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## NEPA: WAITING FOR THE OTHER SHOE TO DROP

KENNETH E. GRAY\*

In 1974, Hugh G. Yarrington wrote an article entitled "Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act."<sup>1</sup> In that article Yarrington noted:

[A]s the procedural aspects of Section 102 become more and more settled by the voluminous case law on the subject, environmental litigants have turned to Section 101 of the Act in an effort to insure compliance with both the letter and the spirit of NEPA. Some students of the act believe that this shift in emphasis in NEPA litigation is terribly significant, and, in fact, presages a second generation of NEPA cases, concerned not with procedure, but rather with enforcement of the substantive environmental policies enunciated in Section 101. At present, it is too early to predict whether the trend toward reliance on Section 101 will significantly broaden the scope of the Act; however, it is possible, depending upon the judicial interpretation given Section 101, that we are indeed on the threshold of a second generation of NEPA cases, and that it will be more significant than the first.<sup>2</sup>

The second generation of NEPA cases heralded by Yarrington has not arrived. Instead, NEPA is in danger of becoming a dead letter statute, at least as far as its ability to generate substantive benefits for the environment is concerned. It is hoped that the following evaluation of NEPA (especially in light of the ominous *Vermont Yankee*<sup>3</sup> decision) will help to avert the dismemberment of NEPA or NEPA's substantive goals currently in the works. This article will chiefly concern itself with an intriguing feature of NEPA that is also its weakest point: the role substantive standards and substantive judicial review play in NEPA's operation.

Evaluations of NEPA differ. In his 1977 Environmental Message,

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1. 19 S.D.L. REV. 279 (1974) [hereinafter cited as Yarrington]. See also Wharton, *Judicially Enforceable Substantive Rights Under NEPA*, 10 S.F.L. REV. 415 (1975-76).

The National Environmental Policy Act [hereinafter referred to as NEPA] is codified at 42 U.S.C. § 4321 (1976).

2. Yarrington, *supra* note 1, at 280-81.

3. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). See text accompanying notes 88-89 *infra*.

President Carter has praised NEPA's accomplishments. The Council on Environmental Quality<sup>4</sup> has cited widespread support for NEPA expressed at public hearings held by the Council in 1977.<sup>5</sup> On the other hand, H. Paul Friesma and Paul J. Culhane have quoted one environmental lawyer who has charged that environmental impact statements<sup>6</sup> are "squandering massive amounts of time, talent, public and private moneys," "have little relationship to actual decision making on location, design, construction, and operation of the endeavor being studied" and "[o]ften . . . are done after basic development decisions have been made."<sup>7</sup> Richard A. Liroff has quoted Congressman Dingell to the effect that "maybe we are breeding a race of environmental impact writers whose responsibility is less an honest evaluation of the environmental impact than it is sort of a medieval exorcist approach to the environment . . . by setting forth certain facts in certain forms, regardless of what the real facts may be."<sup>8</sup> Other observers have noted that whatever the effects of NEPA, its advent has been accompanied by "a proliferation of environmentally-oriented legal firms."<sup>9</sup> It is within this climate of disagreement about NEPA that decisions concerning substantive review by the courts of environmental impact statements and substantive standards will be made.

#### THE PROCEDURAL ISSUES

Mindful of the treacherous path whereby one distinguishes procedure and substance,<sup>10</sup> it seems safe to say that virtually all judicial opinions reviewing the environmental impact statement process so far have dealt exclusively with procedural questions. As Richard N.L. Andrews has pointed out, the federal agencies have followed suit:

It is not too strong to say that the attention of virtually all federal agencies, from the Council on Environmental Quality (CEQ) on

4. Hereinafter referred to as CEQ.

5. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—1977, EIGHTH ANNUAL REPORT 116-17 (1977) [hereinafter cited as Eighth Annual Report].

6. Hereinafter referred to as EIS's.

7. Friesma & Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 339 (1976) (quoting R. Hansen, Speech to the Colorado Open Spaces Council, Aspen, July, 1974).

8. R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT, NEPA AND ITS AFTERMATH 99 (1976) [hereinafter cited as Liroff].

9. Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 257 (1976) [hereinafter cited as Dreyfus & Ingram]. See also COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES 11 (1976) [hereinafter cited as CEQ Report], where CEQ recommends that the agencies increase the training programs devoted to preparation of impact statements.

10. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

down, has been directed almost exclusively to the procedural implementation of §102(2)(C), which required the preparation of detailed statements. The guidelines of the CEQ have been directed solely to the preparation of these detailed statements; not until the 1973 revision was there even an explicit reminder that the statements were intended to insure implementation of the policy goals of §101 rather than serving as ends in themselves.<sup>11</sup>

The major procedural issues addressed by the courts, commentators, and CEQ regulators include:

1. the threshold questions—whether a statement must be prepared or not, and if not, whether some shorter document must be prepared;<sup>12</sup>

2. the delegation questions—*who* prepares the statements;<sup>13</sup>

3. the timing questions—*when* in the process must the statements be prepared;<sup>14</sup>

4. the adequacy of the statement—its quality and understandability, “consideration” of all alternatives, and its use of cost-benefit analysis;<sup>15</sup> and

5. the necessity and extent of “consultation” with other concerned agencies and with the public through some form of

11. Andrews, *NEPA in Practice: Environmental Policy or Administrative Reform?* 6 ENV'T L. REP. 50,001, 50,001 (1976) [hereinafter cited as Andrews]. See also Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 NAT. RESOURCES J. 301, 302 (1976) [hereinafter cited as Andrews-Agency Responses]. CEQ guidelines are still the same. See 40 C.F.R. § 1500. See also Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RESOURCES J. 323, 327 (1976) [hereinafter cited as Cortner]; Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263 (1976) [hereinafter cited as Wichelman]. Wichelman discusses the four stages of compliance among different agencies he has studied.

12. See Rosen, *Cost-Benefit Analysis, Judicial Review, and the National Environmental Policy Act*, 7 ENV'T L. 363, 365-66 n.11 (1977) [hereinafter cited as Rosen]. Retroactivity, or the “grandfather” problem, has also arisen in some cases. See, e.g., *Sierra Club v. Calloway*, 499 F.2d 982, 988 (5th Cir. 1974). On whether NEPA applies overseas, see Bethell, *Exporting Pettifoggery*, HARPER'S 34 (Oct. 1978).

13. See *Greene County Planning Bd. v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972); amendments to NEPA provided by Pub. L. No. 94-83, Aug. 9, 1975, § 89 Stat. 424. See also Druley, *Federal Agency NEPA Procedures*, ENV'T L. REP. No. 23, at 9-11 (July 9, 1976) [hereinafter cited as Druley].

