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# The National Environmental Policy Act, The Freedom of Information Act, and the Atomic Energy Commission: The Need for Environmental Information

Alice M. Craft

*Indiana University School of Law*

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## THE NATIONAL ENVIRONMENTAL POLICY ACT, THE FREEDOM OF INFORMATION ACT AND THE ATOMIC ENERGY COMMISSION: THE NEED FOR ENVIRONMENTAL INFORMATION

*During the 1960's, the Atomic Energy Commission decided that an abandoned salt mine near Lyons, Kansas, would be an appropriate site for underground storage of radioactive wastes. Largely through the efforts of geologist William Hambleton, AEC studies of the site were shown to be deficient. Revelation of the substantial dangers involved turned public support for the project into opposition. Further resistance by the members of Congress from Kansas resulted in legislation prohibiting immediate purchase of the Lyons mine. Had Hambleton not brought his independent research to public attention, the ill-conceived project might have proceeded unhindered. The evidence on which Hambleton based his findings should have been discovered by AEC.<sup>1</sup>*

Growing demands for power, coupled with depletion of traditional sources of fuel, have resulted in increased utilization of nuclear generating plants.<sup>2</sup> New uses of atomic energy for the production of power are currently under investigation.<sup>3</sup> Associated with this use of atomic energy,

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1. For a full report on the Lyons project, see Lear, Radioactive Ashes in the Kansas Salt Cellar, Saturday Review, Feb. 19, 1972, at 39. For example, Hambleton revealed that:

[T]he AEC had based all its calculations on the supposition that there was a single layer of pure shale underlain by a single layer of pure salt. . . . [C]ores [drilled at Hambleton's suggestion] contained many alternating layers of salt and shale. . . . [D]iscrepancies between the AEC's assumptions and the geological realities 'could be responsible for breaking the seal' of rocks overlying the salt and for permitting entry of surface or subsurface waters into the salt bed to create erosional problems and to invite dangerous convection effects.

*Id.* at 41.

2. In 1969, the total U.S. power requirement was 65,645 trillion B.t.u.'s. The forecast from the Office of Science & Technology estimates a requirement of 170,000 trillion B.t.u.'s by the year 2000 if real gross national product increases at four per cent per year. Such a forecast may not, however, reflect the growing concern for the environment, changes in efficiency of energy conversion and changes in patterns of use. Estimates vary as to the future extent of use of nuclear fuel. It has been suggested that by 2000, oil will be the most important fuel and natural gas the next, and either coal will be slightly ahead of nuclear, or, as the FPC and AEC predict, nuclear slightly ahead of coal, or nuclear sources much greater than coal. ENVIRONMENTAL POLICY DIV., LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE ECONOMY, ENERGY AND THE ENVIRONMENT 4-5 (1970) [hereinafter cited as THE ECONOMY].

3. The AEC participates in the Plowshare Program, which is designed to develop

however, are potentially significant effects on the environment, the full extent of which is not yet known.<sup>4</sup> Since protection of the environment has become a national goal,<sup>5</sup> environmental impact is a discrete factor in governmental decision-making concerning power production and its regulation.

Meaningful administrative consideration of environmental consequences, however, requires a complete record. The presence of a comprehensive environmental analysis in the record makes visible to the public and the legislature the relative weight given environmental problems by the agency. The contention of this note is that litigation under the National Environmental Policy Act of 1969<sup>6</sup> (NEPA) and the Freedom of Information Act<sup>7</sup> (FIA) is particularly suited for insuring that relevant environmental information is presented to both the agencies and the public.<sup>8</sup> This discussion will focus on the AEC because of the growing

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peaceful uses of nuclear explosions. Plowshare studies related to power production have included the use of explosions to heat rock, which would in turn heat water, creating steam to run generators. Explosions are also used to stimulate natural gas formation. AEC, MAJOR ACTIVITIES IN THE ATOMIC ENERGY PROGRAMS 195-201 (1971); Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970). See also N. LANDAU & P. RHEINGOLD, THE ENVIRONMENTAL LAW HANDBOOK 318-28 (1971) [hereinafter cited as LANDAU].

4. For description of the environmental problems associated with power plants, see THE ECONOMY, *supra* note 2, at 92-114. Nuclear generating plants emit radioactive particles into the atmosphere and into the cooling water. These emissions are probably within radiation standards, but the standards themselves have become controversial. See note 19 *infra*. There is also danger of an accident which could release high level radiation from the nuclear fuel cells. (The emergency systems have never been tested. Louisville Courier-Journal & Times, Feb. 13, 1972, § H, at 3, col. 4.) Another major effect of power plant operation is thermal pollution. In general, water is used to absorb heat produced in the generating process. If the heated water is discharged into natural bodies of water, the resulting temperature change effects the conditions of aquatic life, the evaporation rate and the concentrations of minerals. When direct discharge is avoided through the use of cooling towers, there are additional problems of noise and local fog or icing. Additional problems include interference with other land uses and aesthetic values. These problems occur with any large facility, but may be aggravated by such measures as the cooling towers used to reduce other pollution factors. For analysis of radiation and thermal effects connected with a particular plant, see two papers prepared primarily by members of the Cornell University staff. CITIZENS COMM. TO SAVE CAYUGA LAKE, RADIOACTIVITY AND A PROPOSED POWER PLANT ON CAYUGA LAKE (1968); CITIZEN'S COMM. TO SAVE CAYUGA LAKE, THERMAL POLLUTION OF CAYUGA LAKE BY A PROPOSED POWER PLANT (1968). Waste storage presents dangers of leakage of radioactivity, whether in liquid or solid form and whether in transit or permanently situated.

