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A PRELIMINARY ASSESSMENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

STEVEN B. FISHMAN*

Lead the people by regulations, keep them in order by punishments (hsing), and they will flee from you and lose all self-respect. But lead them by virtue and keep them in order by established morality (li), and they will keep their self-respect and come to you. Confucius, ANALECTS, II, 3.

I. INTRODUCTION

The National Environmental Policy Act of 1969¹ (NEPA) has, perhaps more than any other recent federal legislation, been the subject of intense discussion and furious speculation, both in legal and nonlegal literature.² It has been hailed as an "environmental bill of rights"³ and criticized as a foppishly romantic waste of time and

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1. 42 U.S.C. §§ 4331 *et seq.* (1970).

2. See Coleman, *Possible Repercussion of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits*, 3 NATURAL RESOURCES LAW. 647 (1970); Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 12 B.C. IND. & COM. L. REV. 541 (1971); 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 & Hanks]; Hazelton, *Public Policy for Controlling the Environment*, 48 J. URBAN L. 631 (1971); Jackson, *Environmental Policy and the Congress*, 11 NATURAL RESOURCES J. 403 (1971); Reilly, *The National Environmental Policy Act and the Federal Highway Program: Merging Administration Traffic*, 20 CATHOLIC U.L. REV. 211 (1970); Yannacone, *National Environmental Policy Act of 1969*, 1 ENV. LAW. 8 (1970); Yost, *Implementing the National Environmental Policy Act*, 3 SW. U.L. REV. 88 (1971); Note, *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, 37 BROOKLYN L. REV. 139 (1970); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 22 HASTINGS L.J. 805 (1971) [hereinafter cited as HASTINGS, *Retroactive Application*]; Note, *A Panoramic View of the National Environmental Policy Act*, 16 HOW. L.J. 116 (1970); Note, *Retroactive Application of the National Environmental Policy Act of 1969*, 69 MICH. L. REV. 732 (1971); Note, *NEPA: Full of Sound and Fury . . . ?*, 6 U. RICHMOND L. REV. 116 (1971); Comment, 50 B.U.L. REV. 616 (1970). See also Lindsay, *Conversation with Britain's Environmental Chief*, 55 SATURDAY REV. 64 (Jan. 1, 1972).

3. See Hanks & Hanks, *supra* note 2.

energy.⁴ The Act has already taken its place in the daily language of environmentalists and the general public with its acronym, NEPA. One commentator has suggested that NEPA's significance and impact is pervasive enough to have a salutary effect on environmentally related legislation by reinforcing their environment-protecting provisions,⁵ while other writers take narrower views on NEPA's impact.⁶ Much of the published material concerning NEPA, its potentials and its limitations, must be considered in the perspective in which the commentators have perceived NEPA's goals and purposes. Also, much of the literature which had been flooding the legal periodicals, was due to an immediate reaction to the passage of the bill. Disregarding for the moment the effect NEPA has had on "environmental quality," *i.e.*, whether or not and to what extent NEPA has accomplished its "goals" (or more precisely, whether the "goals" of NEPA have been properly reached and its "mandate" implemented), the great abundance of energetic treatment which NEPA has received from the very outset, prior to the existence of any reasonable body of case law, can be explained by the national awareness of environmental problems coupled with the dissimilarity of other environmental legislation and the distinctly "new" approach that Congress sought to take toward solution.

Whatever differences commentators had regarding the substance of NEPA, they all agreed that NEPA was something different. Senator Jackson, the Act's sponsor and leading proponent, recently made this point evident when he stated that

A national policy for the environment was necessary to provide both a conceptual basis and legal sanction for applying to environmental management the methods of systems analysis that have demonstrated their value in universities, private enterprise, and in some areas of government.⁷

Certainly there was a large desire among the "professions" to explore and test the limits of this legislatively imposed attempt at a rational decision-making policy.

4. See generally J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

5. HASTINGS, *Retroactive Application* at 809. See also S. REP. NO. 296, 91st Cong., 1st Sess. 14 (1969).

6. See, *e.g.*, *NEPA: Full of Sound and Fury . . . ?*, *supra* note 2, at 116.

7. Jackson, *supra* note 2, at 407.

NEPA

The first obstacle that the writers saw as a block to agency implementation of NEPA was the "retroactive application" issue.⁸ If NEPA was to serve as the basis for a new approach to the environment, it would be necessary to overcome the common complaint set forth by the agencies that NEPA would frustrate much of their ongoing activities. The agencies saw NEPA as a "from this point on" piece of legislation and couched their views on limitations in terms of fair play and economy. It is not surprising, then, that the writers would argue that NEPA's full potential (legislation mandating preventive action rather than the pre-NEPA corrective-type legislation) could only be realized if NEPA was applied to all current agency action, disregarding both the ecologically irrelevant dates of agency decision and legislative allocations of funds.⁹

The first cases to be decided under NEPA were primarily concerned with retroactivity. Early cases approached the issue from the standpoint of legislative intent,¹⁰ with the thrust of their holdings based upon a judicial determination that Congress intended only prospective application.¹¹ Eventually, however, the judicial trend has been in the direction of acceptance of NEPA as retroactively applicable,¹² or at least in the nature of a retroactively applicable statute.¹³ The attitude of the courts toward NEPA was beginning to take form in these cases and was manifested by the oft-employed uses of judicial gymnastics surrounding a holding of retroactivity.¹⁴

8. See, e.g., HASTINGS, *Retroactive Application*, *supra* note 2.

9. *Id.*

10. See *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *aff'd*, 454 F.2d 613 (3d Cir. 1971). But see *Environmental Defense Fund v. Tennessee Valley Authority*, 339 F. Supp. 806 (E.D. Tenn. 1972), where the court, referring to *Bartlett* stated: "None of these opinions analyze NEPA to determine whether the theory has any merit beyond noting the absence of language requiring retrospective application." *Id.* at 811-12.

11. See *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Brooks v. Volpe*, 329 F. Supp. 118 (W.D. Wash. 1970); *Elliot v. Volpe*, 328 F. Supp. 831 (D. Mass. 1971); *Investment Syndicates, Inc. v. Richmond*, 318 F. Supp. 1038 (D. Ore. 1970); *Bucklein v. Volpe*, 2 ERC 1082 (N.D. Cal. 1970).

12. See *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

13. See *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

14. See *Morningside-Lenox Park Ass'n v. Volpe*, 344 F. Supp. 122 (N.D. Ga. 1971).

Perhaps it was this early favorable response by the courts which prompted new theories with regard to NEPA's potential. Emerging as a private vehicle for limiting federal and federal-state action, writers began assessing NEPA's impact on the law of standing.¹⁵ One commentator pointed out that although NEPA was not specifically designed to facilitate judicial review, it should accomplish precisely that objective since it provides a clear basis for asserting standing by private environmental groups.¹⁶ Moreover, one author has quite optimistically observed that

[i]n the past, we have often accepted the non sequitur that where all are intended beneficiaries of an interest, none has standing to protect it. The dangers inherent in this philosophy are now apparent: Both logic and experience support the emerging view that an interest so fundamental that all are within the protected class must be permitted its champion. The National Environmental Policy Act has created such an interest.¹⁷

Generally, the courts have been quick to agree that the Act itself is a sufficient basis for alleging standing to litigate¹⁸ under a provision of NEPA.

Throughout the literature,¹⁹ there have been attempts to imply a substantive cause of action from section 101 of NEPA. One extremely thorough treatment²⁰ of this possibility frankly recognizes that on the face of NEPA there is no indication that the Act was intended to be self-executing. Indeed, one commentator has flatly stated that "[t]he legislative history in this regard is ambiguous; one can only say that such a possibility was thought of and not categorically rejected."²¹

15. See generally Hanks & Hanks, *supra* note 2; *The National Environmental Policy Act: A Sheep in Wolf's Clothing?*, *supra* note 2, at 139; *NEPA: Full of Sound and Fury . . . ?*, *supra* note 2, at 116. See also ENVIRONMENTAL POLICY DIV., 91ST CONG., 1ST SESS., CONGRESS AND THE NATION'S ENVIRONMENT, ENVIRONMENTAL AFFAIRS OF THE 91ST CONGRESS (Comm. Print 1971).

16. *The National Environmental Policy Act of 1969: A Sheep in Wolf's Clothing?*, *supra* note 2, at 154. For a general discussion of this type of standing, see Note, *Non-Statutory Review of Federal Administrative Action*, 68 MICH. L. REV. 387 (1970).

