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THE NATIONAL ENVIRONMENTAL POLICY ACT: A VIEW OF INTENT AND PRACTICE

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INTRODUCTION

Policy performance usually falls short of policy promise. Creative and innovative intentions boldly stated in the preambles of legislation become diluted and deferred in the practical chore of translating what legislatures say into what government does. Causes for the performance gap are legion, and any policy which aims at innovative change is bound to face frustration in application. However, the National Environmental Policy Act of 1969 (NEPA)[1] is an exception to the general rule that the targets and goals of the formulators of policy ebb away as the implementors take over. In NEPA's case, the objectives were expanded during implementation, and the impact of the Act was enhanced beyond initial expectations.

Participants in the legislative process did not generally agree that the passage of NEPA would have much positive impact upon public policy. Contemporary documents reveal that the Nixon administration had aggressively opposed enactment of the measure throughout the legislative process, and the President's signature on January 1, 1970, was a belated and lukewarm acquiescence to growing national concern with the environment. Most members of Congress, moreover, probably did not appreciate the potential scope and significance of the measure. The news media and environmental interest groups displayed little appreciation for the portent of the legislation. The New York Times of January 2, 1970, for example, barely noted the new requirement for preparation of environmental impact statements, and a headline referred to Senator Henry M. Jackson as "Sponsor of Pollution Control Bill."

In place of the attrition of commitment which usually occurs in implementation, this article argues that the goals of NEPA have been reinterpreted and in many ways extended beyond those intended by the sponsors. The thousands of column inches of public praise or

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1. 42 U.S.C. § 4321 *et seq.*, 83 Sat. 852 (1970).

vilification of NEPA printed since 1970 and the volumes of legal arguments, judicial opinions, and administrative rules and regulations dedicated to its interpretation are testimony to its significance. As this essay and the ones which follow in this symposium issue indicate, there is a good deal of disagreement among NEPA scholars about the locus and extent of the impact. There is little question, though, that NEPA has changed the influence of participants in environmental policymaking.

Indeed, as the other four contributions on NEPA demonstrate, the most fruitful and interesting subject for research is not simply whether NEPA is being implemented, but how the law has affected who participates and with what leverage in decisionmaking. A preliminary subject to be addressed here is how the uniquely aggressive implementation of NEPA came about.

The purposes of this introductory essay are twofold. First, the aim is to revisit the legislative process, to recreate the decisionmaking context, and to recall the motives and intentions of several key legislative actors. We have a privileged perspective for this task. One of the authors writes from the vantage point of a staff member of the Senate Interior and Insular Affairs Committee and one of two key aides to Senator Jackson during the formulation of NEPA legislation. Second, this article will comment upon events—again from the frame of reference of a close observer and staff participant with some insight into congressional intent—which have occurred in a half dozen years of implementation.

CONTEXT OF THE LEGISLATIVE PROCESS

The context and orientation of the legislative process is ordinarily remedial. It aims to correct an ill or to restructure or replace a sagging institution. Commentators on NEPA have combed the public record in vain for extensive future-oriented analysis by participants of how the mechanisms and institutions to be established by the law should operate.[2] Far more fruitful for unraveling the legislative intents of NEPA are the participants' perceptions and diagnoses of the ailments of existing institutions and mechanisms. Remarking on the extent to which the existing decisionmaking context dominated Congressional consideration of NEPA, Frederick R. Anderson observed:

> . . . the largest portion of NEPA's legislative history is taken up with establishing the dynamics of environmental systems, diagnosing the

2. R. Liroff, NEPA and Its Aftermath: The Formation of a National Policy for the Environment, (unpublished Ph.D. dissertation, Northwestern, 1975).

> extent of environmental harm insofar as it is known (and calling for study and measurement of what is not yet known), identifying the federal institutional shortcomings which contribute to environmental deterioration, and endorsing the need for comprehensive federal planning, coordination and decisionmaking under a unified national policy. The subject of enforcement of such a policy on the working level in federal agencies did not command Congress' full attention at any point.[3]

The context in which the National Environmental Policy Act was formulated was one in which economic management had long been an accepted government function. An essential objective of government throughout the history of the U.S. had been to promote economic growth. Early frontier expansionism had been replaced by the progressive conservation ethic of the 1900's, which espoused wise use of natural resources. Sustained yield and public stewardship had replaced exploitation, but the goal of management, both public and private, was still economic gain. Even the preservationists of the 1950's and 1960's did not challenge the ascendency of economics as it applied to most issues. They simply maintained that some places had very great value which was difficult to quantify.