5. 42 U.S.C. § 4321 (1970).

6. 42 U.S.C. § 4321 *et seq.* (1970).

7. 5 U.S.C. § 552 (1970).

8. For extensive discussion of the tactic of resorting to the courts for environmental protection, see J. SAX, DEFENDING THE ENVIRONMENT (1970) [hereinafter cited as SAX].

use of atomic energy and the special technical and legal problems involved in the development of nuclear power sources.

The Atomic Energy Act of 1954<sup>9</sup> delegated control of the development and use of atomic energy to the AEC.<sup>10</sup> Yet, various factors indicate that the AEC, in its exercise of control, may be underestimating the importance of environmental considerations. Although the Act envisions both regulatory and promotional functions,<sup>11</sup> this combination of duties creates a potential conflict of interest.<sup>12</sup> Perhaps because it was organized long before widespread environmental concern, the AEC appears to give greater priority to alleviating the power crisis than to environmental problems.<sup>13</sup> Since the AEC has had a long and close working relation-

9. 42 U.S.C. § 2011 *et seq.* (1970).

10. One former responsibility of the AEC, the development of general environmental radiation standards, has been transferred to the Environmental Protection Agency. Reorg. Plan No. 3 of 1970, § 2(a)(5), 84 Stat. —, 5 U.S.C. App. (1970). AEC, however, will continue to set and enforce guidelines and regulations which are in compliance with standards set by the EPA.

11. For example, § 2(g) of the Act authorizes use of federal funds for "the development and use of atomic energy." 42 U.S.C. § 2012(g) (1970). Section 3 provides for:

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information . . . so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material. . . .

42 U.S.C. §§ 2013(a)-(c) (1970).

12. Former Chairman Glenn T. Seaborg, responding to a question in an interview, stated: "I think our regulatory functions as a whole, including the licensing and compliance part of it, will be and should be set up in a separate agency at some time in the future. . . ." Trippe, *Legal Problems in the Use of Nuclear Explosives for Civil Purposes*, 12 *ATOMIC ENERGY L.J.* 377, 392 (1970) [hereinafter cited as Trippe]. See also Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 *S. CAL. L. REV.* 502, 523 n.91 (1972) [hereinafter cited as Tarlock].

13. This attitude is reflected in another quotation from former Chairman Seaborg: [T]oday's outcries about the environment will be nothing compared to the cries of angry citizens who find that power failures due to a lack of sufficient generating capacity to meet peak loads have plunged them into prolonged blackouts. . . .

THE ECONOMY, *supra* note 2, at 19. In *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), the court commented: "In the end, the Commission's long delay seems based upon what it believes to be a pressing national power crisis." 449 F.2d at 1122. In fact, the AEC seems to have been subject to criticism on the same kinds of issues as are involved in application of NEPA and FIA since very early in the Commission's history. In 1956, the AEC Reactor Safeguards Committee raised serious technical questions about the safety of a midwestern reactor. The AEC refused to make the report public until it received pressure from Congress and several labor unions. As a result, the Advisory Committee on Reactor Safeguards was established as a statutory body with the duty of reviewing safety studies and license applications. 42 U.S.C. § 2039 (1970). See Ramey, *The Role of the Public in the Development and Regulation of Nuclear Power*, 12 *ATOMIC ENERGY L.J.* 3, 11 (1970) (article by a Commissioner of the AEC) [hereinafter cited as Ramey].

ship with the power industry it regulates,<sup>14</sup> industrial influence is significant in its decisions. All these elements contribute to an attitude on the part of the AEC likely to result in placing development and application of atomic energy before other goals.

The AEC has recently established an Office of Environmental Affairs to serve "as a focal point for contacts with outside organizations on environmental matters."<sup>15</sup> The AEC also acknowledges as necessary<sup>16</sup> and provides for public participation in its decision-making process.<sup>17</sup> Intervention in administrative proceedings, however, does not guarantee that agencies will give environmental considerations adequate attention.<sup>18</sup> One reason may be that the power of the AEC over employment, research grants and consultant contracts could prevent experts from contradicting the Commission's official stance.<sup>19</sup> However, an intervenor employing NEPA and FIA may effectively use the courts to insure that relevant environmental information is considered by agencies before they act.

#### THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA constitutes the first comprehensive national legislation expressing environmental protection as its goal. The stated purposes of NEPA are:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment;

14. As Prof. Sax describes the process, "[r]egulation in the name of the public interest" has been "a two-party enterprise carried on between the regulated and the professional regulator." SAX, *supra* note 8, at xix.