17. Hanks & Hanks at 248.

18. *But see* McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971) which held that there was no standing to invoke federal jurisdiction under NEPA.

19. See, e.g., Coleman, *supra* note 2, at 647. See also Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963).

20. Coleman, *supra* note 2.

21. *Id.* at 655.

Although cogent arguments have been proffered in support of implying a cause of action, courts have universally rejected any attempt to do so. One court has stated that “[t]he Act appears to reflect a compromise which . . . falls short of creating the type of ‘substantive rights’ claimed by the plaintiffs. Apparently the sponsors could obtain agreement only upon an Act which declared the national environmental policy. This represents a giant step, but just a step.”²² Herein seem to lie the limits that courts were willing to allow for the implementation of NEPA: plaintiffs must be relegated to enforcement of the procedural requirements²³ of the Act.

Now that the basic questions first presented in the early cases have been answered and generally accepted, courts and litigants have turned their efforts toward more subtle and sophisticated questions involving agency implementation of the Act. There is now a fairly explicit body of case law defining to what extent, and in what manner, agencies must consider environmental factors in their decision-making process. Federal agencies have been instructed²⁴ to adopt procedures for the orderly compliance with NEPA’s procedural requirements under section 102.²⁵ All agencies have thus far promul-

22. 325 F. Supp. at 755. *See also* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971); *McQueary v. Laird*, 449 F.2d 603 (10th Cir. 1971); *Bucklein v. Volpe*, 2 ERC 1082 (N.D. Cal. 1970).

23. 42 U.S.C. § 4322(2)(C) (1970).

24. Exec. Order No. 11,514 § 2(b), 3 C.F.R. 105 (1970), 42 U.S.C. § 4321 (1970) in part, orders agencies to: “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. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action.”

25. 42 U.S.C. § 4332 (1970): Cooperation of Agencies; reports; availability of information; recommendations; international and national coordination of efforts.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man’s environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by Title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

gated regulations,²⁶ or at least are operating with them in draft form.²⁷ Nevertheless, there is a steady increase in the quantity of "102 suits"²⁸ brought by conservation groups and private citizens against federal agencies seeking preliminary injunctions in order to halt the commencement or continuation of federal projects. On the surface, the increase in the number of such suits may suggest that agency compliance with NEPA is all but satisfactory. But, whatever appeal there

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, 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. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by Title II of this Act.

26. *See, e.g.*, Dep't of Transportation (DOT) Procedures, 36 Fed. Reg. 23,679 (1971). *See also* notes 116-123 *infra* and accompanying text.

27. *See* Appendix, *Hearings on Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., ser. 91, pt. 2, at 357 (1970).

28. The reported cases are increasing in volume weekly. *See* ERC, vols. 1-3.

may be for the acceptance of this quantitative factor as an accurate indicator of agency implementation, there are other significant factors at play which are too subjective in nature to accurately assess.

One factor which certainly must play a role in increased litigation is the phenomenal growth of the public's awareness of its environment coupled with a growing trend to "do something about it." Ease of access to the courts²⁹ provides a visible route toward these ends. A corollary to this marked tendency to "go to court" is the willingness of courts to provide the relief sought.

Another extremely important factor which must be considered is the attitude of the agencies themselves. Agencies may honestly believe that they are complying with the mandate of NEPA, *i.e.*, they are "doing their best." Furthermore, agencies may regard NEPA as only a minor procedural requirement and not as a departure from their previous authority to consider environmental impact in the decision-making process. This, for example, is the "official" position of the Department of Transportation.³⁰ It would seem, therefore, that the question of whether or not NEPA is sufficiently progressing along the lines that Congress intended cannot be answered solely by a cursory headcount of "102 suits."

Approaching the question from a different point of view, a careful examination of reported cases reveals agency attitudes; attitudes which set the background for either concerted obstructionism or implementation. Additionally, agencies' self-promulgated procedures are strong indicators of their attitudes; but, probably more revealing than any other specific indicator is the scope and depth of their section 102 environmental impact statements.³¹ Courts have played a major role

29. See text accompanying notes 16-18 *supra*.

30. Statement of James D. Braman in *Hearings on the National Environmental Policy Act Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., at 2 (1970). [hereinafter cited as *Hearings on Public Works*.] DOT regards NEPA as no major change in policy from DOT Act of 1966, 23 U.S.C. §§ 2(b)(2), 4(f) (1970).

31. If we assume, as we must, that agency administrators are not inherently "evil," that is to say not diabolically opposed to environmental quality at any cost, then it would seem that a complete and thorough analysis of environmental impact, prior to any final action taken, *must* weigh somewhere in the decision-making process. Proper section 102 statements are indicators only of agency attitude regarding the Act. The "rightness" or "wrongness" of the decision is not questioned and should play no part in determining attitudes toward NEPA. See also *Hearings on Public Works*, *supra* note 30.

in defining the scope of federal agencies' duties under section 102. For this reason, it is fruitless to question the extent of agency compliance without first examining what constitutes compliance.

II. THE NATURE OF THE POLICY ACT

In order to survey the scope of agency compliance with the national policy set down by Congress in NEPA, it will be useful to discuss the nature of this policy. For without a clear and well-defined understanding of what is to be expected, courts, agencies and the public will be hard-pressed to ascertain whether or not NEPA has been successful. The stated purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment" ³² Congress declared that "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare . . . of present and future generations of Americans." ³³ To this end the government must "coordinate Federal plans, functions, programs, and resources" ³⁴ Following the enactment of NEPA, President Nixon ordered federal agencies to "initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals." ³⁵ In this same light, agencies have developed procedures, ³⁶ such as those promulgated by the Federal Highway Administration, "to assure that the human environment is carefully considered and national environmental goals are met when developing federally financed [projects]" ³⁷

There appears to be much confusion concerning the distinction between policy and goals, especially in the attempts by the executive branch to implement NEPA. The Court of Appeals for the District of Columbia recognized this dichotomy in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, ³⁸ stating that "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities so that environmental costs

32. 42 U.S.C. § 4321 (1970).

33. *Id.* § 4331(a).

34. *Id.* § 4331(b).

35. Exec. Order No. 11,514 § 1, 3 C.F.R. 902 (1970), 42 U.S.C. § 4321 (1970).

36. See notes 116-23 *infra* and accompanying text.

37. 36 Fed. Reg. 23,696 (1971).

38. 449 F.2d 1109 (D.C. Cir. 1971).

and benefits will assume their proper place along with other considerations.”³⁹ Senator Jackson has observed that goals are “man” oriented while most federal resource policies are “object” oriented.⁴⁰ For this reason, it is crucial not to confuse broad environmental policy with the narrower, single purpose efforts characteristic of the goals upon which previous environmental legislation has focused.

Despite NEPA’s attempt at a broad environmental policy, there is substantial reason to believe NEPA falls far short of that policy. Professor Grad has pointed out that the most striking aspect of environmental controls is the absence of any broadly inclusive federal policy.⁴¹ NEPA was superimposed, Professor Grad suggests, on an already existing scheme of environmental control which is both inconsistent and bewildering.⁴² NEPA

expresses a general policy in favor of the preservation and restoration of the environment without, however, reaching in to adjust existing intergovernmental relations and without seeking to order the variety of regulatory efforts at different levels of government in any systematic way.⁴³

If NEPA is not a viable national policy, it is certainly a step toward one. The goals expressed in NEPA, however, are too ill-defined to suggest reconciliation with other national policies.⁴⁴ This notion may further be explained by recognizing that “[t]he tendencies of contemporary American society to inordinate and uncontrolled growth

39. *Id.* at 1112.

40. *See generally* Jackson, *supra* note 2, at 408.

41. F. GRAD, *Inter-Governmental Aspects of Environmental Controls*, in ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES, AND THE LAW 47 (1971).

42. *Id.* at 48.