14. See *Aberdeen & R.R.R. Co. v. SCRAP*, 422 U.S. 289 (1975), and CEQ's 1976 “Memorandum” concerning this case, set forth in Druley, *supra* note 13, at Appendix C, 19-23; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) on program statements; and *Scientists Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973). Druley, *supra* note 13, at 16-18, also discussed the two document EIS procedures (draft and final EIS). See also Koshland, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767 (1978).

15. Most NEPA cases involve some or all of these questions. For an exhaustive consideration of these and other issues, see *Sierra Club v. Froehke*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd in part*, *Sierra Club v. Calloway*, 499 F.2d 982 (5th Cir. 1974).

public participation in the EIS process.<sup>16</sup>

One would expect that these procedural questions will diminish in both quantity and importance over time. Once agencies recognize the courts' resolution that agencies examine the impact statement process and comply faithfully with the relevant regulations and court-imposed technicalities, agency compliance undoubtedly will reduce complaints about procedural defects in agency preparation of EIS's.

Additional factors certain to push toward making EIS's procedurally acceptable and immune from traditional attack strategies are the growth of talented multi-disciplined environmental departments or divisions in many agencies whose main job is to prepare the statements and the simultaneous growth of high-priced consultants, who often actually prepare the EIS's.<sup>17</sup> The March 1976 CEQ report on environmental impact statements noted that "[m]ost major federal agencies have established special high-level offices to oversee and help implement agency responsibilities under NEPA."<sup>18</sup> The report further recommended that:

[H]igh-level NEPA offices, fully staffed to help agency leaders use the environmental analyses and procedures required by NEPA as an effective management tool, are essential to NEPA's success. Each agency should periodically evaluate how its NEPA office works and how it can be strengthened to carry out its NEPA responsibilities.<sup>19</sup>

Therefore, logic as well as prognostication seem to indicate that a "second generation" of NEPA decisions will focus on whether and to what extent NEPA mandates specific substantive results. In one way or another, the critical issues coming up will cluster about the central question of the role of the courts in substantive review of agency decisions or substantive rule making under NEPA. Remarkably, as matters now stand, the relevant criteria necessary to make intelligent decisions in these areas have been badly neglected or do not exist. The distinct prospect, therefore, is that the environmental goals of this legislation will be jettisoned for irrelevant reasons.

#### SUBSTANTIVE REVIEW—THE CASES

In its eighth annual report on environmental quality the CEQ

16. CEQ regulations require hearings even though NEPA itself does not. See 40 C.F.R. § 1500.7(d). Druley, *supra* note 13, at 16-17, discusses the hearing and inter-agency procedures. See also Liroff, *supra* note 8, at 86-89, and Cortner, *supra* note 11, at 332, for a general discussion on a number of these matters. For a review of EIS's by CEQ and EPA see text accompanying notes 45-48 *infra*.

17. See Druley, *supra* note 13, at 9.

18. CEQ Report, *supra* note 9, at 5.

19. *Id.* at 11.

boasted that “both federal and state courts have moved from insistence on adherence to NEPA’s procedures (section 102(2)) to implementation of NEPA’s substance (sections 101, 102(1)). The courts are emphasizing the need for better actions rather than simply requiring better environmental impact statements.”<sup>20</sup> In contrast to this view, however, the United States Courts of Appeals for the Ninth and Tenth Circuits consistently have held that NEPA creates procedural rights only and that NEPA’s goals are fulfilled when the required procedures are followed.<sup>21</sup> It is no surprise that these two circuits cover areas of the country opposed to conservation since the days of Theodore Roosevelt and Gifford Pinchot. Furthermore, what the CEQ report fails to mention is that even where substantive review is theoretically available in the courts, no court has yet halted or reversed an agency project on the grounds that the agency decision itself, in light of the EIS, was substantively incorrect or represented an error in agency judgment or failure to carry out NEPA’s substantive environmental goals.<sup>22</sup> As Richard Andrews has stated:

Great scrutiny has been devoted to whether or not impact statements discuss every category of impact that might be considered significant; but no action has yet been rejected because it failed to “approach the maximum attainable recycling of depletable resources,” or because it failed to promote the achievement of NEPA’s other stated goals and objectives. The fascination of both administrative agencies and courts with NEPA’s procedural requirements has so far neglected, if not obscured, the policy purposes which the procedures were intended to serve.<sup>23</sup>

Since there appears to be a significant divergence of viewpoints among the circuits on the question of substantive review, a comparison of the opposing views is instructive. Representative of the Ninth Circuit viewpoint is *Trout Unlimited v. Morton*,<sup>24</sup> the famous Teton Dam

20. Eighth Annual Report, *supra* note 5, at 121. See cases cited in the Eighth Annual Report at 121 n.378. See also the cases cited in Rosen, *supra* note 12, at 368 n.22.

21. *Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975); *Lathan v. Brinegar*, 506 F.2d 677 (9th Cir. 1974); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974). See *National Helium Corp. v. Morton*, 486 F.2d 995, 1006 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *Upper Pecos Ass’n v. Stans*, 452 F.2d 1233, 1236 (10th Cir. 1971), *cert. granted*, 406 U.S. 944 (1972), *vacated and remanded to determine mootness*, 409 U.S. 1021 (1972).

22. See *Concerned Residents v. Grant*, 388 F. Supp. 394, 410 (M.D. Pa. 1975), *vacated in part on other grounds*, 537 F.2d 29 (3rd Cir. 1976); *Atchison, T. & S.F. Ry. Co. v. Callaway*, 382 F. Supp. 610, 622 n.38 (D.D.C. 1974). To the effect that there have been no cases which overturn an agency decision based on a proposal’s cost-benefit balance see Comment, *The Role of the Courts Under the National Environmental Policy Act*, 23 CATH. U. L. REV. 300, 320 (1973); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 747 (1975).

23. Andrews, *supra* note 11, at 50,007.

24. 509 F.2d 1276 (9th Cir. 1974) (action to enjoin construction of Teton Dam; EIS held sufficient).

case,<sup>25</sup> in which the court of appeals stated that NEPA "is essentially a procedural statute"<sup>26</sup> and that:

Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA . . . are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply § 706(2)(D) in reviewing environmental impact statements for compliance with NEPA.<sup>27</sup>

Representative of the viewpoint that allows substantive review is the Gillam Dam case, *Environmental Defense Fund, Inc. v. Corps of Engineers*,<sup>28</sup> in which the Court of Appeals for the Eighth Circuit stated that "[g]iven an agency obligation to carry out the substantive requirements of the Act, we believe that courts have an obligation to review substantive agency decisions on the merits."<sup>29</sup>

Unfortunately, neither point of view has been adequately devel-

25. In that case the EIS was upheld and the project shortly thereafter caused a tragic disaster. 26. 509 F.2d 1276, 1282 (citations omitted).