15. 10 C.F.R. § 1.29 (1972).

16. The prevailing attitude in the industry, as expressed publicly, appears to be that some public participation is welcomed. See Ramey, *supra* note 13, at 20.

17. Commissioner Ramey has identified as points of public participation congressional hearings, public meetings and mandatory public hearings in licensing proceedings (which allow intervention and limited appearances) and publication of rule-making and licensing information for comments. *Id.* at 3.

18. "So far the agency system has done a poor job of protecting the environment." Handzel, *Preservation of the Environment through the Doctrines Covering Judicial Review of Administrative Agencies*, 15 ST. LOUIS UNIV. L.J. 429 (1971). But see Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231 (1970): "The so-called failure of the agencies is only incidentally their failure. It is the failure of the society itself and more particularly the dominant centers of the government."

19. Like, *Multi-Media Confrontations—The Environmentalists' Strategy for a 'No Win' Agency Proceeding*, 1 ECOLOGY L.Q. 495, 502-03 (1971) [hereinafter cited as Like]. That experts' apprehensions may be justified is suggested by the disagreement over radiation standards. Two AEC scientists, Gofman and Tamplin, have challenged radiation levels set as safe by the AEC on the grounds that they take insufficient account of long term low level exposure. A serious charge in such a controversy, it has been alleged that they have been harassed by the AEC, including tactics such as reductions in staff and funding. See SCIENCE, Aug. 28, 1970, at 838.

to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.<sup>20</sup>

The Act further elaborates on environmental goals and requires the Government to perform consistently with them. In developing appropriate procedures, agencies are to: "utilize a systematic, interdisciplinary approach";<sup>21</sup> "include . . . a detailed statement" covering "environmental impact," unavoidable "adverse . . . effects," "alternatives," "the relationship between . . . short- . . . and . . . long-term" effect and "irreversible and ir retrievable commitments of resources"<sup>22</sup> and "initiate and utilize ecological information in the planning and development of resource-oriented projects."<sup>23</sup> Before discussing court enforcement of these procedures, a private party's right under NEPA to challenge an agency's final order must be considered.

Standing has traditionally proved to be an obstacle to private suits against agencies.<sup>24</sup> Recent Supreme Court decisions, however, suggest that suits to enforce NEPA should not encounter standing problems. In *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>25</sup> the Court noted that "where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."<sup>26</sup> The Court formulated two questions as being determinative of standing, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise,"<sup>27</sup> and "whether the interest sought to be protected by the complainant is arguably within the

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20. 42 U.S.C. § 4321 (1970).

21. 42 U.S.C. § 4332(2)(A) (1970).

22. 42 U.S.C. § 4332(2)(C) (1970). Note that NEPA shifts the burden to the Government to study alternatives. Cf. *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970).

23. 42 U.S.C. § 4332(2)(G) (1970).

24. LANDAU, *supra* note 3 at 63-64. For more complete discussions of standing and the relevant cases, see Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970) [hereinafter cited as Hanks]; Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085 (1970).

25. 397 U.S. 150 (1970). This was a suit challenging a ruling by the Comptroller of the Currency that national banks could make data processing services available to bank customers and to others. The action had been dismissed for lack of standing. Standing was granted under § 10 of the Administrative Procedure Act [5 U.S.C. §§ 701-06 (1970)], making the decision applicable to all agencies.

26. 397 U.S. at 156.

27. *Id.* at 152.

zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>28</sup>

Under the *Data Processing* test, NEPA would appear to dictate that conservation groups, as well as individuals, be granted standing. A requisite "injury in fact" would arise from an agency decision detrimentally affecting the environment which was reached without considering all relevant environmental information. When NEPA § 101(c), which states that "Congress recognizes that each person should enjoy a healthful environment,"<sup>29</sup> is read with the general purposes and duties imposed upon the Government elsewhere in the Act, a "federally recognized interest in the promotion of a healthy environment"<sup>30</sup> is created. Thus, when an agency fails to carry out the mandate of NEPA, an environmental "interest" within the "zone of interests to be protected" has been violated.

The question of whether NEPA can be enforced by groups with a national, rather than a local, membership, has not been decided by the Supreme Court.<sup>31</sup> Given the mobility of U.S. society, no action by the federal government of sufficient environmental impact to fall under NEPA should be considered to be of local interest only. If a major reason for limiting standing is to insure that the litigated interest is properly represented, a national organization may be the only body possessing the financial support and organization necessary to pursue the appeal adequately. This is especially true when the agency involved, like the AEC, has a virtual monopoly on the necessary information. Also, a national organization's interest in the precedential value of each case, in addition

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28. *Id.* at 153.

29. 42 U.S.C. § 4331(c) (1970).

30. This phrase was used in *Delaware v. Pennsylvania N.Y. Cent. Transportation Co.*, 323 F. Supp. 487 (D. Del. 1971), in which a challenge to a dike and fill project was found to be within the jurisdiction of the court because of NEPA, among other grounds. The case was stayed for action by the court in bankruptcy.