43. *Id.* But consider the effect that the recently created Environmental Protection Agency (EPA) might have concerning the ideas expressed herein. Professor Grad recognized that the creation of EPA is the first step “in sorting-out of the present legal and administrative relationships.” *Id.*

44. *See generally* Hazelton, *supra* note 2, at 631. “NEPA commits the nation to goals which may prove contradictory without any indication of how such contradictions are to be resolved. Thus, the Act requires the Federal Government to use all practicable means to achieve the nation’s environmental goals, but adds these means must be ‘consistent with other essential considerations of national policy.’” *Id.* at 651. *But see* HASTINGS, *Retroactive Application* at 827, which states that it may be consistent with NEPA to have economic factors override environmental considerations and objectives.

are fundamentally incompatible with the objectives of the environmental quality movement. . . ."⁴⁵

Yet, if NEPA did not emerge as the far-reaching, curative policy act that its sponsors intended, that should come as no surprise. Policy, in general, Professor Henning has observed, is a reflection of the culture where it operates.⁴⁶ In American society, pragmatic and pluralistic characteristics are dominant in general policy areas. "At present the political climate and changing conditions do not appear to give much stability and authority to policy in general."⁴⁷ What, then, is the extent of the policy expressed in NEPA? Professor Grad suggests that NEPA can help reconcile federal programs with broad environmental implications through federal regulatory efforts; no sustained federal environmental policy can emerge without this coordinated effort.⁴⁸

The courts, too, have perceived the extent of policy expressed in NEPA in varying manners. In *Zabel v. Tabb*,⁴⁹ an action by landowners to compel the Secretary of the Army to issue a permit to dredge and fill navigable waters of a bay, the court failed to articulate its reasoning process from the standpoint of policy consideration, but stated that where NEPA is "considered together with the Fish and Wildlife Coordination Act and its interpretation, there is no doubt that the Secretary can refuse, on conservation grounds, a permit under the Rivers and Harbors Act."⁵⁰ In *Greene County v. Federal Power Commission*,⁵¹ the court viewed NEPA as "going far beyond the requirement that the agency merely consider environmental factors It is a mandate to consider environmental values at every distinctive and comprehensive stage of the [agency's] process."⁵² From a widely different perspective, the court in *Environmental Defense Fund v. Corps of Engineers*,⁵³ considered NEPA as, at the very least,

45. Caldwell, *Environmental Policy in a Hypertrophic Society*, 11 NATURAL RESOURCES J. 417 (1971).

46. Henning, *Environmental Policy and Politics: Value and Power Context*, 11 NATURAL RESOURCES J. 447, 452 (1971).

47. *Id.*

48. F. GRAD, *supra* note 41.

49. 430 F.2d 199 (5th Cir. 1970).

50. *Id.* at 214.

51. 455 F.2d 412 (2d Cir. 1972).

52. *Id.* at 420, *citing* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

53. 325 F. Supp. 728 (E.D. Ark. 1971).

an environmental full disclosure law which was "certainly intended to make . . . decision-making more responsive and more responsible."⁵⁴ The manner in which these courts discern the national environmental policy is undoubtedly the key element figuring in what courts will procedurally require of the agencies which are subject to that policy.⁵⁵

Whatever the defects of NEPA may be in terms of ill-defined policy considerations, the reality of the situation must not be obscured: federal agencies must nevertheless function within the limits of NEPA as it has been enacted and interpreted. In recognizing these limitations, the residual effects of NEPA's drawbacks are now becoming evident. One commentator has indicated that "[i]n the absence of a defined . . . policy, there is no way to evaluate any administrative structure or function, even by means of the sterile criteria of economy and efficiency."⁵⁶ And, from the perspective of agency attempts to cope with court-enforced section 102 procedures, Professor Sax has observed that "when problems . . . are presented in a diffuse and unfocused way, as by asking someone to consider all the factors involved in any proposal, the problems are so open-ended as almost to defy resolution."⁵⁷

The frustrated position that many agencies must find themselves in is further illustrated by an examination of the "open-ended" requirements set out in the language of the Act. Section 102(2)(C) provides that "all agencies . . . shall . . . include in every report . . . a detailed statement . . . [of] alternatives to the proposed action."⁵⁸ The majority of courts have required agencies to take positive efforts in discussing options in their environmental impact statements and to consider them in their decision-making process.⁵⁹ Yet, most agencies are severely limited by law or budgetary allowances from implementing any option which would accomplish similar objectives with

54. *Id.* at 759.

55. See note 195 *infra* and accompanying text. See also Reilly, *supra* note 2, at 211.

56. CALDWELL, *Authority and Responsibility for Environmental Administration*, in *THE POLITICS OF NEGLECT* 229, 231 (R. Meek & J. Straayer eds. 1971).

57. J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 91 (1971).

58. 42 U.S.C. § 4332(2)(C) (1970).

59. See, e.g., 325 F. Supp. 728 (E.D. Ark. 1971). See also note 160 *infra* and accompanying text.

less drastic environmental impact.⁶⁰ Without the power to effectuate desired ends through environmentally safer means, all agency action will pull toward the status quo. NEPA, through its disarming shotgun approach, makes no attempt to resolve this administrative quagmire. Without a true policy and without coordination in the executive branch, the thrust of NEPA is embodied in its procedural requirements. An agency need only prepare a carefully tailored section 102 statement to comply with the Act. The paradoxical result, as Professor Grad has observed, may be to protect "the agencies from the environmentalists, rather than the environment from the agencies."⁶¹

In sharp contrast to America's environmental policy stands the "total approach" taken by England's Department of the Environment.⁶² Each section of the country, explains Department Head Peter Walker, has a clear regional planning strategy,⁶³ the result being more effective handling of environmental problems. For example, in the recent London Airport siting, the Department was able to reverse the decision of a high-level commission.⁶⁴ Mr. Walker reports that the Department "was able to look at the total environmental impact . . . [and] was able to bring a total approach to a particular problem."⁶⁵ England has rejected the procedural modes embraced by NEPA for a public watchdog approach. Says Mr. Walker: "[t]here is no British equivalent to your environmental impact statement, nor do I intend to have one. I personally think it is the duty of any government department to pursue high-quality decisions in terms of the environment and they should be severely, publicly chastised if they don't."⁶⁶

However suggestive England's solution might seem, a complete system of federal environmental controls runs headlong into fundamental constitutional problems, consideration of which is beyond the scope of this note. Mention is made of England's "total approach"

60. See Reilly, *supra* note 2, at 211.

61. F. GRAD, *supra* note 41, at 172.

62. The Department of the Environment, created in 1970, has the largest staff and the highest budget of Britain's cabinet level departments.

63. Lindsay, *supra* note 2, at 64.

64. *Id.*

65. *Id.*

66. *Id.* at 70.

simply as a point of contrast to emphasize NEPA's failings and to suggest that any effective environmental policy must be grounded in sufficient statutory and financial power. NEPA and its section 102 statement, "like a number of other decisions in the past, readily makes a land fit for lawyers to live in with no great impact upon the environment itself."⁶⁷

III. JUDICIAL INTERPRETATION OF NEPA'S PROCEDURAL MANDATES

In section 102 of NEPA, Congress directed that "to the fullest extent possible" all agencies of the federal government shall comply with the section 102 procedural requirements.⁶⁸ There is no doubt that the phrase, "to the fullest extent possible," does not render NEPA discretionary. On the contrary, all the circuit courts which have interpreted this phrase have recognized that this requirement sets a high standard for the agencies.⁶⁹ "[T]he words are an injunction to all federal agencies to exert utmost efforts to apply NEPA to their own operations."⁷⁰ In *Calvert Cliffs*,⁷¹ the court held that section 102 duties are not inherently flexible and must be complied with to the fullest extent, unless there exists a clear statutory conflict of authority.⁷² "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance."⁷³ Earlier courts,⁷⁴ however, have used language stressing discretionary aspects of the Act. *Calvert Cliffs* sought to distinguish these cases on the grounds that those courts were referring to NEPA's substantive goals, (section 101) rather than the procedural duties created under section 102.⁷⁵

In spite of the broad reading courts have given to the extent of section 102 applicability, recent cases have limited, to some extent,

67. *Id.*

68. *See* 42 U.S.C. § 4332 (1970).

69. *See, e.g.*, 449 F.2d at 1113.

70. *Ely v. Velde*, 451 F.2d 1130, 1138 (4th Cir. 1971).

71. 449 F.2d 1109 (D.C. Cir. 1971).

72. *Id.* at 1115.

73. *Id.*

74. *See, e.g.*, *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970); *Bucklein v. Volpe*, 2 ERC 1082 (N.D. Cal. 1970).

