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Coordination and Consensus in Water Resource Management

THOMAS E. SHEA*

INTRODUCTION

Mr. Justice Holmes said it well: "A river is more than an amenity, it is a treasure."¹ This realization of the value of rivers can be equally applied to all of the nation's waters. The management of these water resources requires consideration of a variety of factors, including fish and wildlife, commerce, recreation, economics, pollution and allocation. It is the nature of water resources for these and other interests to be in competition with each other when decisions must be made. The policies that guide these decisions are the result of an uneasy balance among national, regional, state and local control. These policies are also the product of a tug-of-war between developmental forces and environmentalists. While it would be an oversimplification to view water resource policy solely as a struggle along these two axes, these have been the main battlegrounds. It is unfortunate but true that the battle analogy is appropriate. The fields of valor are legislatures and courts; the warriors are ecologists, politicians, lawyers and businessmen of our country. As the battle lines change and the strengths of the participants ebb and flow, the management philosophy emerging from the fray has developed.

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1. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

Beyond the underlying philosophy, however, is the process by which water resource management decisions are made. This process, too, has developed. Two of the fundamental concepts in this decision process are coordination and consensus. Coordination is the process by which a proposal is reviewed by parties other than the decision-making entity.² Its purpose is twofold. First, it enables the decision-maker to receive input from other sources, with the objective of better decisions. Second, it opens up the decision process, allowing interested parties to be informed concerning how the decision was made and the reasons for the decision. Consensus is general agreement.³ Its purpose is to achieve a decision that is satisfactory to all.

The purpose of this article is to discuss the concept and application of coordination and consensus as they affect the management of water resources by the Federal Government. This discussion will begin with an exploration of several important federal laws that affect coordination or consensus of water resource management. Discussion of these laws will then be followed by an exploration of the concept and application of the mandate for coordination and the role of consensus in the decision process.

THE RIVERS AND HARBORS ACT OF 1899

As early as 1824, the Supreme Court upheld the right of the Federal Government to regulate the navigable waters of the country.⁴ Because the Constitution does not specifically address itself to navigable waters, this power is based upon the grant of the commerce clause, which allows regulation of commerce with foreign nations and among the several states.⁵ There were, however, no federal statutes in the early days of the country which prevented the obstruction of the nation's waterways, and in 1887 the Supreme Court, in *Willamette Iron Bridge Co. v. Hatch*,⁶ held that there was no common law of the United States which prohibited such obstruction.⁷

In response to this decision, Congress enacted Section 10 of the Rivers and Harbors Act of 1890,⁸ prohibiting the creation of any obstruc-

2. This meaning of coordination differs from the usual dictionary definition. The closest definition the author has found is in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 501 (1971): "to bring into a common action, movement, or condition: regulate and combine in harmonious action." As will be seen in this article, the coordination requirements of federal statutes require consideration but do not necessarily mandate harmony.

3. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1971).

4. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

5. U.S. CONST., art. 1, §8, cl. 3.

6. 125 U.S. 1 (1888).

7. *Id.* at 8.

8. Harbors Act of 1890, c. 907, §10, 26 Stat. 454 (1890).

tion to the navigable capacity of any of the waters of the United States unless affirmatively authorized. Nine years later the Congress passed a compilation of laws affecting navigation in the Rivers and Harbors Act of 1899.⁹ The purpose of the Act is to protect navigation¹⁰ and the Act has proven so effective that it remains essentially unchanged. The jurisdictional extent of that protection was limited to waters which were navigable in fact.¹¹

Sections 9, 10, and 13 of the Rivers and Harbors Act contain the primary authority for federal regulation of the nation's navigable waters. Section 9¹² prohibits the construction of bridges, dams, dikes or causeways over or in any navigable water until the consent of Congress is obtained and until the plans have been approved by the Chief of Engineers and the Secretary of the Army.¹³ The Act also provides that

9. 33 U.S.C. 402-16, 418 (1976 & Supp. III 1979). The compilation of these laws was performed by the Secretary of War at the request of Congress. Rivers and Harbors Act of 1896, c. 314, §2, 29 Stat. 202.

10. 32 CONG. REC. 2297 (1899).

11. In *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), the Supreme Court held that jurisdiction over libels arising under maritime contracts would lie only if performed upon the sea or waters within the ebb and flow of the tide. This test was adopted from the English common-law view of admiralty. The ebb and flow test was later rejected by the Court in *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). The decision noted that the common-law test made sense in England, where all the navigable-in-fact streams were also subject to the ebb and flow of the tides, but that the test would be too limiting if applied in the United States. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) the Supreme Court held that navigable waters of the United States are those which form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes. Today, for purposes of the Rivers and Harbors Act of 1899, navigable waters of the United States are defined as those waters that are subject to the ebb and flow of the tide shoreward to the mean high water mark, and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. 33 C.F.R. §322.2(a) (1980); see *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610 (3d Cir. 1974).