31. *Sierra Club v. Morton*, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972), denied the Sierra Club standing to challenge permits granted by the Secretary of the Interior and the Secretary of Agriculture to develop a ski resort, but the suit was not based on NEPA. The decision affirmed the determination of the Ninth Circuit [433 F.2d 24 (9th Cir. 1970)] as to the standing of the Sierra Club; the case now returns to the district court. The Ninth Circuit's opinion, despite the fact that it denied standing, went on to discuss the merits of the case, a matter that the Supreme Court did not reach.

The court of appeals' view of the standing issue appears to have been influenced by its belief that the administrative agencies had adequately determined the use of the land in terms of the public interest. The court distinguished *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir.), *cert. denied*, 384 U.S. 941 (1965), on the basis that there was a statute specifically granting standing in that controversy; however, the analysis in *Data Processing* suggests that this point should not be determinative. *See also Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), *cert. denied*, 402 U.S. 908 (1971).

to the particular outcome, means that its best advantage lies in developing every case to the fullest extent possible.

Once the standing problem is resolved, NEPA embodies new procedural requirements upon which judicial review can be based. As noted in *Environmental Defense Fund v. Hardin*:<sup>32</sup>

[T]he Court will not substitute its judgment for that of the Secretary on the merits of the proposed program but will require that the Secretary comply with the procedural requirements of the National Environmental Policy Act. . . .<sup>33</sup>

Thus, for purposes of judicial review, courts appear to be adopting the "without observance of procedures required by law"<sup>34</sup> standard of the Administrative Procedure Act instead of the "arbitrary or capricious, an abuse of discretion"<sup>35</sup> or "unsupported by substantial evidence"<sup>36</sup> standards of that Act, which are more difficult for environmentalists to meet.<sup>37</sup> This represents a shift in focus from the outcome of the decision to the specific methods utilized in reaching that outcome. In limiting review of NEPA cases to procedural questions, therefore, courts have avoided problems previously associated with judicial review of administrative decisions.

Since NEPA primarily imposes procedural duties, agency regulations concerning the compilation and consideration of environmental impact statements take on major significance. In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,<sup>38</sup> the court considered a challenge to AEC regulations purporting to implement NEPA.<sup>39</sup> Examining NEPA

32. 325 F. Supp. 1401 (D.D.C. 1971).

33. *Id.* at 1404. This suit sought an injunction against the Secretary of Agriculture's program to control fire ants with spray. The injunction was denied because plaintiffs failed to show irreparable damage. The court gained jurisdiction through NEPA. *But see* *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), which suggests that NEPA might be the basis for reversal of a substantive decision if "it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." *Id.* at 1115. No reported case has followed the D.C. Circuit's suggestion.

34. 5 U.S.C. § 706(2)(D) (1970).

35. 5 U.S.C. § 706(2)(A) (1970).

36. 5 U.S.C. § 706(2)(E) (1970).

37. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 619 (1970); *see* *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970) (agency action did not constitute abuse of discretion). State courts tend to apply similar standards. *See, e.g.,* *UMW v. Colorado Pub. Util. Comm'n*, 170 Colo. 556, 463 P.2d 465 (1970) (sufficient competent evidence in record to support agency action).

38. 449 F.2d 1109 (D.C. Cir. 1971). Plaintiff was an organization concerned about the environmental hazards of locating a nuclear generating plant on Chesapeake Bay.

39. 10 C.F.R. § 50 App. D (1971). Plaintiff raised four specific objections. First,



and its applicability to the AEC, the court stated that “[p]erhaps the greatest importance of NEPA is to require the . . . agencies to *consider* environmental issues just as they consider other matters within their mandates.”<sup>40</sup> The court held that the AEC, in addition to fulfilling its traditional duty of evaluating radiological effects, was “compelled” to consider all adverse environmental effects. This represents a significant expansion of that agency’s former responsibilities.<sup>41</sup> The Commission did not appeal the court’s ultimate holding that the regulations had to be revised.<sup>42</sup>

The subsequently revised regulations<sup>43</sup> appear to represent an attempt

the regulations did not require independent evaluation of staff recommendations by the hearing board. The court’s reaction was “that the Commission’s crabbed interpretation of NEPA makes a mockery of the Act.” 449 F.2d at 116-17. Second, the delay in allowing consideration of environmental issues was said to reveal “a rather thoroughgoing reluctance to meet the NEPA procedural obligations in the agency review process.” *Id.* at 1119. Third, the court said that the AEC’s acceptance of another agency’s evaluation of environmental effects without independent analysis was

in fundamental conflict with the basic purpose of the Act. NEPA mandates a case-by-case balancing judgment on the part of federal agencies. . . . Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment.

*Id.* at 1123. *But see* Tarlock, *supra* note 12, at 536. Fourth, with respect to allowing construction begun previously to proceed on the original plans regardless of what environmental damage the reports revealed, the court observed that “the Commission seems to believe that the mere drafting and filing of papers is enough to satisfy NEPA.” 449 F.2d at 1127.