The idea incorporated in the policy statement of NEPA that valuable economic opportunity might in some instances be foregone in order to achieve an environmental goal was a significant shift of policy premises. Such a revolution in values applied to government decisionmaking would require an extraordinary mechanism to display and weigh environmental effects of proposed actions, just as economic effects had long been considered.

The National Environmental Policy Act was formulated within a context of widely-shared criticism of administrative fragmentation in the handling of natural resources and the environment. The Hoover Commission had long since identified and deplored the conflicting and overlapping missions of myriad agencies and bureaus dealing with natural resources. The solution proposed then, and again seriously considered by the Eisenhower administration, was a Department of Natural Resources.[4]

In the late 1960's, when NEPA was debated, the vanguard concerned with environmental policy added ecological irrationality to the case against executive branch fragmentation. Criticis of existing governmental machinery realized that every decision—to grant re-

3. F. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act 1 (1973).

4. Mister Z, *The Case for a Department of Natural Resources,* 1 Nat. Res. J. 197-206 (1961).

search funds, to construct a public works project, to lease public lands—has environmental implications. They noted that the impact of government upon the environment was in fact comprehensive, but administrative treatment was piecemeal. The mission of each agency was narrowly defined and responsive to some specific federal concern, such as proprietorship over public lands and navigable waters or interstate or international aspects of fisheries and game management. The newer environmentally-oriented functions of air and water pollution control were equally narrowly assigned and were primarily a response to crisis situations which had not been adequately treated by state and local government.

The challenge was to approach environmental management in a comprehensive way. The new values of environmental policy had to intrude somehow into the most remote recesses of the federal administrative machinery and begin to influence the multitude of decisions being made by thousands of officials. The functions of government involved were too diverse to be unified organizationally. Imposing a comprehensive policy within the organizational arrangement was the ambition which Senator Henry Jackson (D-Wash.) had for environmental impact statements. In a floor speech insisting upon the Senate version of the measure, which established the impact statement procedure, Jackson said:

> There are about 80 major Federal agencies with programs under way which affect the quality of the human environment. If environmental policy is to become more than rhetoric, and if the studies and advice of any high-level, advisory group are to be translated into action, each of these agencies must be enabled and directed to participate in active and objective-oriented environmental management. Concern for environmental quality must be made part of every Federal action.[5]

Serious shortcomings in environmental information and a lack of established legitimacy in environmental expertise were recognized as other impediments to environmental decisionmaking. Traditionally, economic impacts of resource development decisions were well documented in justification, but decisionmakers were supplied very little information about environmental impacts. One of the charges raised by conservationists in preservation battles, for example, Echo Park and the Grand Canyon Dam controversy, was that agencies such as the Park Service or the Fish and Wildlife Service, which might be expected to generate information, were muzzled by department

5. 115 Cong. Rec. 29087 (1969) (remarks of Sen. Jackson).

secretaries.[6] Further, decisionmakers had far less respect for environmental information than for economic data, which were clothed in the accepted benefit-cost analysis and backed by established rules and procedures.

The need for sounder environmental information was identified repeatedly at the joint House-Senate colloquium to discuss a national policy for the environment held in July 1968. For instance, Lawrence Rockefeller observed:

> The area where greater knowledge would help is the resource decision-making process. Many federal resource decisions are still made on a benefit-cost ratio which does not adequately reflect environmental factors. We know—or are told—precisely what the dollar benefits are for flood control, irrigation, or highway traffic—but no one can tell us the cost of various alternatives in long-term environmental values.[7]

The environmental impact statement mechanism was relied upon by the authors of NEPA to alter the existing decisionmaking context, so that henceforth environmental effects might be assigned greater significance in decisionmaking.

GENESIS OF NEPA

Perhaps it is an exaggeration to say that "*nothing* is new under the sun," but the policymaking process certainly draws heavily for its raw material upon concepts which have been employed before. There are several impediments to original ideas in policymaking, aside from the obvious scarcity of creative genius which plagues all forms of human endeavor. Public policymaking imposes decisionmaking costs. There is brisk competition for the time and energies of principal decisionmakers, and they cannot afford to invent new techniques for every problem. Furthermore, concepts which are familiar are easily communicated, while departures must be described in tedious detail in the course of legislative debate. Once a policy approach has been put into practice, a body of experience is acquired which serves as a referent for further applications of the same or similar techniques. In any event, if sufficient inquiry is made, most policy concepts can be identified as extensions or adaptations of approaches which have been used before.