12. 33 U.S.C. §401 (1976 Supp. III 1979).

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

Id.

13. The Secretary of the Army was substituted for the Secretary of War by §205(a) of the Act of July 26, 1947, c. 343, Title II, 61 Stat. 501. All of the functions, powers and duties of the Secretary of the Army and subordinate offices of the Department of the Army relating to the location and clearance of bridges and causeways under this section were transferred to the Secretary of Transportation by the Act which created the Department of Transportation, 49 U.S.C. §1655(g)(6)(A) (1976 & Supp. III 1979).

such structures may be built under authority of the state legislature where the navigable portion of the waterway lies wholly within that state and the plans are approved by the Chief of Engineers and the Secretary of the Army.¹⁴

Section 10 prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States.¹⁵ It provides that the building of any structure in the waters of the United States, outside established harbor lines, or where no harbor lines have been established, is unlawful except where the plans are recommended by the Chief of Engineers and approved by the Secretary of the Army.¹⁶ Finally, Section 10 makes it unlawful to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of navigable waters without a recommendation from the Chief of Engineers and authorization by the Secretary of the Army.¹⁷

Section 13, commonly known as the Refuse Act, makes it unlawful to throw, discharge, or deposit, any refuse matter of any kind, other than that flowing from streets and sewers, as a liquid into any navigable water of the United States or its tributary.¹⁸ This section further pro-

14. 33 U.S.C. §401 (1976 & Supp. III 1979).

15. *Id.* §403:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

16. *Id.*

17. *Id.*

18. *Id.* §407:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operation in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by

hibits the deposit of material on the bank of any navigable water or tributary where the material could be washed into the water by tides, storms, floods or otherwise whereby navigation may be impeded.¹⁹ The section exempts operations in connection with the improvement of navigation or construction of public works considered necessary by the supervising officers of the United States.²⁰ The Secretary of the Army is authorized under Section 13 to permit deposits of such material whenever in the judgment of the Chief of Engineers anchorage and navigation will not be affected.²¹ Under the Clean Water Act, however, no permits for discharges under Section 13 may be issued.²² Permits for such discharges are now issued by the Environmental Protection Agency (hereinafter referred to as EPA) under the National Pollution Discharge Elimination System (hereinafter referred to as NPDES).²³ While the permitting aspects of Section 13 are no longer in force, Section 13 remains a viable mechanism for prohibiting discharges.²⁴

In order to implement the provisions of Sections 9, 10 and 13 of the Rivers and Harbors Act of 1899, the Secretary of the Army has delegated considerable authority to the Chief of Engineers of the Army Corps of Engineers and his representatives to issue or deny authorizations.²⁵ The Corps has promulgated regulations governing the implementation of Sections 9, 10 and 13 consistent with this delegation of authority in conjunction with its authority under Section 404 of the Clean Water Act.²⁶

These regulations incorporate extensive coordination requirements. Prior to a final decision by the Corps under the Act, the agency provides public notice of the proposed activity to affected and interested parties, including a variety of federal and state agencies with whom

him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

19. *Id.* For a discussion of the issue of whether there must be an effect on navigation see *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) and *Reserve Mining Co. v. E.P.A.*, 514 F.2d 492 (9th Cir. 1975).

20. 33 U.S.C. §407 (1976 & Supp. III 1979).

21. *Id.*

22. *Id.* §1342(a)(5).

23. *Id.* §1342.

24. *United States ex rel. Scott v. United States Steel Corp.*, 356 F. Supp. 556, 559 (N.D. Ill. 1973).

25. 33 C.F.R. §325.8 (1980). The structure of the Army Corps of Engineers is a three-tier system: (1) Office of the Chief of Engineers; (2) division offices; (3) district offices. The historical foundation for the authority of the Army Corps of Engineers in the area of water resources dates back to the early days of the country when West Point was the only engineering school in the country. When Congress became interested in regulating and improving the waterways, it naturally turned to the Army.

26. *Id.* §§320-329.

coordination is required.²⁷ The coordination process is designed to assure that relevant information and opinion may be assimilated in the evaluation of the proposed activity.

THE CLEAN WATER ACT

As a result of increasing national awareness of the environment and particularly of the need to further protect the nation's waters, Congress passed the Federal Water Pollution Control Act Amendments of 1972.²⁸ After some fine tuning and clarification of the legislation, Congress amended the statute, renaming it the Clean Water Act of 1977.²⁹

The purpose of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters.³⁰ Except in accordance with its provisions, the Act makes unlawful the discharge of any pollutant from a point source into the waters of the United States.³¹ This mandate is consistent with Section 13 of the Rivers and Harbors Act of 1899, but the scope of the Clean Water Act is broader.

