMENTATION

Courts have serious disabilities for serving as the primary agent for implementing NEPA. First, courts can be overruled by Congress<sup>42</sup> and lower federal courts can be overruled by the Supreme Court. The Supreme Court has heard relatively few NEPA cases, and has yet to construe NEPA in any significant way. Yet the possibility exists that a whole line of lower court decisions could be overruled or severely modified by Supreme Court action.

Moreover, lower courts can overrule themselves. Courts are sensitive to the political climate in which they operate. While in the short run they may render decisions counter to the prevailing political climate, in the long run their policies reflect the opinions of the lawmaking majority.<sup>43</sup> Mounting criticism of judicial interpretations and growing discontent in the legislative and executive branches with the results of NEPA requirements may signal the courts to begin to modify or reverse prior decisions.

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41. Statement of Daniel Dreyfus, in Barfield & Corrigan, *supra* note 29, at 340.

42. Many amendments have been introduced which, if enacted, would have directly or implicitly amended NEPA. While a few exemptions have been made, NEPA has to date generally withstood efforts to amend it.

43. Abraham, *The Judiciary: The Supreme Court in the Governmental Process* 116-17 (1969).

Second, administrative agencies soon accommodate themselves to the courts. As Martin Shapiro notes, agencies are adept in "cultivating consensus by throwing issues up to the courts in forms and degrees that will elicit judicial approval or at least acquiescence. In short, the agencies know what will play in court and what won't."<sup>44</sup> There is no reason to expect that agencies are not learning the rules of the game and will soon know which impact statements and agency procedures will be acceptable to a court and which will not. Agencies will learn not to press claims which disturb the traditional harmonious relationship described by Shapiro that exists between administrative agencies and the courts.

Third, the procedural rules governing access to the courts function more to the advantage of the agencies than to environmental litigants. According to Donald Large, administrative unresponsiveness to environmental claims, combined with restrictions on the use of courts before, during and after the administrative process form a closed system of law. Threshold technicalities consume much of the attention of the courts, and if an agency can win just one of the skirmishes over procedural issues, the case is dismissed.<sup>45</sup>

Finally, judicial attitudes and behavior operate to protect commercial, industrial, and agency interests. Grunbaum's data show that judges tend to view environmental problems within an economic framework and to support agencies that are defending their projects against the assaults of environmentalists.<sup>46</sup> These economic and agency proclivities put individuals and environmental groups at a disadvantage even in the courtroom when they try to press environmental claims.

While the foregoing factors pose potential threats to NEPA's implementation, two limitations of judicial activism are already manifest. First, judicial activism has overproceduralized<sup>f</sup> NEPA. Agency reaction to judicial rebuke has been to add more paper to the EIS. A longer, data-crammed statement, the agencies are finding, can meet the judicial tests for adequacy. As the EIS drowns in a sea of minutiae, its usefulness as a public information document diminishes. Individuals and citizen groups lack the time and resources adequately to digest or review a multi-volumed EIS. Major issues can thus be more easily obscured.

Judicial emphasis on procedure has also made agency identification and evaluation of environmental impacts a discrete process associated with the EIS. It has encouraged the agencies to view the

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44. M. Shapiro, *The Supreme Court and Administrative Agencies* 267 (1968).

45. Large, *supra* note 26.

46. Grunbaum, *supra* note 32.

impact statement as a court exhibit. The statement must convince a court that environmental factors have been considered by the agency and that environmental consequences have been fully disclosed.<sup>47</sup> Some scholars maintain that if identification and evaluation of environmental consequences are to be truly effective, environmental assessment must be interwoven throughout the entire planning process.<sup>48</sup> Yet as long as courts focus upon assessment as it is presented in the impact statement, agencies are unlikely to feel compelled to perceive assessment techniques and data as integral parts of agency policymaking. The EIS's will continue to serve as project justifications. Candid discussions of alternatives and thorough delineations of social, as well as physical, impacts will not be presented. NEPA will continue to have only a limited impact at the policymaking level.<sup>49</sup>