27. *Id.*

28. 470 F.2d 289 (8th Cir. 1972) (citation omitted) (action to enjoin completion of flood control project based on insufficient EIS dismissed).

29. *Id.* at 297-98 (footnotes omitted). The court continued:

Whether we look to common law or the Administrative Procedure Act, absent legislative guidance as to reviewability, an administrative determination affecting legal rights is reviewable unless some special reason appears for not reviewing. Here, important legal rights are affected. NEPA is silent as to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.

The conclusion we reach with respect to substantive review of agency decisions is supported by the District of Columbia Circuit, the Second Circuit and the Fourth Circuit, and by the analogous decision of the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L. Ed. 136 (1971).

The commentators appear to prefer the Eighth Circuit's approach of allowing substantive review. For example, according to one commentator, "Notwithstanding the controversy over the question of substantive review of agency compliance with the policies of NEPA set forth in Section 101, it would appear that the better reasoned cases hold that such review should be available." Yarrington, *supra* note 1, at 293. A second commentator has stated:

This interpretation is certainly the better view. Those courts that recognize only procedural duties seem to dismiss as mere rhetoric the entire section of the act that declares a national environmental policy. It is unreasonable to maintain that Congress would have enacted such a policy without establishing an effective means of effectuating it.

Note, *Program Environmental Impact Statements: Review and Remedies*, 75 MICH. L. REV. 107, 127 (1977) [hereinafter cited as Program EIS's]. See also DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 77 DUKE L. REV. 409, 423-25 (1977). But see Comment, *Implementing the National Environmental Policy Act Through Rulemaking: The Implications of Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 126 U. PA. L. REV. 148, 177-79 (1976-77) [hereinafter cited as *Implementing NEPA*], where the author is one of the few who criticizes "second-guessing" agency decisions. The Comment remarkably anticipates some of the feelings ultimately expressed in *Vermont Yankee*, 435 U.S. 519 (1978).

oped or supported. Neither opinion set forth above is supported by comprehensive analysis or compelling reasons. For example, the *Environmental Defense Fund* court upheld the substantive decision reached in that case by the Corps of Engineers, but failed to explain logically why even though there are substantive goals broadly enunciated in NEPA, these goals are within the province of the courts to help determine. It is just as reasonable to have a system whereby the administrative branch regulates itself through the impact statement process, but where the process, while allowing public and legislative input, is closed to judicial intervention in policy-making decisions.<sup>30</sup> The *Environmental Defense Fund* case and concurring majority cases seem finally to be grounded simply on the "presumption" of reviewability noted by Davis<sup>31</sup> and referred to by the Eighth Circuit.<sup>32</sup>

One perceptive critic seems to suggest that the procedure-substance distinction is not really meaningful anyway since "all questions of NEPA compliance may be characterized as procedural."<sup>33</sup> Blurring the distinction might give reviewing courts a tool for significant supervision of agency decisions in environmental areas, by encouraging de novo review of all, not just some, agency decisions.<sup>34</sup> But it may be that increasing agency sophistication, plus the United States Supreme Court attitude expressed in *Vermont Yankee*<sup>35</sup> toward excruciating procedural requirements imposed by the courts, will prevent environmentally beneficial development along these lines. This strategy has been criticized on other grounds as well.<sup>36</sup>

30. Such an environmental impact statement system, closed to substantive judicial review, appears to have been adopted in Australia. See Whalan, *The Structure and Nature of Australian Environmental Law*, 8 FED. L. REV. 294 (1976-77). The avenues of administrative accountability in a parliamentary system are different, of course, and the United States is in an era where oversight of the agencies exercised by the executive branch has and will create serious political problems. President Nixon justified Watergate and other horrors, reportedly, on his inability to effectively control the federal bureaucracy. The recently enacted "regulatory-calendar," see ENV'TL REP. 1211 (Oct. 27, 1978), creates constitutional questions similar to those raised during the Nixon administration over impoundment. See Cutler, *Who Masters the Regulators*, THE WASHINGTON POST A17 (Oct. 17, 1978).

31. See K. DAVIS, ADMINISTRATIVE LAW 510-11 (3rd ed. 1972) [hereinafter cited as Davis], which relies in turn on the Administrative Procedure Act, §§ 701, 704.

32. 470 F.2d at 298.

33. Leed, *The National Environmental Policy Act of 1969: Is the Fact of Compliance A Procedural or Substantive Question?* 15 SANTA CLARA LAW. 303, 314 (1974-75) [hereinafter cited as Leed].

34. Leed commented that "[t]reating section 101(b) and 102(1) compliance as a procedural question could give a court at least as much room to consider fact issues as would the substantive review approach, since in rendering decisions involving NEPA, courts have tended to conduct de novo review of procedural questions." Leed, *supra* note 33, at 322.

35. 435 U.S. 519 (1978). See text accompanying notes 88-89 *infra*.

36. See Andrews, *supra* note 11, at 50,007; Andrews-Agency Responses, *supra* note 11, at 321.



As to inter-agency review of EIS's by the Council on Environmental Quality, Hannah J. Cortner has summarized CEQ's problems by stating:

CEQ's oversight role is limited because it does not have authority to veto actions of agencies or compel adoption of its guidelines. It does not have sufficient staff to review EIS's. It has also been criticized for failing to devise objectives and guidelines for developing impact assessment methods. Unable to sanction agencies for noncompliance, CEQ has relied upon environmental litigants and the courts to accomplish what it could not. As the courts have handed down stringent rules, CEQ has incorporated them into its revised guidelines.<sup>37</sup>

EPA review of draft statements, mandated by section 309 of the Clean Air Act,<sup>38</sup> and carried out under a rating system, appears subject to similar criticism. Even the 1976 CEQ report on impact statements concedes that EPA review is often ineffective.<sup>39</sup> EPA's attitude toward the Act has even been described as hostile.<sup>40</sup>

What criteria should be used to decide whether and to what extent substantive review of agency decisions, where EIS's are required, is permitted? Traditionally, questions of statutory interpretation have been resolved by examining the legislative intent or purpose behind the statute, and by evaluating the probable consequences or impacts of alternative decisions.