40. *Id.* at 1112 (emphasis in original).

41. *Calvert Cliffs’* is the first major judicial acceptance of the argument that NEPA expands the jurisdiction of federal licensing agencies. . . . A strict reading of these sections in light of their legislative history suggests that the NEPA is not jurisdictional, but that it expresses a policy of statutory construction for agencies and courts to follow in resolving cases of doubtful statutory authority.

Tarlock, *supra* note 12, at 538. *Contra*, Hanks, *supra* note 24, at 251-58. *See also* Brooks, *Millstone Two and the Rainbow: Planning Law and Environmental Protection*, 4 CONN. L. REV. 54 (1971) [hereinafter cited as Brooks].

42. AEC has since asked Congress to modify the nation’s environmental protection law temporarily and permit what it called “emergency” operation of nuclear power plants now idled by environmental disputes. Washington Post, Mar. 17, 1972, § A, at 1, col. 8.

43. 10 C.F.R. § 50 App. D (1972). For a discussion of possible effects of the revision, see Gillette, *AEC’s New Environmental Rules for Nuclear Plants May Open New Debate, Extend Delays, Raise Plant Costs*, SCIENCE, Sept. 17, 1971, at 1112. The regulations largely reflect the guidelines promulgated by the Council on Environmental Quality. Statement on Proposed Federal Actions Affecting the Environment: Guidelines 36 Fed. Reg. 7724 (1971) [hereinafter cited as Guidelines]. Under the new rules, the applicant submits an environmental report at the construction and operation license stages, including the elements required by NEPA. The Director of Regulation is in charge of analyzing the report and preparing a draft statement. The report and draft statements are made available to the public, with time limits for comments from outside sources. After receiving the comments, the Director prepares the final statement. The statement at the operational stage is to cover only those aspects which are different from those at

to comply with the *Calvert Cliffs*' decision. Given the AEC's traditional assignment of high priority to the development of atomic energy, however, no one case can be expected to guarantee that NEPA procedures will be fully implemented. This can be seen in a recently filed suit which challenged an AEC license grant under a regulation allowing temporary licenses without an environmental impact statement.<sup>44</sup>

The courts' interpretations of NEPA suggest that the role of the Act lies between the extremes predicted by the commentators. Some environmentalists feared that the Act would remain a policy statement only, with little possibility of enforcement. Thus it has been suggested that nominal agency compliance would be found sufficient, thus resulting in evasion of the statute.<sup>45</sup> This latter danger seems to have been foreclosed by the position taken by the court in *Calvert Cliffs*' and by the Council on Environmental Quality that the "fullest extent possible" language of NEPA § 102<sup>46</sup> sets a high standard of performance.<sup>47</sup> However, hopeful predictions by commentators that NEPA can be "an environmental bill of rights"<sup>48</sup> do not appear to be justified. The interest created by NEPA § 101(c), upon which this optimistic view is based, appears to be confined to insuring that proper procedures are followed. The view that seems to be gaining acceptance in judicial interpretation is that the Act requires the Government "to improve and coordinate the Federal plans, functions, programs and resources; but it does not purport to vest . . . a 'right' to the type of environment envisioned therein."<sup>49</sup> This interpretation appears to be the soundest because Congress has not made the requisite social decisions defining "the type of environment envisioned therein" or how it is to be achieved. Thus, by assuring that environmental considerations assume a role in the decision-making process, NEPA

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the construction stage. Draft statements are to be available ninety days, and final statements thirty days, before hearings.

44. The suit is described in *Outdoor America* (a newspaper published by the Izaak Walton League), Dec., 1971, at 1, col. 2. The Izaak Walton League and the Illinois State Community Action Program of the United Auto Workers combined to prevent the issuance of an operating license for the Cordova, Ill., nuclear generating plant. The suit was settled when the AEC agreed to certain controls. *Louisville Courier-Journal*, Apr. 3, 1972, § B, at 3, col. 4.

45. Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139, 145-46 (1970).

46. 42 U.S.C. § 4332 (1970).

47. "[It] does not provide an escape hatch for foot dragging agencies . . . [Rather it] sets a high standard which must be vigorously enforced by the reviewing courts." 449 F.2d at 1114. See also CEQ Guidelines, *supra* note 43, at 7724.