6. O. Stratton & P. Sirotkin, The Echo Park Controversy (1959); H. Ingram, Patterns of Politics in Water Resource Development: A Case Study of New Mexico's Role in the Colorado River Basin Bill (1969).

7. *Hearings of the Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Aeronautics,* 90th Cong., 2d Sess., at 6 (1968).

There are three distinct parts to NEPA; each was conceived separately and derived from separate sources. They are:

1. Establishment of the Council on Environmental Quality (Title II)
2. An explicit declarationof a national environmental policy (Section 101)
3. A direction to all agencies of the federal government to carry out certain functions–the "action-forcing mechanism" (Sections 102 through 105)

Council on Environmental Quality

The phylogeny of the Council of Environmental Quality (CEQ) can be traced directly to the model of the Employment Act of 1946, which established the Council of Economic Advisors to the President.[8] The 1946 Act was a formal recognition of the government's responsibility for maintenance of economic health and for the economic impacts of its activities. Over the years national economic efficiency was established as an objective for a wide range of governmental programs. Basic economic data were collected, and economic criteria were established to evaluate projects. Establishment of the Council of Economic Advisors symbolized this development and provided an institutional mechanism for monitoring economic well-being.

The Resource and Conservation Act, proposed in 1959, was a direct, section-by-section parallel to the Employment Act. Sponsored by Senator Murray, the bill declared "a national policy on conservation, development, and the utilization of natural resources and for other purposes."[9] It required an annual Presidential Resources and Conservation Report, establishment of a Council of Resources and Conservation Advisors to the President, and organization of a Joint Congressional Committee on Resources and Conservation.

Substantial considerations supported application of economic policy approaches to environmental management. Environment, like economics, pervades governmental actions. The aim of the proposed Resources and Conservation Act was to give similar legitimacy to environmental concerns and to provide continuing review of the cumulative impact of federal actions upon environmental matters. Of course, in 1960 environment was very narrowly defined to include only recreational, wildlife, scenic, and scientific values and enhancement of the national heritage for future generations.

No action was taken on Senator Murray's bill, but the concepts

8. Employment Act of 1946, 15 U.S.C. § § 1021-25 (1964).
9. S. 2549, 8th Cong. (1959).

were perpetuated in various forms, and ultimately some of them became the major legislative objectives of both the Jackson bills and Congressman John Dingell's (D-Mich.) House companion measure. The notion of a presidential advisory council or board and the annual report remained a central theme of the NEPA bills of the 91st Congress. A joint committee on environment was proposed and nearly established in 1970 but was not a part of successful NEPA measures.

The structure and functions of the CEQ were major questions in the legislative history of NEPA. The Nixon administration preferred its own small advisory body in the executive office. Congressman Dingell and Senator Jackson were committed to a body with sufficient stature to be influential in the executive branch and with sufficient staff capability to monitor and advise upon the state of the environment.

National Environmental Policy

The Murray bill, after the fashion of the Employment Act, began with a short statement of national policy. As enacted in NEPA, the statements of goals and objectives were a good deal more sophisticated. The essential building blocks of an environmental policy statement, though not widely discussed, were articulated by the environmental vanguard throughout the 1960's. Professor Lynton Caldwell as early as 1963 had suggested "environmental administration" as the focus for public policy. He noted that:

> Examination of the recent literature of human ecology, public health, natural resources management, urbanism and development planning suggests a growing tendency to see environment as a policy framework within which many specific problems can be solved.[10]

In 1965 the President's Science Advisory Committee also recognized broad political and social implications for environmental affairs and suggested that environmental quality was a citizen's right.[11]

An unusual Senate-House colloquium, held during 1968 to discuss a national policy for the environment, marked an important step in the evolution of an environmental policy statement. The Congressional co-chairmen, Senator Henry Jackson and Congressman George P. Miller, invited legislators, administrators, academics, and well-known citizens interested in the environment to attend. While there was little agreement about the scope of federal concern and less upon

10. L. Caldwell, *Environment: A New Focus for Public Policy*, 23 Pub. Ad. Rev. 138 (Sept. 1963).

11. President's Science Advisory Committee, *Restoring the Quality of Our Environment*, Report of the Environmental Pollution Panel 16 (The White House 1965).