NEPA's legislative history is inconclusive, to say the least.<sup>41</sup> For example, consider the compromise worked out between Senators Henry Jackson (D. Wash.) and Ed Muskie (D. Me.) prior to NEPA's passage. The requirement of a formal "finding" with respect to environmental impacts was changed to a "detailed statement" by a responsible official. Consultation with environmental agencies and public disclosure also were mandated. Logically, dropping the requirement of

37. See Cortner, *supra* note 11, at 327 (footnotes omitted).

38. 42 U.S.C. § 1857 (1976).

39. CEQ Report, *supra* note 9, at 40. See also Trubek, *Allocating the Burden of Environmental Uncertainty: The NRC Interprets NEPA's Substantive Mandate*, 1977 WIS. L. REV. 747 (dealing with intra-agency review, a subject little explored given our usual preoccupation with the activities of courts). See also Wichelman, *supra* note 11, at 291 n.14.

40. MacBeth, *The National Environmental Policy Act After Five Years*, 2 COLUM. J. ENV'T'L L. 1, 14 (1975-76).

41. As Dreyfus and Ingram have stated:

Since NEPA was enacted, endless hours in 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. Dreyfus & Ingram, *supra* note 9, at 254.

a "finding" suggests a desire to make the statements non-reviewable. Nonetheless, Robert Liroff's description of the compromise points to the opposite conclusion. Liroff sees the basic difference between the two men as one of disagreement as to the fundamental conduct of environmental policy. According to Liroff:

Senator Jackson's view was that with enactment of NEPA, mission-oriented public works agencies would internalize environmental values as they began to develop evaluations of projects' environmental impacts. But Senator Muskie and the Public Works Committee staff harbored grave misgivings about the self-enforcement qualities of NEPA's action-forcing provisions. They believed that some form of external policing mechanism was needed; the mission-oriented agencies could not be trusted to consider seriously the environmental consequences of their actions and the requirement for environmental findings provided but the narrowest basis for outside review. In Senator Muskie's view, external policing could be provided by federal water and air pollution control agencies, for whose reviews provision had to be made.<sup>42</sup>

Because judicial review never appears to have been seriously deliberated, the courts must decide what Congress would have intended if it had thought about the problem.<sup>43</sup>

### THE IMPACT OF NEPA

To determine the potential effect of extensive substantive review by the courts, or whether such review or other reforms are desirable, one first must know what the effects of NEPA have been to date. Court and agency enamoration with procedures and the development of professional EIS preparers already have been noted. Getting some idea of just what "good" NEPA has done is another matter. Commentators have stated that NEPA's widespread impact statement process "is one of the most remarkable but, in the literature of political science and public administration, unremarked developments in recent years."<sup>44</sup> The truth seems to be that while there have been a few case studies and some intuitive projections regarding NEPA's impact, no one really knows, certainly not in any detailed or rigorous way, what the accomplishments or failures of NEPA have been or why they have occurred.

There are two broad categories of NEPA effects that should be considered: NEPA's organizational impact on the federal agencies and

42. See Liroff, *supra* note 8, at 18-19.

43. *Id.* at 31-32.

44. Dreyfus & Ingram, *supra* note 9, at 261 (quoting Wandesforde-Smith, Schwartz & Johnston, *Policy Impact Analysis and Environmental Management: Review and Comment*, 3 POLICY STUDIES J. (1975)).

its effect on the environment itself. The two categories are not, of course, completely separable.

### *Organizational Impact*

The Council on Environmental Quality's report on environmental impact statements optimistically maintains that "[e]nvironmental assessments and impact statements have substantially improved government decisions over the past six years,"<sup>45</sup> and that better decision-making has led to improved environmental planning and management.<sup>46</sup> CEQ has also expressed a positive attitude regarding the delays and costs<sup>47</sup> generated by environmental impact statements. CEQ's Eighth Annual Report is equally optimistic about NEPA.<sup>48</sup>

Others have not been as sanguine. Professor Caldwell has pointed out that a person's point of view largely depends on his view toward environmental protection and the proper government role. According to Professor Caldwell:

From the viewpoint of tradition-minded engineers, fiscal officers, lawyers, and mission-directed administrators, NEPA has been effective in generating costly delays, mountains of paper work, and irresponsible interference in agency business. Ecologically-oriented citizens, on the other hand, have seen the Act as a Magna Carta of environmental protection and a cornerstone of a new era in the responsible exercise of public power.<sup>49</sup>

Allan F. Wichelman has described a four stage process of agency compliance with NEPA that demonstrates that the impact of NEPA has at least been different upon different agencies.<sup>50</sup> Wichelman con-

45. CEQ Report, *supra* note 9, at 2. The report concludes by recommending the "use of incentive awards as well as meritorious service awards and other employee benefits to recognize individuals who have dealt with environmental problems in a significant and helpful manner." *Id.* at 26. *But see Id.* at 52 where CEQ admits to some analytical inadequacies. These problems will evaporate, no doubt, with enlarged professional staffs. *See* text accompanying notes 17-18 *supra*.

46. *Id.* at 35.

47. *Id.* at 43.

48. Eighth Annual Report, *supra* note 5, at 116-17. This Report states:

The National Environmental Policy Act received strong support and direction from the new Administration. In his Environmental Message, President Carter said that NEPA's effect had been dramatic and beneficial in the 7 years since its passage, but he also emphasized the need to reduce the paperwork and increase the usefulness of environmental impact statements. In a new Executive order he directed CEQ to issue regulations, binding on all federal agencies, to implement NEPA and guide the EIS process. . . . Until now, agencies have developed their EIS procedures in accordance with CEQ guidelines . . . issued under an earlier Executive order. The regulations are expected to be a refined, improved, uniform, and legally binding step forward from the guidelines.

49. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL L. REP. 50,030 (1976). *See also* Dreyfus & Ingram, *supra* note 9, at 260.