48. See Hanks, *supra* note 24; LANDAU, *supra* note 3, at 137-38.

49. *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 755 (E.D. Ark. 1971). The court granted an injunction against construction of a dam until NEPA was complied with.

represents the first step, rather than the last, in the development of comprehensive environmental policy, theory and practice.<sup>50</sup>

#### THE INFORMATION PROBLEM AND THE FREEDOM OF INFORMATION ACT

The value of the procedures required by NEPA depends significantly on whether the information the agency takes into consideration is as complete as possible. Scientists do not always agree on theory or findings, even when based on the same data.<sup>51</sup> NEPA can be satisfied, however, by including opposing views in an impact statement.<sup>52</sup>

The more important informational problem is the availability of all information possessed by an agency relevant to the environment, whether or not the data are included in the impact statement or in other parts of the agency's record. NEPA requires agencies to provide copies of environmental statements and comments solicited from other bodies to the President, the CEQ and the public in accordance with the Freedom of Information Act.<sup>53</sup> One court has gone so far as to call NEPA "an environmental full disclosure law . . . intended to make [agency] decision-making more responsive and more responsible."<sup>54</sup> But the impact

50. To the extent that NEPA requires development of a full record in agency proceedings and grants standing to conservation groups, it can be seen as writing an earlier case, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir.), cert. denied, 384 U.S. 941 (1965), into law. See Atkeson, *New Institutional Arrangements to Balance Energy and Environmental Needs*, 4 NATURAL RESOURCES LAW 774, 776 (1971).

51. Referring to the controversy over radiation standards, the District Court for the District of Colorado said:

[T]he "scientific" disagreement in such cases . . . may in reality be a disagreement with the value judgment that utilization of materials and processes which produce radiation should proceed even though all risks may not be known.

*Crowther v. Seaborg*, 312 F. Supp. 1205, 1232 (D. Col. 1970).

52. See *Committee for Nuclear Responsibility v. Seaborg*, 3 BNA ENVIRONMENT REP., CASES 1126 (D.C. Cir. 1971):

When, as here, the issue of procedure relates to the sufficiency of the presentation in the statement, the court is not to rule on the relative merits of competing scientific opinion. Its function is only to assure that the statement sets forth the opposing scientific views.

*Id.* at 1128.

53. 42 U.S.C. § 4332(2)(C) (1970).

54. *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749, 759 (E.D. Ark. 1971). See also Exec. Order No. 11,514, 3 C.F.R. §§ 531, 532 (1971), 42 U.S.C. § 4321, note (1970), ordering agencies to:

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. . . .

(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies . . . and other entities, as appropriate.

statement and comments by themselves may not be sufficient guides by which to measure compliance with NEPA. The AEC's impact statements for plant licensing proceedings are prepared on the basis of the license applicant's report. Since cost minimization is to the applicant's advantage, its report will probably underemphasize environmental concerns likely to result in increased expenditures. An intervenor must be able to make an independent assessment of a project's impact, as well as to subject the Commission's statement to intensive scrutiny.<sup>55</sup> Necessary information and aids for its analysis are most likely to be found in the hands of the AEC because of its pre-eminence in the atomic energy field. The availability of any information from the Commission is determined by FIA.

The Freedom of Information Act, an amendment to the Administrative Procedure Act,<sup>56</sup> is designed to insure that information concerning the organization, procedures, regulations, activities and other "identifiable records" of administrative agencies are available to "any person."<sup>57</sup> Subject to nine exemptions,<sup>58</sup> the Act makes disclosure the general rule. An action may be brought in a federal district court to "enjoin the agency from withholding agency records and . . . order the production of any agency records improperly withheld."<sup>59</sup> The burden of proof in such an action is placed on the agency.

A review of judicial interpretation of FIA reveals a trend toward expanding disclosure. Interpretation of its legislative history has been a major factor in this trend. The bill was first passed in the Senate, and that body's committee report<sup>60</sup> expressed a liberal disclosure policy. The bill was then adopted by the House without change, but its committee report<sup>61</sup> indicated a much more restrictive attitude.<sup>62</sup> Relying heavily on

55. . . . Too often the environmentalist takes for granted the efficiency of the technology which is incorporated in the questioned project and accepts uncritically the project's numerical or quantitative values as represented by the project's sponsors.

. . . . [T]he computation of radiation dosage involves many unverifiable assumptions and meteorological variables . . . [and] a process of negotiation between the AEC technical staff and the utility. . . . Unfortunately the calculation of offsite doses takes place behind closed doors and sometimes involves what have been called 'knock-down, drag-out battles.'

Like, *supra* note 19, at 508-10.

56. 5 U.S.C. §§ 551-59, 701-06 (1970).

57. 5 U.S.C. § 552(a) (1970).

58. 5 U.S.C. § 552(b) (1970).

59. 5 U.S.C. § 552(a)(3) (1970).

60. S. REP. No. 813, 89th Cong., 1st Sess. (1965).

61. H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966).

62. See K. DAVIS, ADMINISTRATIVE LAW TREATISE, SUPPLEMENT § 3A.2 (1970) [hereinafter cited as DAVIS]:

In general, the Senate committee is relatively faithful to the words of the act, and the House committee ambitiously undertakes to change the meaning that

the House view, the Attorney General wrote a memorandum explicating the Act for the agencies.<sup>63</sup> However, courts have adopted the Senate report as the basis for interpreting the Act.<sup>64</sup> Denial of trial court discretion to allow an agency to withhold information which does not fall within one of the exemptions has further contributed to expanded disclosure. Thus, in *Getman v. NLRB*,<sup>65</sup> the court stated that "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed."<sup>66</sup> Certain of those exemptions, however, are likely to create difficulty when the relevant information concerns atomic power production projects. These exemptions are for national defense, trade secrets and inter-, intra-agency memoranda.