75. 449 F.2d at 1115 & n.13.

its scope. As some commentators have suggested, "the existence of a review, control or planning function in the agency raises a presumption for the applicability of the Act."⁷⁶ In *Cohen v. Price Commission*,⁷⁷ the court held that the Price Commission created by the Economic Stabilization Act need not file an environmental impact statement before authorizing increases in subway and bus fares merely because fare increases could conceivably result in an acceleration of air pollution due to a substantial increase in motor vehicle traffic. The court reasoned that the Price Commission was a temporary agency "whose function would readily be frustrated by bureaucratic delays were it required to . . . [evaluate] environmental benefits or detriments that may be involved in its determination of price and wages."⁷⁸ The decision in *Cohen* seems to be grounded in the contrast between long-range environmental policy and short-term economic policy. Whatever broad implications *Cohen* may have had on NEPA's applicability were wisely avoided by its narrow holding.

In cases where the agency did not file a section 102 statement,⁷⁹ most courts have had no problem enjoining agency action provided it was a "major Federal action significantly affecting the quality of the human environment"⁸⁰ as required by section 102. Courts have been split, however, in granting preliminary injunctions to plaintiffs who allege defects in the agency's impact statements. There are those courts which have adopted an attitude that "general policy compliance" is sufficient for NEPA's section 102 requirements even though there may be substantive defects in the impact statement.⁸¹ Other courts have approached the problem from the point of view that nothing less than "strict compliance" is sufficient.⁸²

In *Daly v. Volpe*,⁸³ the court denied plaintiffs a preliminary injunc-

76. Hanks & Hanks, *supra* note 2, at 265.

77. 337 F. Supp. 1236 (S.D.N.Y. 1972).

78. *Id.* at 1241.

79. *See, e.g.,* Cathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971).

80. 42 U.S.C. § 4332(2)(C) (1970). Concerning judicial interpretation of this statutory language, see text accompanying note 138 *infra*.

81. *See, e.g.,* Daly v. Volpe, 326 F. Supp. 868 (W.D. Wash. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971); Sanguine v. Laird, 217 F. Supp. 664 (W.D. Wis. 1970).

82. *See, e.g.,* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).

83. 326 F. Supp. 868 (W.D. Wash. 1971).

tion upon a showing by the agency that extensive correspondence, consultation, meetings and hearings were held on the location of an interstate highway, despite the fact that a draft impact statement was not filed prior to the third corridor hearing; hence, comments thereon were not part of the decision-making process as contemplated by NEPA and its implementing regulations.⁸⁴ The court reasoned that "there has been substantial compliance with the policies underlying NEPA and its implementing regulations . . . [thus] the objectives of NEPA have been achieved . . ."⁸⁵ Similarly, the court in *Sierra Club v. Hardin*,⁸⁶ refused to enjoin the Forest Service from completing a sale of timber in a national forest although its hastily compiled impact statement did not comply with the Council on Environmental Quality's guidelines. The court narrowed its holding to the particular facts of the case and relied on the following: extensive environmental considerations by a panel of experts, "the high quality of its research product, the advance stage of planning [as of NEPA's effective date of application] . . . and the exorbitant cost of any further delay . . ."⁸⁷ These cases suggest that as long as an agency can affirmatively indicate that environmental considerations were major inputs into the decision-making process, the spirit of NEPA has not been frustrated. Furthermore, NEPA's procedural requirements should be followed, if at all possible, since a bad faith circumvention of the procedural requirements is contrary to NEPA's policy.

On the other hand, however, the majority of courts have held that bona fide efforts to consider environmental impact without strict compliance with section 102 "should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA."⁸⁸ In *Environmental Defense Fund v. Corps of*

84. *Id.* at 870. ". . . DOT issued interim regulations . . . implementing section 102(2)(C) of NEPA. These regulations provided that an environmental statement 'be prepared at the earliest practicable point in time . . . so that the analysis of environmental effects and the exploration of alternatives with respect thereto are significant impacts to the decision-making process.'" *Id.* Furthermore, there was no compliance with Council on Environmental Quality (CEQ) Interim Guidelines which require that draft environmental statements be circulated for comment to all interested federal agencies.

85. *Id.*

86. 325 F. Supp. 99 (D. Alas. 1971).

87. *Id.* at 127.

88. 325 F. Supp. at 746.

Engineers,⁸⁹ the court enjoined the completion of the Gilham Dam project on grounds that the impact statement filed by the Corps of Engineers was deficient in several respects. Plaintiffs contended that the statement reached erroneous conclusions, paid inadequate attention to certain matters and no attention at all to other important factors.⁹⁰ The court agreed, but went one step further by setting down minimum procedural requirements insofar as new projects are concerned.⁹¹ According to the court, the primary procedural minimum requires an agency to utilize a systematic interdisciplinary approach in planning and decision-making by setting forth all environmental impacts which are known to the agency.⁹² In addition, the court in *Committee for Nuclear Responsibility v. Seaborg*,⁹³ held that the agency must set out all adverse environmental effects which cannot be avoided.⁹⁴ Finally, the *Seaborg* court held that the agency must consult with, and obtain comments from, all federal agencies which have jurisdiction by law or expertise.⁹⁵ With respect to procedures to be followed for environmental impact consideration of ongoing projects, one court has suggested that so long as the detailed statement requirements are complied with, any reasonable procedure may be adequate.⁹⁶

It is apparent that simply requiring agencies to compile thorough and detailed statements, without something more, may possibly result

89. 325 F. Supp. 728 (E.D. Ark. 1971).

90. *Id.* at 746.

91. *Id.* See also *Environmental Defense Fund v. Tennessee Valley Authority*, 339 F. Supp. 806 (E.D. Tenn. 1972), where the court issued a preliminary injunction upon further construction of the Tellico Dam project on the grounds that "the draft statement's cost-benefit analysis consist[ed] almost entirely of unsupported conclusions." *Id.* at 809.

92. 325 F. Supp. at 758. See generally *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971), which states that ". . . the court has a responsibility to determine whether the agencies involved have fully and in good faith followed the procedure contemplated by Congress: that is, setting forth the environmental factors involved in order that those entrusted with ultimate determination whether to authorize, abandon or modify the project, shall be clearly advised of the environmental factors which they must take into account." *Id.* at 787.

93. *Id.* at 783.

94. *Id.*

95. *Id.* "Only *responsible* opposing views need be included and hence there is room for discretion on the part of the officials preparing the statement; but there is no room for an assumption that their determination is conclusive." *Id.* at 787.

96. 325 F. Supp. at 757.

in agency frustration of the national policy. This is precisely the situation presented in *Calvert Cliffs*. Atomic Energy Commission regulations provide that an applicant for an initial construction permit must submit to the Commission his own "environmental report."⁹⁷ A new report must then be submitted at the time of application for an operating permit, noting any factors which have changed since the initial report. At each stage the Commission must take the applicant's report and compile its own detailed statement which is then circulated for comment to other agencies.⁹⁸ Furthermore, the regulations state that:

when no party to a proceeding . . . raises any [environmental issue] . . . such issues will not be considered . . . although the applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the review processes, they will not be received in evidence, and the Commission's responsibilities under [NEPA] will be carried out in toto outside the hearing process.⁹⁹

The court held these procedures to be wholly inadequate inasmuch as the word "accompany," in section 102(2)(C), does not merely suggest a requirement of physical proximity, but must "be read to indicate a congressional intent that environmental factors, as compiled in the 'detailed statement,' be *considered* through agency review processes."¹⁰⁰ The court met AEC's argument that economic reasons are the bases for limiting environmental issues to hearings in which parties affirmatively raise those issues, by observing that it is "unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs."¹⁰¹

97. AEC Regulations, 10 C.F.R. § 50.1 (1971).

98. *Id.* Concerning the propriety of these regulations, see notes 171-76, *infra* and accompanying text.

99. 10 C.F.R. § 50.1 (1971).

100. 449 F.2d at 1117-18.

Compliance to the "*fullest*" possible extent would seem to demand that environmental issues be considered at every important stage in the decision-making process concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.

Id.

101. *Id.* at 1118-19.