50. Wichelman, *supra* note 11, at 263-67.

tends that even where agency compliance appears to be pro forma, in spite of generating a voluminous and impressively comprehensive EIS, there is gradually effected a “subtle but pervasive integration of environmental values into many of the agencies’ routine decision-making activities.”<sup>51</sup> Wichelman views continued oversight, by courts or otherwise, as important.<sup>52</sup>

Most judicial activists probably assume that judicial oversight—insistence on complying with proper procedure—while it may create problems, is in the long run marginally beneficial. Eugene Bardach and Lucian Pugliaresi,<sup>53</sup> make the provocative and disturbing contention that judicial intervention in the NEPA-EIS process actually has been dysfunctional. Basing their arguments in large part on personal experience as EIS writers, the authors first note the staggering costs of the statements. For example, the Bureau of Land Management’s agreement to prepare 212 EIS’s in connection with capital investments in rangelands will cost in excess of \$100 million (ten times the annual budget for the investments themselves during an average year in the early 1970’s). Second, the authors question whether there is a “normative conception of ‘policy analysis’ against which the EIS contribution can be measured.”<sup>54</sup>

Bardach and Pugliaresi concede that Congress wanted the agencies to take a “hard look” at environmental consequences. But the authors argue that what the agencies are actually doing in preparing the statements is essentially a “defensive” activity. That is, environmentalists are charged with being more interested in making a record for a possible legal case than in making a constructive contribution to the process. Thus, the agencies fill EIS’s with bulk, “because sheer size is a way of trying to convince courts and other onlookers that the EIS proc-

51. *Id.* at 279.

52. Hannah Cortner dissents. According to Cortner:

[T]he 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. 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 an agency decisionmaking.

Review of EIS’s by Leonard Ortolano and William Hill, a study team at the University of Colorado, and Gordon A. Enk 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.

Cortner, *supra* note 11, at 324 (footnotes omitted).

53. Bardach & Pugliaresi, *The Environmental-Impact Statement v. The Real World*, 49 PUB. INTEREST 22 (1977).

54. *Id.* at 24 n.2.

ess is being taken seriously."<sup>55</sup> Critical issues may not only be obscured, they may be missed altogether. Bardach and Pugliaresi contend that rather than realism about environmental impacts, the process promotes undue pessimism. A direct incentive is also created to *avoid* discussion or adoption of possible mitigation measures.<sup>56</sup> Bardach and Pugliaresi conclude that serious consideration should be given to immunizing agencies from most legal proceedings. Bardach and Pugliaresi believe that "without the constant threat of legal proceedings hovering in the background, the public debate over the statement's contents would be more intelligent, more candid, and more honorable, as would be the contents of the statement itself."<sup>57</sup>

Even Professor Sax's landmark article *The (Unhappy) Truth About NEPA*<sup>58</sup> was not this bleak. While decrying, from personal experience with the airport expansion program, the notion of the "redemptive quality of procedural reform,"<sup>59</sup> Sax did not contend that mitigation measures will be positively impeded.<sup>60</sup>

Richard Andrews has categorized and discussed a number of burdens NEPA has imposed on the administrative process,<sup>61</sup> but regarding the main culprits of NEPA's opponents—cost, delay and paperwork—apparently no one has come up with hard figures on the subject. Moreover, on the question of what effect NEPA, or NEPA's concomitant court supervision, has had on the administrative decision-making process, evaluations differ widely, with the suggestion now be-

55. *Id.*

56. Bardach and Pugliaresi state:

The technicians who work on the EIS have neither the access to analytical resources nor the bureaucratic standing to promote mitigating measures that might usefully be incorporated into the project design. This is the price of protecting them—and their legally reviewable work product—from real and imagined bureaucratic contamination.

*Id.* at 35.

57. *Id.* at 37.

58. 26 OKLA. L. REV. 239 (1973).

59. *Id.* at 239.

60. Sax posited five rules of bureaucratic behavior:

1. Don't expect hired experts to undermine their employers.
2. Don't expect people to believe legislative declarations of policy. The practical working rule is that what the legislature will fund is what the legislature's policy is.
3. Don't expect agencies to abandon their traditional friends.
4. Expect agencies to back up their subordinates and professional colleagues.
5. Expect agencies to go for the least risky option (where risk means chance of failing to perform their mission).

*Id.* at 248. Sax concluded:

If we want them to change their behavior, we must give them signals that will register. . . . Until we are ready to face these hard realities, we can expect laws like NEPA to produce little except fodder for law review writers and contracts for that newest of growth industries, environmental consulting.

*Id.*

61. Andrews, *supra* note 11, at 50,006-07.

ing voiced that court review has had a detrimental effect in terms of NEPA's overall environmental goals. Where the truth lies is impossible to ascertain.<sup>62</sup>

### *Environmental Impact*

In spite of unknown administrative costs or inefficiency, the National Environmental Policy Act still might be judged successful if, overall, it has produced significant benefits to the environment. Unfortunately, there seems to be no present way of gauging NEPA's success, either in an absolute sense of measurable concrete benefits, or in the comparative sense of weighing administrative and other costs against environmental benefits. The Council on Environmental Quality admitted in its 1976 report that, with respect to litigation over EIS's, "in no case was the agency precluded from proceeding with its project or program after it complied with NEPA."<sup>63</sup> As to projects modified or abandoned because of the EIS process, or uncompleted litigation, or the threat thereof, there is little useful data.<sup>64</sup> For example, in his study of early Corps of Engineers and Soil Conservation Service responses to NEPA, Richard Andrews concluded "that few substantive changes in proposed water projects were made by either agency as a direct consequence of NEPA."<sup>65</sup>

Changes in priorities that did occur came, according to Andrews, chiefly as a result of outside "political" pressures. In other words, changes occurred only because the impact statement process alerted agency directors, other agencies, environmental groups and the public about proposed actions. Hannah Cortner has concluded that "[w]hile 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."<sup>66</sup>

Perhaps the most somber support for this skeptical view of NEPA can be found in the April 1978 study by William W. Hill and Leonard

62. *Accord Liroff*, *supra* note 8, at 84, 91-92.

63. Eighth Annual Report, *supra* note 5, at 32.

64. See Eighth Annual Report, *supra* note 5, at 129, Table 26.

65. Andrews-Agency Responses, *supra* note 11, at 313. Andrews also stated:

In the case of the Corps, survey responses in late 1971 indicated that less than one-fifth of the projects for which impact statements had been prepared (six per cent of authorized projects) had been affected in any substantive way as a result of NEPA. In more than 60 per cent of these cases the effect was listed as postponement rather than cancellation or significant change. Similar survey responses from SCS indicated substantive effects on approximately six per cent of its authorized watershed planning processes. In two-thirds of these cases the effect was identified simply as a postponement.

*Id.*

66. Cortner, *supra* note 11, at 325. Even the mitigation theory itself is brought into question by the Bardach and Pugliaresi study. See text accompanying notes 53-57 *supra*.