the form which federal environmental management should take, there was a consensus that a more explicit expression of federal attitude toward the environment was desirable.[12]

The impetus given an explicit policy statement in the colloquium was extended in the consideration of Senate Bill 1075, introduced by Senator Jackson and others in the 91st Congress. As introduced, Senate Bill 1075 was limited. It would have established an advisory Council on Environmental Quality in the Executive Office of the President, required an annual environmental quality report, and vested in the Council certain broad environmental data-gathering functions. Similar measures were under consideration in the House, including House Resolution 6750, formulated by Congressman John Dingell, which became the center of House action on NEPA. Both the Jackson and Dingell bills were designed to favor the jurisdiction of their respective committees. The Senate bill referred to the Department of the Interior under the jurisdiction of the Senate Interior and Insular Affairs Committee, and the House bill was introduced as amendments to the Fish and Wildlife Conservation Act under the purview of the Merchant Marine and Fisheries Committee.[13]

During the Senate hearings key legislators became convinced of the need for a strong policy statement. Dr. Lynton Caldwell strongly recommended that an explicit statutory policy on environmental management be included in the bill. Following the hearing, the Senate Interior staff worked out an amendment to Senate Bill 1075 which contained a declaration of national environmental policy; the amendment was enacted in section 101. Specifically, the federal government is instructed to protect and restore the environment in accordance with a general national policy—declared by the act—that government shall endeavor "to create and maintain conditions under which man and nature can exist in productive harmony." One provision in the amendment which did not survive the House-Senate conference in its original form stated: "The Congress recognizes that each person has a fundamental and inalienable right to a healthy environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[14] Though eventually stricken on the ground that its vagueness might

12. *Hearings of the Joint House-Senate Colloquium, supra* note 7.

13. Jurisdictional disputes imposed restraints upon the NEPA proposals throughout the legislative process. Congressional committees handled the environment in a fragmented manner (as did the administration); a large number of committees could, therefore, logically assert dominion.

14. Senate Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969, S. Rep. No. 91-296, 91st Cong., 1st Sess. 2 (1969).

invite endless litigation, the provision is indicative of the sponsors' policy objectives.

Environmental Impact Statements

Environmental Impact Statements (EIS) were invented in response to the anticipated administrative indifference or outright hostility toward the environmental council and the environmental policy statement. During the hearings on Senate Bill 1075 it became clear that while the administration professed full concurrence with the objectives of environmental management, it in fact recommended against enactment of the measures then sponsored. Dr. Lee DuBridge, the President's Science Advisor and the administration's principal spokesman at the Interior Committee's hearing, proposed the alternative of establishing a committee of selected cabinet members under presidential leadership to deal with environmental issues.[15] Interrogation by committee members developed the fact that the proposed cabinet council would have little or no full-time staff support.

After the hearings Senator Jackson discussed with the committee staff his concern that if the legislation were enacted over the administration's opposition, the newly formed Council on Environmental Quality would be unlikely to enjoy strong presidential support. Some other institutional arrangement seemed to be needed. He instructed the staff to explore the concept, suggested by Dr. Lynton Caldwell during Senate hearings, of incorporating "action-forcing" mechanisms into the bill. In part, Dr. Caldwell suggested:

> . . . Congress should at least consider measures to require the Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of these proposals upon the state of the environment.[16]

Building upon Dr. Caldwell's idea, language was drafted which would grant authority to every federal agency to implement the environmental policy act as part of its established responsibilities.

As reported by the Interior Committee, Senate Bill 1075 included the requirement that every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment include a finding by the responsible official that the environmental impacts of the proposed action had been studied, that unavoidable adverse impacts were

15. *Hearings on S. 1075, S. 237, S. 1752 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 71-73 (1969).

16. *Id.* at 116.

justified by other stated considerations of national policy, that long term resource considerations had been evaluated, and that irreversible and irretrievable commitments of resources were warranted. If proposals involved unresolved environmental conflicts, alternatives were to be studied, developed and described. In other words, whatever the principal objective of the proposed action, the agency would be required to explore the environmental consequences and expose them to the consideration of any subsequent reviewers.

The measure passed the Senate, as amended by the Interior Committee with the environmental findings provision, on July 10, 1969, without significant debate. The ease of Senate passage was, however, deceptive. Later in the legislative process jurisdictional and substantive conflicts arose in both the House and the Senate.