The effect of *Calvert Cliffs*, and cases accepting its rationale,¹⁰² is two-fold: first, agencies have the duty to affirmatively compile and report, to the fullest extent possible, all factors which may have any effect on the human environment; and, second, to consider this information wherever and whenever it may possibly affect the outcome of that agency decision.¹⁰³

To insure that the *Calvert Cliffs* requirements are genuinely effectuated, courts have generally been very demanding as to where and from whom the agencies obtain their environmental information. Section 102 does not speak directly to this point, providing only that "[p]rior to making any detailed statement, 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."¹⁰⁴ The least complicated situation was presented in *Greene County*, where the Federal Power Commission substituted the environmental statement of an applicant for its own. The court rejected this procedure,¹⁰⁵ citing the language of *Scenic Hudson Preservation Conference v. Federal Power Commission*¹⁰⁶ that "the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."¹⁰⁷ Similarly, in *Goose Hollow v. Romney*,¹⁰⁸ HUD filed a "negative statement" indicating no en-

102. See, e.g., *Greene County v. Federal Power Comm'n*, 455 F.2d 412 (2d Cir. 1972); *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

103. The court, in *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), in dictum, articulated the rationale underlying the duties of agencies expressed in *Calvert Cliffs*, stating:

[A] federal agency obligated to take into account the values . . . NEPA seek[s] to safeguard, may not evade that obligation by keeping its thought processes under wraps. Discretion to decide does not include a right to act perfunctorily or arbitrarily. . . . The agency must not only observe the prescribed procedural requirements and actually take account of the factors specified, but it must also make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts will not be left to guess whether the requirements of . . . NEPA have been obeyed.

Id. at 1138.

104. 42 U.S.C. § 4332(2)(C)(v) (1970).

105. 455 F.2d at 420.

106. 354 F.2d 608 (2d Cir. 1965).

107. *Id.* at 620.

108. 334 F. Supp. 877 (D. Ore. 1971).

vironmental impact statement was necessary, solely on the basis of an applicant's preliminary environmental worksheet.¹⁰⁹ The court rejected the "negative statement" because HUD, not the applicants, had "overall responsibility for the proposal federal action."¹¹⁰

In a like manner, certain courts have shown a willingness to strike down agency regulations which give complete deference to another agency with respect to specific environmental considerations.¹¹¹ In *Kalur v. Resor*,¹¹² the court ordered new rulemaking, stating that "certification by another agency . . . that its own environmental standards are satisfied involves an entirely different kind of judgment."¹¹³ The court in *Calvert Cliffs*, faced with regulations similar to those in *Kalur*, observed that a certifying agency makes no attempt to balance environmental costs against opposing benefits.¹¹⁴ "The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action—the agency to which NEPA is specifically directed."¹¹⁵

109. *Id.* at 879

110. *Id.* at 878. *But see* *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971), where the court held that the Forest Service was justified in its reliance upon an applicant's environmental studies due to, *inter alia*, "the high quality of its research project. . . ." *Id.* at 127.

111. Army Corps of Eng'rs Regs., 33 C.F.R. §§ 209.131(d)(8)-(10) (1972), provide that the Corps will accept the findings, determinations and interpretations of the Regional Representative of the EPA concerning the applicability of water quality considerations upon requests for permits to dump refuse into navigable waters, even if there is disagreement between the Secretary of the Army and the EPA; AEC Regs., 10 C.F.R. § 50.1 (1971), state that the AEC will defer to water quality standards devised by state agencies under authority of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1171 (1970).

112. 335 F. Supp. 1 (D.D.C. 1971).

113. *Id.* at 14.

114. 449 F.2d at 1123.

115. *Id.* Consider in this context that NEPA requires agencies with primary responsibility to consult other agencies having special expertise in the field. 42 U.S.C. § 4332(2)(C)(v) (1970). There has been considerable concern regarding the effect that *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), might have on the Refuse Act Permit Program (based on the 1899 Refuse Act and established by President Nixon on December 23, 1970). In a letter to members of Congress, 2 ENVIRONMENT RPT., CURRENT DEV. NO. 2, at 1247 (1972), GEQ chairman, Mr. Train, and EPA head, Mr. Ruckelshaus, explained that, under the program, over 20,000 applications for permits have been reviewed. Permits when issued will in every case contain conditions which limit and control the pollution discharges in accordance with applicable water quality standards. However, under the *Kalur*

IV. AGENCY PROCEDURES TO IMPLEMENT NEPA
AND THE JUDICIAL RESPONSE

The Council on Environmental Quality (CEQ) issued Interim Guidelines¹¹⁶ on April 30, 1970 and revised Guidelines¹¹⁷ on January 25, 1971, for the preparation of detailed statements. Although the Guidelines do not have the force of law, they have persuasive value.¹¹⁸ For this reason, the Guidelines make no attempt at furnishing enforcement methods¹¹⁹ nor do they categorically mandate that agencies follow a specific procedure, but rather are couched in terms of what agencies *should* consider. The CEQ has correctly recognized that federal agencies have vastly differing functions and programs.¹²⁰ Thus, federal agencies whose programs are generally carried out by state and local governments (*e.g.*, HUD) will require entirely different and more sophisticated regulations than will agencies which have direct program implementation.¹²¹ It should, therefore, come as no surprise that the procedures promulgated by the agencies show a wide range of variation¹²² in approaching implementation, both from the

decision, the ultimate balancing decision must be made by the Corps of Engineers rather than the EPA. Messrs. Train and Ruckelshaus argued that

[I]t is important that the primary Federal regulatory responsibility for controlling and abating water pollution should be centralized in the Environmental Protection Agency, rather than judicially forced into a system of divided authority and responsibility. . . .

If the NEPA procedure is required to be followed in the case of each of the approximately 20,000 permits to be issued, there is a serious question as to whether the permit program would be administratively feasible.

Id. In this context, see CEQ Guidelines, § 5(d), 36 Fed. Reg. 1399 (1971), which provides that "environmental protective regulatory activities concurred in or taken by the EPA" will not require preparation of a section 102 statement. *Id.*

116. 35 Fed. Reg. 7390 (1970). *See also* Exec. Order No. 11,514, 3 C.F.R. § 104 (1970), 42 U.S.C. § 4321 (1970).

117. 36 Fed. Reg. 1398 (1971).

118. *See generally* Perkins v. Matthews, 400 U.S. 379, 391 (1971) and cases cited therein.

119. Neither NEPA nor the Guidelines furnish any means of assuring that section 102 statements will be submitted. *See* 3 Environment Rptr., Current Decisions No. 20, at 553-56, 781 (1972). *See also* Yost, *supra* note 2, at 88.

120. *See Hearings on the First Annual Environmental Quality Report Before the Sen. Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. (1970).

121. *Id.* Many agencies which administer large programs may have staff and funding problems with respect to the necessity of routine filing of statements.

122. *Compare* General Services Admin. Regs., 36 Fed. Reg. 23,702 (1971), which take a rather exclusionary approach with HEW Regs., 36 Fed. Reg. 23,676 (1971), which encourage a more positive and energetic role for HEW.

perspective of agency attitude¹²³ and the care taken in preparation of their procedures. Nevertheless, courts have sought to insure that the section 102 mandates are fully complied with, and thus, have laid down their own minimum requirements for agency procedures. This judicial concern, manifested in several recent cases, may have the effect of rendering nugatory many current agency regulations.

A. *Time for Preparation of Section 102 Statements*

Assuming for the moment that a federal agency is required to file an environmental impact statement,¹²⁴ a preliminary question arises concerning when it must do so. NEPA does not speak directly to this issue, providing only that the detailed statement "shall accompany the proposal through the existing agency review processes."¹²⁵ The Interim Guidelines were not much clearer, stating that a section 102 statement would be necessary "[b]efore undertaking major action or recommending or making a favorable report on legislation"¹²⁶ The new Guidelines, however, state more definitely that filing of a detailed statement will be required "[a]s early as possible and in all cases prior to agency decision"¹²⁷ Discussing the new Guidelines, CEQ Chairman Train has suggested that a section 102 statement must be prepared and circulated for comment early enough to affect the decision-making process.¹²⁸

Agency regulations are generally of no aid in determining when an environmental impact statement must be filed. Department of Transportation (DOT) regulations provide for preparation "at the earliest practicable point in time,"¹²⁹ while USDA procedures call for prepa-

123. Indicative of agency attitude is their statements of purpose in promulgating regulations. It is interesting to note how the agency views its duties and how it perceives the objectives and the results of complying procedurally with NEPA. Other indicators of agency attitude may be found in the degree to which the public is encouraged to partake in environmental analysis. *See, e.g.*, Forest Service Regs., 36 Fed. Reg. 23,672 (1971) (that draft environmental statements are to be the basis for encouraging public action); HEW Regs., 36 Fed. Reg. 23,676 (1971) (encourage press releases on environmental matters).