Ortolano.<sup>67</sup> This study, funded by the Department of Interior, was based not on mere speculation, which unfortunately dominates the early literature, but on a detailed set of questionnaires and empirical data. Hill and Ortolano concentrated on the effective consideration of "alternatives" by the Corps of Engineers and the Soil Conservation Service. The study concluded that while agency personnel give lip service to the language in the regulations about consideration of alternatives, the actual results are largely influenced by the detailed regulations. In fact, changes in planning brought about by NEPA were said to "have largely been what we would call cosmetic—that is, project modifications and mitigation measures added to protect or enhance the environment."<sup>68</sup>

CEQ's own report on environmental impact statements was more candid than it may have realized when it casually admitted that NEPA's influence on federal decision-making "cannot be measured precisely."<sup>69</sup> In fact, CEQ conceded that:

It was not always possible to determine precisely when, why, and by whom a decision was made—whether, for example, an important environmental decision was made by middle-level officials on the basis of a preliminary environmental assessment or whether the decision might still have been the same in the absence of NEPA.<sup>70</sup>

Apparently there is an absence of data regarding: (1) NEPA's costs; (2) NEPA's effect on the decision-making process; and (3) NEPA's production of environmental benefits. The effects of court review, court-required procedures and agency regulations on cost, decision-making and production of environmental benefits also remain unknown and unstudied.

It is incredible that these issues have not been addressed, particularly where proposals are blithely made or endorsed to extend judicial review to include genuine substantive review of agency decision-mak-

67. Hill & Ortolano, *NEPA's Effect on the Consideration of Alternatives: A Crucial Test*, 18 NAT. RESOURCES J. 285 (1978). The study is based on data that is already a few years out of date.

68. *Id.* at 308. Hill and Ortolano argued that:

NEPA was . . . intended to be more than a full disclosure law. It was intended to do more than insure that environmental considerations were brought in at the end of planning to minimize adverse environmental impacts of (already planned) projects. Rather, NEPA was intended to force federal agencies to consider environmental factors equally with economic and technical factors in their planning and decision making processes. If NEPA is to accomplish this end it is necessary that environmental considerations be integrated into planning starting at the earliest possible point in the process.

*Id.* at 309-10. Hill and Ortolano concluded that "[b]ased on our expectations as to what NEPA should accomplish with respect to the consideration of alternatives, we would have to conclude that NEPA has not been very effective." *Id.*

69. CEQ Report, *supra* note 9, at 21.

70. *Id.*

ing.<sup>71</sup> The argument seems to be that if judicially imposed procedural compliance is a good thing, then judicially imposed substantive compliance will be a better thing. The trouble is that no one knows whether, or in what ways, the first premise is correct. With over eight thousand EIS's already accumulated, some answers to these questions should be available. Environmentalists should be particularly concerned because an argument solidly grounded upon positive answers to the above questions would be more likely to persuade a court, or Congress, especially in a time of severe budgetary cutbacks. Absent some positive answers, substantive review or other reform may be lost by default, thereby locking in an expensive, unnatural system of paperwork that few apparently find satisfactory.

### JUDICIAL INTERVENTION

If no directly relevant criteria are developed for deciding where substantive review of impact statements goes from here, a decision, when it comes, probably will be made on the basis of secondary criteria. Perhaps the most obvious and troublesome question is whether, as a matter of sound public policy, the courts ought to be deeply involved in the administrative, "fourth branch" process, and whether the courts really are capable of being so involved. There seems to be no logically compelling reason to *insist* that they should not be involved, if time and resources are otherwise available, even though this is a role in which courts traditionally have not been immersed.

Indeed, a persuasive argument could be mounted in favor of judicial oversight of administrative judgment and policy. Where agency decisions have become pervasive in society and affect the interests of almost every citizen at one time or another, the need for fairness, accountability, and oversight becomes crucial. With the present limits on oversight by the executive branch,<sup>72</sup> and the inherent weaknesses in congressional oversight,<sup>73</sup> the courts might well be needed, more than in the past, to serve as impartial guardians of the public interest.<sup>74</sup> While federal judges sit for life, they are, nevertheless, politically responsive. As Judge Oakes reminds us, the courts do still follow the

71. See Robie, *Recognition of Substantive Rights under NEPA*, 7 NAT. RESOURCES L. 387, 422 (1974) [hereinafter cited as Robie].

72. See note 30 *supra*.

73. See Liroff, *supra* note 8, at 139. With the demise of the two political parties, interest group politics has become ferocious in recent years, with the "public interest" forced to take an even more remote "back seat" position.

74. For a good current call to reexamine the notion of "public interest" see Peters, *The Solution: A Rebirth of Patriotism*, THE WASHINGTON MONTHLY (Oct. 1978).



election returns.<sup>75</sup> Moreover, as Judge Oakes has stated:

Judicial review of a vigorous nature may in some ways make environmental decisions, more, rather than less, responsive to the public will. The process of review provides several additional levels of give-and-take on questions of great public moment. If a substantive decision of the EPA Administrator were allowed to stand unchallenged, for example, we would have much less assurance of its wisdom, including its political wisdom, than we do in a system that permits at least one and quite often two levels of appeal. The resulting scrutiny by the parties and the courts could even affect the initial decision: aware of what his decision must withstand, the Administrator will make certain that it is as wise as possible and will take care to articulate his reasoning in terms that make the decisions as defensible as possible.<sup>76</sup>

Of course, decisions requiring impact statements often involve broad policy and planning questions, choices and prognostications about the future, government expenditures and various proprietary activities. Such decisions do not easily fit into our traditional fact-finding adjudicatory model of judicial functioning. Courts are uncomfortable with these decisions, not simply because "uncertainty" is involved,<sup>77</sup> but because the courts are thrust into a role traditionally considered policy-making or political. As Professor Sax has pointed out, "It is virtually unheard of for a court to rule directly that a policy is illegal because it is unwise. . . ." <sup>78</sup> Whether this should continue to be so is a matter that should at least be rethought, especially in view of the present popular distrust of bureaucracy, and the helplessness of those confronted with the influence of powerful interest groups. Courts should not be so wedded to the past that they reject out of hand a limited role of partner in the administrative process.<sup>79</sup>

Whether the courts are capable of intelligently reviewing decisions

75. See Oakes, *The Judicial Role in Environmental Law*, 52 N.Y.U.L. REV. 498, 515 (1977) [hereinafter cited as Oakes]; Oakes, *Substantive Judicial Review in Environmental Law*, 7 ENV'T L. REP. 50,029, 50,032 (1977). In both articles, Judge Oakes quotes Mr. Dooley's famous comment that "th' supreme coort foolows th' illiction returns."