Congressman Dingell's companion version in the House included a very brief policy statement, requirement of an annual environmental report, and establishment of the Council on Environmental Quality. There was no language in the House measure regarding impact statements or other action-forcing provisions. It passed by a vote of 372 to 15 on September 23, 1969, but not without several important concessions obtained by Congressman Aspinall (D-Colo.), Chairman of the Committee on Interior and Insular Affairs. In recognition of the overlapping interests of Aspinall's Interior Committee with the Merchant Marine and Fisheries Committee, he was granted a position on the conference committee, where he acted as a restraining force. He also succeeded in inserting an important amendment which affected the substance of the legislation. It stated that "nothing in the Act shall increase, decrease, or change any responsibility of any Federal official or agency." Had this provision not been modified by conference and its effects mitigated by the language of the conference report, this amendment would have negated the action-forcing mechanism.

In the Senate a heated substantive and jurisdictional controversy between the Interior and the Public Works Committees had to be bargained to terms before the conference. In contrast to the House settlement of the jurisdictional dispute, no members of the Senate Public Works Committee were appointed as conferees on Senate Bill 1075. Instead, Senator Jackson agreed to support in conference several changes in the measure which had been negotiated between himself and Senator Muskie (D-Me.), the spokesman for the Public Works Committee viewpoint. Two significant modifications were made in the "action-forcing" provisions:

1. The requirement for a formal finding of environmental impact was changed to a "detailed statement" by the responsible official.

2. A provision was added to require consultation with environmental agencies in the development of environmental impact statements and to make explicit that such statements would be public documents widely available.

The negotiations among adversaries—both principals and staff—leading to this settlement and several others affecting other parts of the bill were protracted and bitter. The bases of disagreement are complex and multifaceted and are only sparsely displayed in the public record.[17] The substance of the Muskie objection to the "finding" requirement was that it would be difficult to challenge. He doubted that an environmental finding declared by federal agencies would be reliable. Muskie stated:

> The concept of self-policing by Federal agencies which pollute or license pollution is contrary to the philosophy and intent of existing environmental quality legislation. In hearing after hearing agencies of the Federal Government have argued that their primary authorization, whether it be maintenance of the navigable waters by the Corps of Engineers or licensing of nuclear power plants by the Atomic Energy Commission, takes precedence over water quality requirements.
>
> I repeat, these agencies have always emphasized their primary responsibilities making environmental considerations secondary in their view.[18]

The essence of the Muskie insistence upon interagency review of impact statements was a desire to extend and protect the authority of the environmental agencies under the jurisdiction of his Public Works Subcommittee on Air and Water Pollution. As he said on the Senate floor:

> The requirement that established environmental agencies be consulted and that their comments accompany any such report would place the environmental control responsibility where it should be.[19]

The result of the compromise version was to reduce the solemnity of the official's responsibility to consider environmental implications and to substitute greater outside sanctions—criticisms by other agencies, court challenges, or public opinion—to enforce NEPA policies. Few significant changes were made in environmental impact statement provisions by the conference committee, and the compromise was embodied in Section 102 as enacted.

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17. For a detailed discussion of the Muskie-Jackson negotiations *see* T. Finn, Conflict and Compromise: Congress Makes a Law, The Passage of the National Environmental Policy Act (unpublished Ph.D. dissertation, Georgetown 1972).

18. 115 Cong. Rec. 29053 (1969) (Remarks of Sen. Muskie).

19. *Id.*

THE INTENT OF CONGRESS CONCERNING SECTION 102

Since NEPA was enacted, endless hours of intellectual effort have been invested by solicitors of federal agencies, nonfederal litigants and potential litigants, and judges and their law clerks in trying to divine the intent of Congress from the sketchy documentation of legislative history. The pursuit of "congressional intent," however seriously it may be approached, has been about as scientific as the voodoo practice of reading the future in a random pile of chicken bones.

Clearly, no one can say except a presiding judge—and that because of authority rather than special insight—what the intent of Congress was with respect to Section 102. There were many House and Senate participants in the legislative process, and each had diverse interests and perspectives; it would be impossible to unravel their separate intentions. At the same time, Senator Jackson's Interior and Insular Affairs Committee staff prepared the original draft of Section 102 and participated in the later process of modifications. Therefore, the recollections of a staff member—along with consideration of the record—may afford some useful insight.