The national defense exemption<sup>67</sup> raises a problem, peculiar to the

appears in the Act's words. The main thrust of the House committee remarks . . . is almost always in the direction of nondisclosure.

63. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967). The memorandum "consistently relies on . . . remarks by the House Committee." DAVIS, *supra* note 62, § 3A.2. It "reflects the point of view of the agencies, all of whom opposed the enactment." *Id.*, § 3A.1. This opposition, according to some commentators, has been continued in a policy of ignoring or attempting to circumvent the Act. Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1968) [hereinafter cited as Fellmeth]; Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970) [hereinafter cited as Nader]. The agencies' continuing reluctance is suggested by the statement of a congressional aide: "If an applicant appeals to the director of an agency and shows willingness to go to court, he will generally get his information." Wade, *Freedom of Information: Officials Thwart Public Right to Know*, SCIENCE, Feb. 4, 1972, at 498 [hereinafter cited as Wade].

64. See *Benson v. General Serv. Administration*, 289 F. Supp. 590 (W.D. Wash., 1968):

The House Report accompanied the bill on its passage through the House of Representatives, after the bill had already passed the Senate. It therefore seems to me that it represents the thinking of only one house, and to the extent that the two reports disagree, the surer indication of Congressional intent is to be found in the Senate Report, which was available for consideration.

*Id.* at 595. See also *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969). The Attorney General's memorandum, therefore, is given little weight. As Prof. Davis comments, "The Memorandum is the law in the sense that it guides the government's practices under the Act, but it is not the law in the sense of binding the courts." DAVIS, *supra* note 62, § 3A.1.

65. 450 F.2d 670 (D.C. Cir. 1971).

66. *Id.* at 672, quoting *Bristol Myers v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970). *Getman's* narrow construction of the exemptions suggests that the agencies may no longer create loopholes by interpreting the language of the exemptions loosely. See Katz, *The Games Bureaucrats Play: Hide and Seek under the FOIA*, 48 TEXAS L. REV. 1261 (1970); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967).

67. This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or

AEC Plowshare Program, involving experiments with atomic explosions for power production. These experiments employ technology identical to that used in building nuclear weapons.<sup>68</sup> Therefore, environmental information about such a blast could be withheld because of its military significance. This problem, however, appears to have been attenuated by the decision in *Mink v. EPA*.<sup>69</sup> *Mink* concerned an effort to obtain documents reviewing the underground nuclear test at Amchitka, Alaska. The trial court refused disclosure upon a finding that the documents fell within the national defense and inter-, intra-agency memorandum exemptions. The Court of Appeals for the District of Columbia Circuit reversed and remanded, ordering in camera inspection by the district court to determine:

. . . whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption [for national defense data] solely by virtue of their association with separately classified documents. . . .<sup>70</sup>

Under such a rule of separability, much information on the Plowshare Program should be made available.

The AEC's interpretation<sup>71</sup> of the trade secrets exemption<sup>72</sup> is reflective of its general adherence to the interpretation of FIA's disclosure

foreign policy.

5 U.S.C. § 552(b)(1) (1970).

68. Trippe, *supra* note 12, at 382.

69. 40 U.S.L.W. 2233 (D.C. Cir. Oct. 15, 1971), *cert. granted*, 40 U.S.L.W. 3428 (U.S. Mar. 6, 1972). The suit was brought by 33 congressmen; the trial had dismissed the suit insofar as plaintiffs were acting in their official capacity because of separation of powers, and insofar as they were acting as private citizens because of the application of the exemptions.

70. *Id.* The court applied the same reasoning to the intra-, inter-agency memorandum exemption. Decisions such as this suggest that courts will not allow agencies to evade the Act, whether by the sort of "commingling" (a term coined in Nader, *supra* note 63) which was specifically dealt with here and in Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970), and Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), or by unfounded agency replies that there was insufficient identification of the documents requested. See Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969). See also Fellmeth, *supra* note 63; Gianella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 Ad. L. Rev. 217 (1971); Nader, *supra* note 63; Wade, *supra* note 63.

71. 10 C.F.R. § 9.5(a)(4) (1972).

72. This section does not apply to matters that are—

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

5 U.S.C. § 552(b)(4) (1970).

requirements adopted by the House report and the Attorney General's memorandum. The AEC regulation begins by duplicating the language of the Act but adds the following qualifications:

Matter subject to this exemption is that which is customarily held in confidence by the originator. It includes, but is not limited to:

(i) Information received in confidence, such as trade secrets, inventions and discoveries, and proprietary data;

(ii) Technical reports and data, designs, drawings, specifications, formulae, or other types of proprietary information which are generated or developed by the AEC or for the AEC under contract.<sup>73</sup>

The language of the introductory sentence and subsection (i) is an attempt to apply the exemption to any information given the Government in confidence. Because the AEC dominates the atomic energy field, the expansive interpretation in (ii) could be used to prevent disclosure of environmentally relevant information. It appears doubtful, however, that these attempts to limit disclosure can stand. The Commission's interpretation reflected in (i) has been specifically rejected in at least two cases.<sup>74</sup> With regard to subsection (ii), courts have said that the trade secrets exemption "condones withholding information only when it is obtained from a person outside the agency."<sup>75</sup> The judicial interpretation seems more justifiable than that of the Commission since, absent considerations of national defense, a governmental body should hardly be considered to have a proprietary interest in information generated from the use of public funds. The attempt to apply the trade secrets exemption so broadly, as well as the use of such terms as "need" and "relevancy" in other AEC regulations,<sup>76</sup> suggests an attempt by the Commission to avoid full disclosure.