76. Oakes, *supra* note 75, at 515-16. Judge Oakes also noted that "[P]erhaps the greatest strength of substantive judicial review lies in its inherently limited nature: it is simply one part of an ongoing political process in which all sides can seek to influence ultimate outcomes through a multiplicity of channels." *Id.* at 516.

77. See Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking*, 48 S. CAL. L. REV. 371, 372 (1974-75).

78. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 558 (1970).

79. This is not to say that problems of court congestion and expertise in scientific matters are not significant, but they might be avoided by resorting to a National Court of Appeals proposed in the last few years, or by creation of a special court to solely review agency decisions (like the Court of Claims or the Tax Court). *But see* REPORT OF THE PRESIDENT, ACTIVE THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM (1973), which recommends against such a system.

involving technical scientific data is another question that must be faced. One would like to think that this question was implicitly disposed of by Justice Frankfurter in *Universal Camera Corp. v. NLRB*<sup>80</sup> in his discussion of congressional intent in establishing judicial review of NLRB decisions. In that opinion Justice Frankfurter stated:

It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.<sup>81</sup>

However, a serious debate on this question has been engaged in by Judges Leventhal and Bazelon of the United States Court of Appeals for the District of Columbia Circuit.<sup>82</sup>

Judge Leventhal takes a moderate position, suggesting that the courts should establish a zone of reasonableness, or non-arbitrariness, and that this requires some delving into technical issues, with or without aid of special expert assistants.<sup>83</sup> Judge Bazelon's position, on the other hand, is that judges generally are not in a position to delve into the technological aspects of most environmental decisions. Instead, Judge Bazelon would "go further in requiring the agency to establish a decision-making process adequate to protect the interests of all 'consumers' of the natural environment."<sup>84</sup> Moreover, according to Judge Bazelon, if a result is disliked, procedural deficiencies can be found to reverse it. In fact, however, Judge Bazelon really chooses to duck the

80. 340 U.S. 474 (1951).

81. *Id.* at 487.

82. See Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U. PA. L. REV. 509 (1973-74); Bazelon, *Coping with Technology through the Legal Process*, 62 CORN. L. REV. 817 (1976-77); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

83. Judge Skelly Wright, also of the District of Columbia Circuit, while generally allied with Leventhal, has seemed enthusiastic about imposing greater procedural requirements upon the "informal" rulemaking process (§ 553 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976)), and he has equated the informal rulemaking process with the impact statement process. See Skelly Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 AD. L. REV. 59 (1977). If this idea were carried to its logical extreme a perfect circle would occur because all EIS's would require rulemaking, and rulemaking would require an EIS.

84. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (Bazelon, J., concurring). In this opinion Judge Bazelon (concurring in the result) would have reversed an EPA decision because of failure to provide for cross-examination. Leventhal, for the majority, chose to reverse EPA on the basis of a "substantive standard," *i.e.*, the inordinate risk to the economy if EPA were wrong balanced against slight advantages if they were right in not delaying auto emission standards for one year.

substantive issues by falling back on the presumption that correct, or at least exhaustive, procedures will produce correct results.

In *National Resources Defense Council, Inc. v. Nuclear Regulatory Commission*,<sup>85</sup> Judge Bazelon reversed the Nuclear Regulatory Commission's grant of an operating license for a nuclear reactor, imposing additional "procedural" requirements on the informal rulemaking process. Further, in *Aeschliman v. Nuclear Regulatory Commission*,<sup>86</sup> Judge Bazelon reversed a grant of construction permits for two nuclear reactors because the EIS failed to consider alternative measures to reduce consumer demand for power (obviously outside the agency's ability to implement), and because a report relied on by the Nuclear Regulatory Commission relied too much on technical jargon.<sup>87</sup>

These two companion decisions, *National Resources Defense, Inc. v. Nuclear Regulatory Commission* and *Aeschliman v. Nuclear Regulatory Commission*, recently were dramatically reversed by the United States Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>88</sup> In this decision, Justice Rhenquist, writing for the majority, was highly critical of the approach taken by the District of Columbia Circuit. He suggested that the second part of Bazelon's strategy, *i.e.*, imposing elaborate procedures upon environmental decision-making as a conscious substitute for substantive review, will be severely limited in the future. If this is so, then the question of substantive review will have to be faced squarely. The Supreme Court's vigorous opinion may be in large part due to their dismay at finding that the licenses or permits in question had been languishing for almost ten years because of interminable administrative proceedings and litigation.

Even if one rejects Judge Bazelon's view of judicial competence to deal with technical scientific questions, Justice Rhenquist's dicta may make the question moot with respect to review of EIS's. Nonetheless, the door might still be open a small crack for substantive review, depending perhaps upon the standard or scope of review to be employed by the courts.

#### SCOPE OF REVIEW

The substantive scope of review to be applied by courts in reviewing environmental impact statements has been the subject of much dis-

85. 547 F.2d 633 (D.C. Cir. 1975).

86. 547 F.2d 622 (D.C. Cir. 1975).

87. *Id.* at 631.

88. 435 U.S. 519 (1978).

discussion by courts and commentators.<sup>89</sup> The generally accepted test, where substantive review is said to exist, has combined the “arbitrary and capricious”<sup>90</sup> standard, authoritatively adopted by the United States Court of Appeals for the Eighth Circuit in *Environmental Defense Fund v. Corps of Engineers*,<sup>91</sup> with the “searching and careful inquiry” standard enunciated in *Citizens to Preserve Overton Park v. Volpe*.<sup>92</sup> Other tests have limited applicability. The “substantial evidence” test applies only where an adjudicatory or rulemaking hearing has been held.<sup>93</sup> A “rule of reason” standard of review is only applicable where the review is solely to determine compliance with NEPA procedures.<sup>94</sup> The fascination with these standards is hard to explain since no agency decisions ever have actually been reversed under any substantive standard for review of EIS’s. In addition, subtle differences among verbal formulae probably do not make much practical difference anyway.<sup>95</sup>

Much attention also has been given to the question of consideration of “alternatives” in the environmental impact statement.<sup>96</sup> *Vermont Yankee* has of course added to this debate.<sup>97</sup> Where courts have required exhaustive “consideration,” agencies have supplied the studies. Forcing exhaustive review, or consideration, of remote alternatives

89. On the issue of overruling the Commission’s decision on procedural grounds, Justice Rhenquist was clear. He stated:

[N]othing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case.

*Id.* at 548. Regarding the consideration of alternatives in the EIS, Justice Rhenquist further stated:

Common sense also teaches us that the “detailed statement of alternatives” cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.