124. *See* notes 133-38 *infra* and accompanying text.

125. 42 U.S.C. § 4332(2)(C)(v) (1970).

126. CEQ Interim Guidelines § 2, 35 Fed. Reg. 7391 (1970).

127. CEQ Guidelines § 2, 36 Fed. Reg. 7724 (1971).

128. *See Hearings on the First Annual Environmental Quality Report Before the Sen. Comm. on Interior and Insular Affairs, supra* note 120, at 9.

129. 36 Fed. Reg. 23,679, 23,680 (1971).

ration and circulation "early enough in the agency review process . . . to permit meaningful consideration . . ." ¹³⁰ Other agencies, however, have been more specific. The Federal Highway Commission, for example, provides that draft statements "shall be prepared . . . and circulated for comment during the location study," ¹³¹ and the ICC now requires section 102 statements for all initial papers filed. ¹³²

The courts have held, at the least, that draft statements must be prepared and circulated for comment before official decision. ¹³³ In *Greene County*, the Federal Power Commission argued that a section 102 statement was not required until the agency made its final decision; plaintiffs contended that a statement must be filed prior to any formal hearings. The claims of both parties were rejected by the court which designated the applicable point in time for filing the statement as any time prior to initial decision by the Presiding Ex-

130. *Id.* at 23,687, 23,668.

131. *Id.* at 23,696, 23,698. This newly promulgated regulation appears to settle the problem raised in *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), which considered whether NEPA becomes applicable to a highway project upon location approval, construction approval or at some intermediate point when federal participation is assured. Defendants claimed that NEPA becomes applicable only when the state actively seeks federal funds, conceding, however, that a project becomes part of the federal-aid-highway system upon location approval. Plaintiffs contended that NEPA applies when it is "highly likely" that the state will seek federal funds. The court held that NEPA becomes applicable upon location approval. Similarly, in *Northeast Area Welfare Rights v. Volpe*, 2 ERC 1704 (E.D. Wash. 1971), the court denied a preliminary injunction on a freeway project, stating that NEPA was not yet applicable to the project:

. . . it is clear that *at this time* the [project] is proceeding with state funds only; that no final approval has been sought from the Department of Transportation for this project and that there is no immediate plan to seek federal financial participation in this project. The only evidence of any federal participation at this time is the fact that the Federal Government has financed the [study]

Id. at 1705. In *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971), the court rejected defendant's contention that an impact statement was not required until the final highway approval stage, reasoning that "it could well be too late to adjust the formulated plans so as to minimize adverse environmental effects." *Id.* at 1121. In addition, the court noted that in the later stage the flexibility in considering alternatives have been lost. *Id.* In *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 132, 144 (N.D. Ga. 1971), the court held that the "approval event" is clearly the most appropriate time to consider environmental impact.

132. ICC Regs. Implementing NEPA, 3 ERC 1650 (1972).

133. *Lathan v. Volpe*, 445 F.2d 1111 (9th Cir. 1971); *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971); *Morningside-Lenox Park Ass'n v. Volpe*, 334 F. Supp. 122 (N.D. Ga. 1971); *Northeast Area Welfare Rights v. Volpe*, 2 ERC 1704 (E.D. Wash. 1971).

aminer.¹³⁴ The case of *Upper Pecos v. Stans*,¹³⁵ questioned when a statement need be filed where two or more agencies are involved in a single project. In *Upper Pecos*, a grant offer was made by the Economic Development Administration (EDA) to construct a road, and the offer was accepted by the county commissioners. No impact statement was filed by the EDA. However, the Forest Service, the agency responsible for approval of location and construction plans, filed a statement some time later. Plaintiffs argued that the Forest Service statement was a meaningless gesture after EDA made the decision to offer the grant. The court disagreed, stating that "the project must be of sufficient definiteness before an evaluation of its environmental impact can be made and alternatives proposed."¹³⁶ Judge Murrah dissented, reasoning that *Calvert Cliffs* required that environmental issues should be considered at every important stage in the decision-making process; and, it did not appear that EDA had ever considered the environmental consequences of its action.¹³⁷ Whatever legal consequences *Upper Pecos* and *Greene County* may have, the practical result has been for agencies to go beyond judicial standards and self-impose filing requirements at very early stages.¹³⁸

B. Major Federal Actions

Of course NEPA does not require section 102 statements for every agency action, rather, only for those "major Federal actions significantly affecting the quality of the human environment."¹³⁹ However, as Chairman Train has observed, "[y]ou cannot define how significant is significant, or how big is major, or how substantial is substantial. These are qualitative, subjective terms that do not lend themselves to legal definition."¹⁴⁰ Nevertheless, the CEQ has attempted to list criteria for the definition of "[a]ctions"¹⁴¹ and further provides that this statutory clause

134. 455 F.2d at 422.

135. 452 F.2d 1233 (10th Cir. 1971).

136. *Id.* at 1237.

137. *Id.* (dissenting opinion).

138. *See, e.g.*, notes 130, 131 *supra*.

139. 42 U.S.C. § 4322(2)(C) (1970).

140. *Hearings on the Administration of the National Environmental Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, supra* note 27, at 64.

141. *See* CEQ Guidelines § 5(a), 36 Fed. Reg. 7724 (1971).

. . . is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions the environmental impact of which is likely to be highly controversial should be covered in all cases. . . . [A]gencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.¹⁴²

Because of the variety of federal actions, agencies have approached the delineation of "major federal action" in a number of ways. Some agencies with extremely broad functions have deferred to the general inclusiveness of the CEQ Guidelines,¹⁴³ while other agencies with equally broad functions have gone one step farther and have made the decision to resolve all doubts in favor of discussion of impact.¹⁴⁴ Agencies with narrower functions, however, have recognized that procedural regulations lend themselves more readily to particularization and have attempted to do so. The Forest Service, for example, has taken the position that the responsible official must use good judgment in determining when an impact statement is necessary, and has provided him with eight categories of possible ecological effects, as well as, a non-inclusive listing of ecological situations which may be affected.¹⁴⁵ HEW has gone even farther than the Forest Service, providing that

[t]he major determinate . . . is the significance of the . . . potential effect . . . on the community, including compatibility of the . . . use with the . . . environment The dollar and physical size of the project should not be the sole criteria for determining whether an environmental impact statement is required¹⁴⁶

The procedures then list many points of comparison between the proposed project and its ecological effect.¹⁴⁷

142. *Id.* § 5(b).

143. *See, e.g.*, General Services Admin. Regs., 36 Fed. Reg. 23,702 (1971).

144. *See, e.g.*, USDA Regs., 36 Fed. Reg. 23,667 (1971).

145. Forest Service Regs. § 1942.2, 36 Fed. Reg. 23,671 (1971).

146. HEW Regs. § 20-15-40(A), 36 Fed. Reg. 23,677 (1971).

147. *Id.* This approach is also taken by DOT, 36 Fed. Reg. 23,679 (1971); and the Federal Highway Admin., 36 Fed. Reg. 23,696 (1971).

Courts have recognized the necessity for agency expertise in deciding whether an action is "major" and whether it "significantly affects the quality of the human environment," and will generally overturn an agency decision only if it is arbitrary, capricious or an abuse of agency discretion.¹⁴⁸ But, in *Scherr v. Volpe*,¹⁴⁹ the court rejected this view on the basis that NEPA is a flat command to federal agencies. Thus, agencies must have the first determination to decide what is expected of them. "However, when its failure is then challenged, it is the court which must construe the statutory standards . . . and, having construed them, then apply them to the particular project . . ." ¹⁵⁰ In *Goose Hollow*, the court looked behind HUD's determination that the construction of a 16-story apartment building (admittedly a "major action") would not have a "significant effect" upon the human environment; and, held that the methods employed in gathering the environmental information, used to determine that there would be no "significant effect," were infirm.¹⁵¹ Finally, in *Izaak Walton League v. Schlesinger*,¹⁵² the court has cast some doubts as to the efficacy and propriety of rigid classification or "threshold" methods, concluding, on the facts, that Atomic Energy Commission regulations which did not require preparation of detailed statements prior to the issuance or denial of a partial 50 per cent operating license are invalid.¹⁵³

C. Contents of the Impact Statement

NEPA requires only that a detailed statement be prepared and circulated prior to decision-making. However the CEQ, in order to in-

148. See *Echo Park v. Romney*, 3 ERC 1255 (C.D. Cal. 1971); where the court upheld a HUD determination that an environmental impact statement was not required in connection with a 66-unit apartment complex.