Second, judicial activism is limited to procedural implementation. Because judicial activism does not extend to NEPA's substantive policy, court-ordered implementation is incomplete implementation. While substantive change may occur as a result of formal compliance with procedures, new procedures and rules do not necessarily change attitudes or behavior if basic agency decisions can remain the same. Sax labels the "emphasis on the redemptive quality of procedural reform . . . nine parts myth and one part coconut oil."<sup>50</sup> The ultimate success of NEPA rests upon implementation and acceptance of its substantive environmental goals and objectives. NEPA must affect change in the agencies' programs and policies; decisions and policies must be made with a view toward creating and maintaining a better environment. Yet it is in the area of substantive implementation and review of decisions that the courts generally practice judicial restraint.

### CONCLUSION

Implementation of policy is mainly a function performed by administrators. However, other political actors—legislators, private interest groups, the President, and judges—may be involved. This

47. Turner Smith discusses the strategy of corporate lawyers in preparing EIS's in *Complying with NEPA*, *supra* note 8, at 1329-40.

48. Andrews, *A Philosophy of Environmental Impact Assessment*, 28 J. Soil & Water Conservation 197 (1973); Flamm, *A Philosophy of Environmental Impact Assessment: Toward Choice Among Alternatives*, 28 J. Soil & Water Conservation 201 (1973); Jordan, *A Philosophy Of Environmental Impact Assessment: Some Considerations for Implementation*, 28 J. Soil & Water Conservation 205 (1973); Comment, *The National Environmental Policy Act Applied to Policy Level Decisionmaking*, 3 Ecology L. Q. 799-842 (1973).

49. Strohbehn, *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 Ecology L. Q. 93-108 (1974); Wichelman, *supra* note 32.

50. Sax, *supra* note 14, at 239.

paper has focused upon the interactions of these political actors in the implementation of a single statute—NEPA.

When a new policy does not demand changes in the agencies' established structural and behavioral characteristics, implementation is apt to be facilitated. NEPA, however, demands change. It requires modifications in a number of variables which are rooted in the organization's basic structure and its established patterns of action. To implement NEPA effectively, agencies would have to become committed to innovative behavior and would have to make alterations in their internal value configurations. Such behavior is too risky for the agencies; resistance and opposition have been the safer course.

Originators of policy usually have a stake in realizing articulated policy goals. Since NEPA's was initiated by Congress, Congress could be expected to play a strong oversight role. However, NEPA's Congressional support quickly dissipated as court decisions showed the legislators the significance of the language they had approved. Congressional pressures for improvements in agency implementation efforts have been counteracted by Congressional acquiescence to, and approbation of, less than full agency compliance. The agencies also have little fear that retaliation for noncompliance will come from CEQ, OMB or the President. CEQ lacks staff and enforcement authority. OMB has chosen not to use its legislative clearance responsibilities to require agencies to submit EIS's for legislative proposals. Finally, Presidential policy priorities increasingly place energy and economic considerations above environmental considerations.

Agency propensity not to push NEPA's implementation has been curtailed by the courts. As a result of court decisions there are discernable changes within agencies in response to NEPA and its EIS requirement. There are, however, serious limitations associated with judicial activism when it functions as the dominant external force directing implementation. In NEPA's case overemphasis on procedure has caused the agencies to become chiefly concerned with the preparation of judicially adequate EIS's. The merits of the impact statement and its utility as a planning and decision tool have been lesser considerations.

Judicial restraint in the area of substantive implementation and an absence of pressures from other political actors have given administrators a great deal of discretion in substantive implementation of NEPA. Agencies have exercised this discretion to avoid comprehensive substantive reform in agency decisionmaking and in decision outcomes at the policy level. Consequently, after five years, NEPA as



a vehicle for creating and maintaining environmental integrity and reforming the process of environmental decisionmaking has had only a modicum of success.