*Id.* at 551. The District of Columbia Court of Appeals also was severely reprimanded for reversing the Commission because one report was not couched in language understandable to a layman.

90. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

91. 470 F.2d 289 (8th Cir. 1972). Whether the “arbitrary and capricious” standard is broader or narrower than a “clear error of judgment” standard (also suggested in *Environmental Defense Fund v. Corps of Engineers*) or the “abuse of discretion” standard has provoked some discussion. See Rosen, *supra* note 12, at 370 n.34.

92. 401 U.S. 402 (1971).

93. § 557(2)(E) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1976).

94. See Program EIS’s, *supra* note 29, at 123.

95. See Friendly, “Some Kind of a Hearing,” 123 U. PA. L. REV. 1267 (1974).

96. See Note, *The Least Adverse Alternative Approach to Substantive Review under NEPA*, 88 HARV. L. REV. 735 (1974-75). See also *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

97. See note 89 *supra*.

through the impact statement process clearly seems to be a procedural device employed by the courts premised upon the assumption that if the agency decision-maker is forced to *consider* all aspects of the problem he will come up with the right decision, or at least a decision to which the courts must defer. Therefore, the EIS merely becomes evidence of adequate consideration of environmental factors in the agency decision-making process and nothing more.

Because of the concentration on scope of review and consideration of alternatives, a critical role that the EIS *might* be better suited to serve has been largely overlooked and little explored.<sup>98</sup> That role is simply one of *explanation*. Rather than demonstrating that an agency considered relevant environmental impacts, an obligation all too easy to evade in fact if not in appearance, the EIS should explain and justify the decision made, at least in terms of its environmental impacts, to a reviewing court. Verbal formulae about scope of review need not become terribly significant here because the courts typically would not be dealing with questions involving the credibility of witnesses.<sup>99</sup> On the contrary, the court would be addressing broad policy issues.

The extent to which these matters are left to agency discretion poses another problem. As Professor Davis has pointed out, this depends upon how important the courts view the conflicting rights involved.<sup>100</sup> NEPA itself suggests that some presumption favoring the environment and environmental interests ought to be adopted.<sup>101</sup> Perhaps the courts simply should satisfy themselves that the decision is a "reasonable" one, reasonableness thereby becoming a question of law.

One serious flaw in a suggestion that the EIS might serve principally as an explanation of agency action, a flaw perhaps curable only by Congress, is the fact that generally the EIS is not the document used in agency proceedings for decision-making.<sup>102</sup> Nor is it thought to be

98. *But see* the articles by Judges Oakes and Leventhal, *supra* note 82.

99. *See* Judge Frank's concurring opinion of remand in *NLRB v. Universal Camera Corp.*, 190 F.2d 429 (2d Cir. 1951). *See also* Judge Skelly Wright's opinion in *Amoco Oil Co. v. Environmental Protection Agency*, 501 F.2d 722, 740-41 (D.C. Cir. 1974), wherein he states:

Where, by contrast the regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations, but not "findings" of the sort familiar from the world of adjudications.

100. Davis, *supra* note 31, at 514-15.

101. Robie, *supra* note 71, at 411.

102. Nuclear Regulatory Commission procedures provide the contrary. *See* 10 C.F.R. §§ 51.20(b), 51.23(c).

Final CEQ Regulations published on November 29, 1978 (43 Fed. Reg. 55,978-56,007 (1978)) make what appear to be significant changes. Section 1505.2 of the new regulations provides:

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required

capable of bearing the full weight of the decision-making process.<sup>103</sup> It does not typically contain agency findings and conclusions, nor does it necessarily constitute the administrative record. If courts are to involve themselves regularly in broad agency policy-making, thought should be given to "cleaning up" the record of such decision-making so that agency actions will be explained in a concise written set of documents or a single document that realistically permits scrutiny by non-technically trained judges. There is no theoretical reason why the EIS could not become an essential component in such a reform process.

### CONCLUSION

It is ironic that a statute "designed to break the incremental decision chain that too often results in irreversible commitments with unexpected effects on the environment,"<sup>104</sup> nevertheless has concretized an incremental process effectively subject to no broad substantive standards, mired in procedure, and generally inapplicable to programmatic or early stage planning where it might have had some constructive effects. As has been observed, "[n]ot only have relatively few impact statements been done on programs and policies, but the treatment of important policy issues has in general been judged a weakness of NEPA's implementation."<sup>105</sup>

by OMB Circular A-95 (Revised), part I, sections 6 (c) and (d), and part II, section 5 (b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

Whether CEQ has the authority to impose such a regulation, and whether the courts will use it is yet to be determined. The new Regulations make a number of other changes, including provisions for:

1. Reducing the length of EIS's (§ 1502.7);
2. Emphasizing real alternatives;
3. Using an early "scoping" process;
4. Using plain language (§ 1502.8);
5. Reducing delay and paperwork;
6. Insuring follow-up on agency decisions.

All the changes are "procedural" in nature, alas. There is considerable doubt whether there will be a reduction in delay or man-hours, or better results.

103. *Accord* Dreyfus & Ingram, *supra* note 9, at 260; Cortner, *supra* note 11, at 324; Leed, *supra* note 33, at 316.

104. Implementing NEPA, *supra* note 29, at 184.

105. Miller, Anderson & Liroff, *The National Environmental Policy Act and Agency Policy Making: Neither Paper Tiger nor Straijacket*, 6 ENV'T L. REP. 50,020, 50,027 (1976).

Recent decisions of the United States Supreme Court, including the language in *Vermont Yankee*<sup>106</sup> may bolster the resistance to applying the EIS process at a stage early enough in agency planning to do some good. Nonetheless, the problems involved in judicial mastery of technical scientific data do not seem insurmountable.<sup>107</sup>

At present the following choices appear to be available:

1. no substantive review at all;
2. continued lip service to the existence of substantive review without actually engaging in it;
3. vigorous substantive review designed to force substantive agency rulemaking or regulations;<sup>108</sup> or
4. restrained substantive review until such time as agencies develop rules or regulations.

Unfortunately, without persuasive data from scholars, environmentalists, lawyers and students of government setting forth what has been accomplished or is expected to be accomplished, there is no satisfactory way of making an intelligent choice among these or other options.

106. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). See text accompanying notes 88-89 *supra*. See also *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Aberdeen & R.R.R. Co. v. SCRAP*, 422 U.S. 289 (1975).

107. See note 79 *supra*.

108. Andrews, *supra* note 11, at 50,008, appears to opt for this choice.