Above all, the impact statement was not intended merely to provide data or description, but to force a change in the administrative decisions affecting the environment. It was conceived as an action-forcing mechanism and consistently described as such by its proponents. Emphasis—perhaps over-emphasis—upon environmental concerns was considered a necessary means of instilling the new policy into an uncongenial decisionmaking process in which the support of the administration was uncertain and federal agencies were wedded to their own missions and to economic efficiency.

The principal staff members who drafted Section 102[20] combined two viewpoints—that of a lawyer with an appreciation for the role of the courts in policymaking, and that of a student of administration and practitioner of bureaucratic infighting. Both perspectives were useful in designing incentives and recognizing disincentives to operate under Section 102.

It is axiomatic that nearly any significant proposal will face competition for allocation of scarce resources. There are more actions proposed than federal agencies can possibly undertake, and at each stage of the bureaucratic decision process there is a need to eliminate some proposals. The decisionmaker must have criteria upon which such eliminations can be based, and it was NEPA's action-forcing intent to introduce new criteria. Consequently, a proposal accom-

20. William J. Van Ness Jr. and Daniel Dreyfus.

panied by an environmental horror story should carry a heavy handicap in the competition. Given a choice, an administrator is unlikely to stake the agency's program upon proposals which must carry such liabilities throughout the remaining review process and which face public and political opposition as well.

The temptation for agency officials to understate the adverse environmental consequences of favorite proposals was recognized. Here the role of legal review was to be critical. Preparation of the environmental impact statement was to be a statutory requirement. There is no question that the original drafters of Senate Bill 1075 contemplated a role for the courts. The threat of litigation was intended as an incentive to agencies to make a fair appraisal. The requirement for interagency review comment was a further guarantee against excessive agency bias. The members and staffs of both the Senate Interior and Insular Affairs and the Public Works Committees had experience with water resources programs under their jurisdictions. They anticipated similar interagency relationships would emerge under NEPA. By law, proposals for water resource projects to be constructed by federal agencies are submitted to other interested federal agencies and to concerned states for review and comment. The rivalry among federal water agencies is legendary, and the interest of the states in such projects is intense. Consequently, the comments from the interagency review process have often been critical, have displayed in-depth technical analysis, and have been a most fruitful source of questions for the examiners of the Office of Management and Budget and the Congressional committees.

Congressional intent concerning the scope of actions to which NEPA was to apply and how statements were to be prepared is difficult to divine. The words of the Act are vague:

- The entire Section 102 was qualified by the Senate-House conferees with the phrase "to the fullest extent possible."
- Statements were to be prepared for "*major* federal actions significantly affecting the quality of the human environment."

Also,

- "Alternatives" to the proposal are to be described.

The interpretations of each of these and other turns of phrase have been argued endlessly, and the meager official legislative history sheds little light upon intent.

Generality of wording, however, was unavoidable, since the Act was intended to apply to numerous agencies and programs. No precise procedures or definitions could be cast in statutory language which would be applicable to such dissimilar undertakings as con-

struction of a major airport, a change in grazing regulations on public lands, the licensing activity of a regulatory commission, and granting research funds.

Procedural details were left for executive rulemaking, as is customarily the case. The conferees said that "the President was to prepare a list of those agencies . . ." which would participate in the review of impact statements and to establish a time limitation for receipt of comments from federal, state, and local agencies.[21] Presumably, similar executive amplifications of the impact statement procedure—regarding such matters as the definition of a "major action," retroactive applicability, occasions for generic rather than specific statements, and other considerations—were anticipated.

There are few clues in the legislative history concerning what NEPA's Congressional authors expected impact statements to look like. Although the language of the act specifies "a detailed statement," the most active participants probably had different things in mind. Some of the conferees were concerned that the process might become cumbersome and delay the implementation of programs. The few exhortations in the Conference Report that such delays be avoided now appear naive.

It is certainly true, however, that the conferees never contemplated anything so extravagant as the multiple volume dissertations which now are commonly produced. This contention is bolstered by the fact that NEPA made no provision for funding extensive additional work by the federal agencies.

A PARTICIPANT'S PERSPECTIVE OF NEPA IN PRACTICE

The atmosphere in which a policy is implemented is often quite different from that in which it is formulated. Typically, the coalition of interests responsible for passage of a policy through Congress falls apart, and the subsequent support for implementing policy is less strong. It has been noted that the Congressional designers anticipated a hostile environment for the Act's application. In fact, this unfavorable reception did not materialize. When the language of the Act is read in light of subsequent events, it leads inevitably to the style of implementation which occurred.