73. 10 C.F.R. § 9.5(a)(4)(i)-(ii) (1972).

74. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

75. *Benson v. General Serv. Administration*, 289 F. Supp. 590, 594 (W.D. Wash. 1968); see *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

76. See 10 C.F.R. § 2.744(b) (1972):

An application by a party to a proceeding for the production of Commission inspection reports and other records and documents, the basic purpose of which is to record matters of fact relating to license applications . . . shall set forth the need of the party for such documents and the relevancy thereof to the issues in the proceeding. . . . Upon a determination of need and relevancy . . . such

NEPA requires the issuance of an environmental impact statement to be preceded by a process in which "the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."<sup>77</sup> Involvement of other agencies raises the possibility that data not otherwise exempt may be withheld as interagency memoranda.<sup>78</sup> The CEQ Guidelines state that :

The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public pursuant to the provisions of the Freedom of Information Act . . . without regard to the exclusion of inter-agency memoranda when such memoranda transmit comments of Federal agencies . . . upon the environmental impact of proposed actions.<sup>79</sup>

The AEC has formulated a policy along the CEQ Guidelines, making its draft and final impact statements available to the public in advance of hearings and disclosing the statutorily required comments of other agencies on the final drafts. Previously, statements had not been available until the time of the hearing.<sup>80</sup> However, agency practices in disclosing impact statements are not uniform.<sup>81</sup>

Facts contained in intra-, inter-agency correspondence other than impact statements and official comments thereto are also likely to shed light on both the content of the impact statement and the procedures used to compile it. In *Soucie v. David*,<sup>82</sup> the court said of the intra-, inter-agency memorandum exemption :

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records . . . will be produced if the facts recorded therein are not otherwise available. . . .

Since FIA says disclosure must be to any person, there does not appear to be any reason for having this separate rule. Apparently this sort of formulation of two sets of regulations retaining expressions of discretion is fairly typical of the agencies. See Hoerster, *The 1966 Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641 (1969).

77. 42 U.S.C. § 4332(2)(C) (1970).

78. This section does not apply to matters that are—

. . . .

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.  
5 U.S.C. § 552(b)(5) (1970).

79. CEQ Guidelines, *supra* note 43, at 7726.

80. Brooks, *supra* note 41, at 60.

81. This is to be expected because release of impact statements is conditioned on FIA, and each agency has its own rules implementing FIA.

82. 448 F.2d 1067 (D.C. Cir. 1971). The court of appeals determined that the district court had erred in determining that the Office of Science and Technology was not an agency within the meaning of the Act and remanded for a determination of whether



. . . That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.<sup>83</sup>

Therefore, even if such memoranda include nondisclosable observations on policy, in camera review by the trial court to determine separability of information should result in release of the factual portions of the documents.

#### CONCLUSION

The complementary roles to be played by NEPA and FIA in litigation instituted to insure that environmental information is available and considered in the nuclear power program is apparent. Courts are strictly enforcing the procedural requirements of NEPA.<sup>84</sup> In addition, several judicial decisions have demonstrated that FIA may be used to obtain information essential for determining both the possible effects of atomic energy projects and whether the AEC has considered them. Litigation under NEPA and FIA alone, however, will not solve environmental problems. As one author has commented, "it is the rare exception in which a judicial remand to an administrative agency for further procedures results in a changed decision."<sup>85</sup> But presentation of environmental information before the agencies, the public and the legislature represents a significant step toward giving environmental values meaningful weight in decision-making.

Alice M. Craft†

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the agency's evaluation of the supersonic transport was protected in whole or part by specific exemptions.

83. *Id.* at 1077.

84. Chief among these is the Court of Appeals for the D.C. Circuit. The vast majority of NEPA cases have been filed in the District of Columbia pursuant to 28 U.S.C. § 1391(e)(1) (1970). Perhaps not without coincidence, the D.C. Circuit has never failed, in a reported decision, to grant disclosure in a case brought under FIA.

85. Sax, *supra* note 8, at 133. The Lyons salt mine disposal scheme mentioned in the introduction to this note would probably have been such an exception had it been taken to court. By way of contrast, following *Calvert Cliffs'* a newly issued preliminary study of the questioned power plant "tentatively concluded that operation of the . . . plant . . . will cause virtually no danger to fish in the bay or to humans who live nearby." Washington Post, Feb. 2, 1972, § C, at 4, col. 1.