149. 336 F. Supp. 886 (W.D. Wis. 1971).

150. *Id.* at 888.

151. 334 F. Supp. at 886.

152. 337 F. Supp. 287 (D.D.C. 1971).

153. *Id.* at 294. A related problem to "quantifying" actions so as to exempt potential major actions falling out of the classifications, is the practice of "fragmentation." See *Conservation Soc'y v. Texas*, 2 ERC 1871 (5th Cir. 1971) (sections of a proposed highway were considered separately), and *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970) (first draft environmental statement by the Department of the Interior never mentioned the Trans-Alaska Pipeline, but only the service road). Thus, if these attempts to break up the projects into smaller "digestible parts" had succeeded, there may never have been environmental considerations of the projects in toto.

sure that the comments of other agencies will be valuable inputs, has provided for the mechanism of a "draft statement."¹⁵⁴ The five categories¹⁵⁵ of environmental impact (to be discussed later), set out in the Act, represent the format adopted by the Guidelines¹⁵⁶ and most agencies.¹⁵⁷ Agency procedures vary widely as to the scope of objectivity required. HEW requires, for example, that the impact statement be ". . . written in a narrative form. Each item should be discussed in sufficient detail to permit a reviewer to arrive at an independent judgment . . .",¹⁵⁸ while, in marked contrast, the DOT requires only that the five categories "be covered in the statement."¹⁵⁹

I. Adequate Discussion of Alternatives

Possibly the greatest problem area with respect to the scope of content is the requirement of including alternatives in the detailed statement. Does this requirement mean that an agency must simply list other possibilities or does it go farther and require the agency to consider fully the environmental impact of each alternative? How many alternatives must be included? Agency procedures have generally required more than a mere listing, but they have differed greatly with respect to the scope of analysis.¹⁶⁰ DOT provides that "[a]lternative actions . . . should be set forth and analyzed . . .",¹⁶¹ and USDA states that "alternative actions . . . should be explored . . . and . . . evaluated . . .",¹⁶² while the Forest Service has taken an initiative in requiring alternatives to be described and the analysis presented, including costs and impact on the environment. Furthermore, "[c]reativity is required in recognizing and developing alternatives", and a range of alternative means has been set out.¹⁶³

154. Letter from Russell E. Train, Chairman, CEQ, to Senator H. Jackson and Rep. Dingell, Chairman, Subcomm. on Fisheries and Wildlife Conservation, *reprinted in* 1 ENVIRONMENT RPTR., CURRENT DEV. No. 31, at 802-04 (1970).

155. *See* 42 U.S.C. § 4332(2)(C)(i) (1970).

156. CEQ Guidelines § 7, 36 Fed. Reg. 7725 (1971).

157. *See, e.g.*, HEW Regs. § 20-15-50(A), 36 Fed. Reg. 23,676-78 (1971); REA Regs., § VI(A), 36 Fed. Reg. 1000 (1971).

158. HEW Regs. § 20-15-50(B), 36 Fed. Reg. 23,678 (1971).

159. DOT Regs. § 8(O), 36 Fed. Reg. 23,681 (1971).

160. *Compare* DOT Regs. § 8(O)(4), 36 Fed. Reg. 23,681 (1971) *with* Forest Service Regs. § 1942.2(V), 36 Fed. Reg. 23,671 (1971).

161. DOT Regs. § 8(O)(4), 36 Fed. Reg. 23,681 (1971).

162. USDA Regs., 36 Fed. Reg. 23,667 (1971).

163. Forest Service Regs. § 1942.2(V), 36 Fed. Reg. 23,671 (1971).

The leading case setting the minimum limits for discussion of alternatives is *Natural Resources Defense Council v. Morton (NRDC)*.¹⁶⁴ In *NRDC*, the Department of Interior filed a somewhat lengthy and considerably detailed section 102 statement concerning proposed offshore oil leases. However, the statement failed to adequately discuss alternatives and their environmental impact. The court held the statement inadequate, stating that NEPA

. . . requires a presentation of the environmental risks incident to reasonable alternative courses of action. The agency may limit its discussion of environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment, or that their effect, briefly described, is simply not significant. A rule of reason is implicit in this aspect of the law¹⁶⁵

Federal agencies, however, are limited in their "courses of action" by law. Recognizing this pragmatic consideration, an interesting question arises as to whether or not an agency must consider alternatives which it has no authority to implement. The court in *NRDC* confronted this problem by limiting the alternative requirement to a construction of reasonableness,¹⁶⁶ suggesting that "reference may of course be made to studies of other agencies—including other impact statements. Nor is it appropriate . . . to disregard alternatives merely because they do not offer a complete solution to the problem."¹⁶⁷ The dissent, however, argued that the range of alternatives to be discussed should be limited to realistic alternatives that will reasonably be available within the period prior to decision-making.¹⁶⁸ But, the dissent fails to recognize the value of alternative actions in the decision-making process. Consideration of a specific alternative, albeit not within the scope of authority of the lead agency, may well be the deciding factor in determining not to go ahead with the proposed action. The effect of *NRDC* is to place a heavy burden on all agencies to consider all viable and reasonable alternatives before ruling them out.¹⁶⁹

164. 458 F.2d 827 (D.C. Cir. 1972).

165. *Id.* at 834.

166. *Id.* at 837. ". . . the discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives . . ." *Id.* at 836.

167. *Id.*

168. *Id.* at 839 (concurring and dissenting opinion).

169. *But see* *Conservation Council v. Froehke*, 340 F. Supp. 222 (M.D.N.C. 1972).

2. Consideration of Comments

Another important difficulty arises with respect to when and to whom the draft statement must be circulated for comment. The Act provides that comments must be obtained "[p]rior to making any detailed statement" ¹⁷⁰ The CEQ has interpreted this language to mean that comment must be obtained prior to the final statement, but after the draft statement is prepared. ¹⁷¹ "The principle to be applied is to obtain views of other agencies at the earliest feasible time in the development of program and project proposals." ¹⁷² Courts have held that all comments, positive or negative, must be included in the final statement if they have been received from any agency which has "jurisdiction by law or special expertise with respect to any environmental impact involved." ¹⁷³ Yet, the courts are split as to what public comments need be included. One court has required that all environmental impacts should be included which the public alleges, even if the agency finds them to be without merit. ¹⁷⁴ "Then, if the decision-makers choose to ignore such factors, they will be doing so with their eyes wide open." ¹⁷⁵ Another court has concluded, however, that only "responsible opposing views need be included and hence there is room for discretion on the part of the officials preparing the statement" ¹⁷⁶

The net effect of court decisions on agency procedure and, in turn, the net effect of agency procedures on the proper implementation of NEPA, cannot yet be fully realized. The cases have only begun to touch on many of the important implications that agency procedure may exert on agency policy. As long as the courts continue to consider primarily the nature of the Act, and apply general principles consistent with NEPA's spirit to the situation at hand, they will continue to carve out necessary implementing procedures.

170. 42 U.S.C. § 4332(2)(C)(v) (1970).

171. CEQ Guidelines § 8, 36 Fed. Reg. 1399 (1971).

172. *Id.* § 9.

173. *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 786 n.10 (D.C. Cir. 1971).

174. *Environmental Defense Fund v. Corps of Eng'rs* 325 F. Supp. 728 (E.D. Ark. 1971).

175. *Id.* at 759.

176. 463 F.2d at 788.

D. *The Role of Courts and Agencies in Implementing NEPA*

Professor Louis Jaffe has suggested that it may prove futile to allocate roles to the agencies or the courts without first analyzing the jobs to be done by each.¹⁷⁷ The advantages and handicaps inherent in these institutions must be understood fully in order to maximize their usefulness in environmental control.

I. The Nature of the Administrative Agency

Whether or not agencies are "captives" of those interests which they purport to regulate is a question which has been hotly debated for generations by students of public administration. Professor Jaffe neither fully agrees nor disagrees with the absolutists on either end, but does concede that administrative bodies tend to develop a "symbiosis" with those they regulate. "This characteristically comes about over a period of time in which the initial impulses behind the enabling legislation have worked themselves out and have lost their urgency."¹⁷⁸ Professor Jaffe points out that the defect in the so-called "capture theory" is that it is essentially based on a Marxian analysis of social forces which assumes that finance and industry run the country.¹⁷⁹ If Professor Jaffe's view is correct, then agencies must be assessed individually in order to establish the extent of "symbiosis."