In the early years of implementing the requirement for impact statements, three developments occurred which transformed them from a force operating from inside program administration (as anticipated by the original drafters) to a force exerted from outside

21. National Environmental Policy Act of 1969, H.R. Rep. No. 91-765, 91st Cong. 1st Sess. 8-9 (1969).

by interest groups and courts. These included the explosion of the environmental movement, the emergence of environmental law firms, and the assumption by the CEQ of the role of monitor of the EIS process.

With Earth Day, which was celebrated four months after the passage of NEPA, the environmental issue burst into the crisis stage in American public opinion. During the time the legislation was being considered, the environmental issue was at what Anthony Downs calls the pre-problem stage.[22] Although some legislators and the environmental vanguard were articulating a need for environmental management, there was no general public consciousness of environmental concepts. Prior to 1970 issues were taken up in discrete fashion: opposing dams in the Grand Canyon, saving the Redwoods, rescuing the scenic Hudson, etc. As the era of the environment emerged, many issues were tied together as examples of a more general problem. The public activity involved in each instance of the general environmental problem was greatly enlarged and insistent upon positive action. Many government agencies were called upon to do something effective. The President, once hostile to NEPA, embraced it and appointed committed environmentalists to the CEQ. As a consequence, there was much more outside pressure and much less bureaucratic resistence than the designers of NEPA expected in the preparation and review of impact statements.

The advent of a national environmental ethic was accompanied by a proliferation of environmentally-oriented legal firms whose expensive legal work was underwritten by the Ford Foundation and other donors. As noted earlier, the architects of NEPA clearly foresaw a role for the courts in enforcing environmental policy. Landmark cases predated the enactment of NEPA, such as the High Mountain Sheep Dam on the middle Snake River[23] and Storm King Mountain pumped storage powerplant on the Hudson,[24] but these were infrequent and associated only with prominent issues. No one in the NEPA policymaking process, however, could have forseen that talent and funds would become available to pursue hundreds of cases involving matters of purely regional or even local concern. A result of the expanded legal action was that almost any environmental impact statement might be challenged in the courts. The courts, in turn, generally took a critical attitude toward agency compliance with the Act.

22. A. Downs, *Up and Down With Ecology: The "Issue-Attention Cycle,"* 28 Pub. Interest 38-50 (Summer 1972).

23. Udall v. Fed. Power Comm'n, 387 U.S. 428 (1967).

24. Scenic Hudson Preservation Conference v. Federal Power Comm'n. 453 F.2d 463, 492 (Second Cir. 1971).

The shape of NEPA implementation also was greatly influenced by the President's decision to delegate to the newly-established CEQ responsibility for issuing guidelines for agency implementation of NEPA. Such a delegation was by no means necessary; in fact, legislative history indicates that the designers thought the Bureau of the Budget would supervise the 102 process, just as it served as overseer of benefit-cost evaluations.[25] On the one hand, the role of CEQ as umpire of the NEPA process has further diversified its often conflicting roles as a monitor of the nation's environmental health, advisor to the President, and public ombudsman,[26] and these built-in contradictions have hampered the agency in the performance of its tasks. On the other hand, CEQ handling of NEPA has marked the process with the Council's particular perspective. Unlike the Bureau of the Budget (now OMB), which is responsible to the President alone, CEQ is dependent upon environmental groups for political support. It is likely that CEQ has been less sensitive to the dynamics of organization and administration and more sympathetic to environmental political forces and to public participation than the central budgeting agency would have been.

Modification of the initial action-forcing concept which began with the Muskie-Jackson compromises was greatly extended by the events just chronicled. The initial approach—a formal "finding" by the responsible official—was intended to internalize the influence of environmental concerns upon agency decisionmaking. Changes in legislative language combined with environmental activism have served to transform the impact statement process into a tool for "external," public participatory policymaking. The change has had a number of unfortunate, dysfunctional consequences.

Because of CEQ guidelines and court action, environmental impact statements were required for actions in which decisions had already been made and to which administrative agencies were already committed. The consequences of this retroactive application, however desirable it might be in the abstract, profoundly affected early implementation of the Act. It created instantly an incredible backlog of impact statements which had to be prepared on what were essentially irrevocable decisions—projects under construction, programs under way, and the like.

More significantly, it was often these advanced actions and proposals which set the unfortunate tone for early implementation of NEPA. Militant environmental groups grasped the opportunities for

25. *See, e.g.*, remarks in Senate *National Environmental Policy*, Hearings at 117-124.

26. R. Liroff, *The Council on Environmental Quality*, Environmental Law Rep. 50051-70 (1973).

one more delaying action in conflicts they had previously lost. Agencies found themselves rationalizing commitments to actions which they had no practicable abilities to modify or reverse. The best talents in the agencies were devoted to defending old decisions made before full consideration of their environmental impacts was required.

Because of litigation, CEQ guidelines and public participation, environmental impact statements have become too long, disjointed and complex. The earliest environmental impact statements prepared pursuant to the Act were perfunctory affairs. One (related to a land use permit for a road from the Yukon River to the north slope of Alaska) was only eight typewritten pages long, including discussion of alternatives. Another (relating to Corps of Engineers dredging programs in the Great Lakes) required only three pages. The proper balance between these early documents which contained too little information, and efforts prepared today, which threaten information overload, has yet to be struck.

The courts and CEQ's guidelines have applied two interpretations to environmental impact statements which probably were not anticipated or intended by the authors of the provision:

(1) They look upon the statements as comprehensive decision documents; and
(2) They view the statements as evidence of whether the agency is complying with other provisions of NEPA.

As indicated by a specific reference in the Conference Report, Section 102(2)(c) was patterned after the 90-day review process required for water resource projects. There was an implicit assumption by the authors that, as in the case of a water project, any major proposal would already have been justified by economic evaluations and that the objectives and alternatives of the proposal would have been identified and described in the course of formulation. The impact statement, therefore, need only amplify environmental considerations which might otherwise have been overlooked.

As the Act was applied to programs dissimilar from water resources, such as licensing actions of the Atomic Energy Commission, it became clear that the analysis and justifications for many federal decisions were not being documented in any formal way. At least there was no basic decision document upon which the logic of the proposal itself could be weighed by the public or the courts.

Environmentalists, who had been frustrated for years by their inability to obtain written analyses supporting governmental decisions, sought to have a written account of the entire decision process

included in environmental statements. The courts, sharing a need for information, agreed. CEQ in its November 1971 guidelines determined that "Environmental statements will be documents complete enough to stand on their own."[27]

Certainly, there is a need for public documentation of important governmental decisions, and the complexity of such decisions requires that the documentation be voluminous and costly. The body of policy concerning the public right to information appears to be deficient in that it relates only to already prepared documents and does not require gathering information in a public disclosure document; it also does not prescribe the level of detail required. The responsibility has been imposed upon NEPA in this instance to enforce the fundamental public right to freedom of information concerning governmental activities. Environmental policies probably are being unfairly burdened with the costs of this extra public service and unfairly criticized for the required effort.

A final and perhaps most dangerous dysfunctional consequence has been that of delay. The external process into which the EIS has evolved defies the expressed intent of the Act's authors that it be efficient. The diversity of the participants, the independence of litigants and the judiciary, and the delays which legal actions necessarily entail militate against expedited decisionmaking and deprive the responsible officials of control over timetables.

Some of the greatest strengths and most dangerous weaknesses of NEPA stem from this transformation. The checks provided by outside participants obviously preclude expedient action by agency officials in response to parochial or political motives. Alternatively, the process can be unresponsive to real needs for timely federal action. Honest disagreements by courts or litigants or cynical delaying action by interest groups could frustrate proposals which are supported by the general public.

Most criticism of NEPA has been presented as opposition to unjustified and costly delays. Until recently, however, the critics have had very little public credibility. With the currently increasing concern over energy supplies and economic stagnation, however, the situation could change dramatically.

Current energy problems and the economic crisis facing the nation have greatly reduced public enthusiasm for environmental constraints upon constructive economic activity. The news media have notably mitigated their partisan treatment of environmental issues. Oppo-

27. *Implementation of the National Environmental Policy Act,* 36 Fed. Reg. 23667 (December 11, 1971).

nents of NEPA, it would appear, now have an opportunity to attack it effectively. Like Frankenstein's monster, the ultimate threat to NEPA lies in the possible disaffection of its creator. There is no question that Congress had something far less awesome in mind when it fashioned the act. Thus, the future holds two possibilities for NEPA. If Congress, dissatisfied with NEPA's implementation, substantially amends it, the result might be a conscious tradeoff of greater environmental degradation in return for other public benefits. On the other hand, if the public does not agree to such modification, then NEPA is likely to continue to be an unusual example of policy-making in which impact exceeds expectations.