From a different perspective, one author suggests that administrative officers operate under a type of "profit motive" (analogous to the motivating force behind private business organizations) whereby government officials generally must seek to maximize the power of their positions.¹⁸⁰ Institutional survival is the ultimate goal, so the theory goes, and accompanying it is a tendency toward conservatism and inflexibility. "Adaptation, innovation and creation all involve risks of failure, with attendant discredit or disgrace as well as possible threat to job security."¹⁸¹ This instinct for survival which gravitates toward the status quo is further accentuated by the manifestation of

177. Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231 (1970).

178. Jaffe, Book Review, 84 HARV. L. REV. 1562, 1565 (1971).

179. Jaffe, *The Administrative Agency and Environmental Control*, *supra* note 177, at 232. "A quick inventory of the agencies and departmental bureaus reveals the naivete of this assumption." *Id.* Professor Jaffe cites, for example, the SEC's history of investor protection.

180. Loewinger, *The Sociology of Bureaucracy*, 24 BUS. LAW. 7, 10 (1968).

181. *Id.* at 11.

bureaucratic specialization which, as one commentator has observed, leads to parochialism, which in turn characteristically leads to excessive preoccupation with its own goals and its own vision of the public interest with an accompanying disproportionate sacrifice of other social goals and interests.¹⁸²

It is, therefore, essential that the new national environmental policy be viewed against the background of agency sociology. In the past, agencies have evolved policies, procedures, programs, philosophies and clientele which have limited their responsiveness to any broad environmental policy.¹⁸³ Confronted, however, with the legislative mandates of NEPA, agencies are forced into the position of policy change. In this context, Professor Henning has observed that "[a]lthough outward conformance and change [in] . . . policy is required, this does not necessarily mean past policies will not still play a key role in the actual direction of the agency."¹⁸⁴

2. Nature of the Decision-making Process

Any attempt to superimpose an environmental policy over existing agency structure must encounter difficulties. The planning process, of course, is almost always a continuous process. Often federal programs undergo years of study with many "decisions" made informally or on an ad hoc basis, giving rise to an "insider's perspective."¹⁸⁵ Professor Reich has observed that most agency planning is done on the basis of balancing competing interests, an unsatisfactory basis which equates policy-making with satisfying the majority.¹⁸⁶ He points out that as agencies make decisions based on a harmonizing of many competing interests in a given situation, they begin to evolve a meaning for their decision-making couched in terms of objectivity.¹⁸⁷ Herein lies the central myth of administrative law: "the belief that decisions concerning planning and allocation can be, and are, made on an objective basis."¹⁸⁸ Professor Reich's views are further illus-

182. Shapiro, *The Supreme Court and Government Planning*, 35 GEO. WASH. L. REV. 329 (1966).

183. Henning, *supra* note 46, at 452-53.

184. *Id.* at 453. See generally J. SAX, *supra* note 57.

185. See generally Reich, *The Law of the Planned Society*, 75 YALE L.J. 1228 (1966).

186. *Id.* at 1234.

187. *Id.* at 1236.

188. *Id.*

trated by Professor Sax who has noted that agency "sub-optimizing," (essentially a balancing process) will frequently lead to a "nibbling phenomenon," in which large resource values are "gradually eroded, case by case, as one development after another is allowed."¹⁸⁹

Because there is always some constraint and limitation on agency resources and funds, agencies must seek to balance only those interests which can give rise to those objectives which are immediately attainable.¹⁹⁰ Moreover, any agency decision must be guided by the qualifying factor of feasibility. This principle may serve to explain much of the agency torpidity observed in complying with NEPA, such as the sparsity of impact statements filed, fragmatization of programs into more digestible parts, consideration of a minimum of alternatives and attempts to place much of the effort of gathering environmental impacts on the applicants or the public.¹⁹¹ As Victor A. Thompson has pointedly remarked:

It is understandable that the . . . [agency] should wish to avoid implementing such a policy. Should . . . [it] nevertheless be required to do so . . . [it] can be expected to shift as much of the cost to the clientele as . . . [it] can. The public presentation of a program will be couched in terms of its ideal policy goals, but the actual performance will also be governed by considerations of administrative feasibility (least effort). Thus, there is always a gap, more or less wide, between the ideal and the actual, between the administrative self-presentation and the administrative reality.¹⁹²

3. The Dual Role of the Courts

Judge J. Skelley Wright, writing for the court in *Calvert Cliffs*, suggested that it is too early for the courts to realize their proper role for the implementation of NEPA: "it remains to be seen whether the promise of this legislation will become a reality. Therein lies the

189. J. SAX, *supra* note 57, at 55. "The danger is that in each little dispute—when the pressure is on—the balance of judgment will move ever so slightly to resolve doubts in favor of those with a big economic stake in development and with powerful allies." *Id.*

190. See generally *Hearings on the Administration of the National Environment Policy Act Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, *supra* note 27, at 64.

191. V. THOMPSON, *Bureaucracy in a Democratic Society*, in PUBLIC ADMIN. AND DEMOCRACY 205 (R. Martin ed. 1965).

192. *Id.* at 215-16.

judicial role."¹⁹³ But, it is now the time for the courts to resolve how this legislation can become a reality. The context in which the courts must fashion their role must be in terms of the nature of the policy to be implemented (NEPA) and the nature of the implementing instruments (federal administrative agencies). The general view of commentators is that the courts should have a role as "coordinate law-makers,"¹⁹⁴ to fill interstitially or otherwise effectuate statutory patterns enacted by the legislature.¹⁹⁵ But NEPA has been considered only as a policy mandating reform in the procedures of decision-making, not a policy aimed directly to the substance of the decision.¹⁹⁶ Therefore, without a clear "substance policy," the courts must remain "coordinate lawmakers" on the plane of agency procedure. This view is further buttressed by the lack of defined environmental goals. As Professor Mandelker has stated, "[e]ffective judicial intervention in social controversy requires a consensus on the goals and objectives of social change, at a time in history when it is our failure as a society to agree on the goals and objectives of social change"¹⁹⁷

V. CONCLUSION

Generalities are frequently inaccurate. Generalities within the law are often dangerous. With extreme caution, then, it may be said that the National Environmental Policy Act of 1969 has achieved some degree of success; with equal precept it may also be said that NEPA has suffered some degree of failure. The extent of success or failure cannot fully yet be assessed without a complete understanding of the task NEPA is to perform. NEPA's success has been attained primarily as each agency has begun to consider environmental factors in their decision-making. NEPA's failure, inherent in its nature and fostered by attitudes inherent in public administration, is dramatically evident when one considers that planning and decision-making are still grounded basically in an ad hoc framework.

193. 449 F.2d at 1111.

194. Coleman, *supra* note 2, at 647.

195. See generally Mishkin, *The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

196. See notes 32-37 *supra* and accompanying text.

197. See Mandelker, *The Role of Law in Social Change*, 8 OSGOODE HALL L.J. 355 (1970). In this context, see also Grier, *The Role of the Court in Protecting the Environment—A Jurisprudential Analysis*, 23 S. CALIF. L. REV. 93 (1971).

NEPA

This note has attempted a preliminary survey of an extremely far-reaching piece of legislation. The drafters intended NEPA to be a firm, but fluid, statement. As the courts become more willing to involve judicial machinery with the problems of the environment, NEPA may become a significant tool. Environmental groups, too, are becoming highly successful inputs into the process of defining what projects should be considered under the policies of NEPA. With involvement from all sections of American society, NEPA may well become an effective device for solving problems in the urban environment.

Important areas of NEPA which are ripe for resolution include the retroactivity issue and the scope of required alternatives. There are several amendments to the Act pending in Congress which will basically serve to weaken many of the judicial interpretations. NEPA is becoming persuasive evidence of congressional intent in many fields, such as highway relocation. Yet, with the many positive aspects of NEPA's development, the Act can never achieve full success unless courts, agencies and the private sector work together to define *practicable* means to implement NEPA's requirements.

NEPA, as it exists today, is not "the answer." But whatever its major failings, it is interesting to reflect that such an Act could ever become the law of the land with the extent of societal polarization on the issues and the lack of any real environmental goals within our society.

COMMENTS