The definition of waters of the United States under the Clean Water Act extends to all waters which may be regulated by Congress under the commerce clause.³² Under the Rivers and Harbors Act of 1899, the jurisdictional scope is limited to navigable waters of the United States; this term encompasses less than the full constitutionally allowable territorial jurisdiction.³³ Under the Clean Water Act, the term "navigable waters" means the waters of the United States including the territorial seas.³⁴ As a result, there are two definitions of navigable waters for regulatory purposes. The first, under the Rivers and Harbors Act of 1899, refers to those waters of the United States which are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.³⁵ Under the Clean Water Act, waters of the United States refers to all waters which can be regulated under the commerce clause, including the territorial seas, navigable waters, tributaries to navigable waters and their

27. *Id.* §325.3.

28. 33 U.S.C. §§1251-1376 (1976 & Supp. III 1979) as amended by Clean Water Act of 1977, Pub. L. No. 95-217, §§1-72, 91 Stat. 1567.

29. 33 U.S.C. §§1251-1376 (1976 & Supp. III 1979).

30. *Id.* §1251(a).

31. *Id.* §1311(a).

32. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1970); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1970).

33. *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1299 (5th Cir. 1976).

34. 33 U.S.C. §1362(7) (1976 & Supp. III 1979).

35. 33 C.F.R. §322.2(a) (1980).

adjacent wetlands and other waters such as isolated wetlands and lakes, intermittent streams, prairie potholes and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.³⁶

Responsibility for administering the Clean Water Act is divided between the Administrator of the EPA and the Secretary of the Army. The Administrator of the EPA is charged with the responsibility of establishing effluent limitations for point sources³⁷ and for issuing NPDES permits for the discharge of pollutants from point sources.³⁸ In granting NPDES permits, the Administrator is empowered to prescribe conditions for the permits in order to assure compliance with the other parts of the Clean Water Act, including the effluent limitation provisions.³⁹ In addition, the Act provides a mechanism for states to take over the responsibility for issuance of NPDES permits after complying with requirements to insure an adequate program.⁴⁰

The Secretary of the Army is given responsibility for issuing permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites (Section 404 permits).⁴¹ The Secretary may either issue individual permits or may issue general permits on a state, regional or nationwide basis for any category of activities involving the discharge of dredged or fill materials.⁴² The states may take over partial administration of the 404 permit program.⁴³

In the case of a NPDES permit or 404 permit, the authorization may not be issued until there has been notice and an opportunity for a public hearing.⁴⁴ The purpose of the public notice is to advise interested parties of the proposed activity and to solicit comments and informa-

36. *Id.*; 40 C.F.R. §122.30 (1980).

37. 33 U.S.C. §1311(b) (1976 & Supp. III 1979).

38. *Id.* §1342(a); see *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D.C. Del. 1981).

39. 33 U.S.C. §1342(a)(2). (1976 & Supp. III 1979).

40. *Id.* §1342(b). Problems can arise under this system with concurrent State-Federal enforcement. *United States v. Cargill, Inc.*, 508 F. Supp. 734 (D.C. Del. 1981).

41. 33 U.S.C. §1344(a) (1976 & Supp. III 1979). Traditionally a development oriented agency, the Corps accepted its new environmental role with some ambivalence. Blumm, *Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency*, 5 COLUM. J. OF ENV'T'L L. 69, 71 (1978). While other agencies were reluctant to implement the policies of NEPA, however, the Corps made a concerted effort to comply with both the spirit and the letter of the law. D. MAZMANIAN & J. NIENABER, *CAN ORGANIZATIONS CHARGE: ENVIRONMENTAL PROTECTION, CITIZEN PARTICIPATION, AND THE CORPS OF ENGINEERS*, vii. The Corps is now in the position of catching fire from environmentalists for not doing enough to protect the environment while at the same time being accused by others of strangling development.

42. 33 U.S.C. §1344(a), (e) (1976 & Supp. III 1979).

43. *Id.* §1344(g).

44. *Id.* §§1342(a)(1), 1344(a); 33 C.F.R. §325.3 (1980) (Corps); 40 C.F.R. § 124.10-12 (1980) (EPA).

tion necessary to evaluate the probable impact on the public interest.⁴⁵ Generally, the determination of whether a public hearing is to be held depends on a request made by a member of the public in response to the public notice, but in some instances the necessity for a hearing may depend on whether there are material facts which are in dispute.⁴⁶

As with the issuance of permits under the Clean Water Act, enforcement is the responsibility of both the Administrator of the EPA and the Secretary of the Army. After the issuance of a compliance order, the EPA may institute a court action for violations of the Act, including a violation where a state has responsibility for administering the NPDES permit program.⁴⁷ The Corps may institute proceedings against a party for a violation of Section 404.⁴⁸ Civil and criminal penalties as well as injunctive relief are available to remedy violations of the Act.⁴⁹

THE NATIONAL ENVIRONMENTAL POLICY ACT

In order to declare a national policy encouraging the productive and enjoyable harmony between man and his environment,⁵⁰ Congress passed the National Environmental Policy Act (hereinafter referred to as NEPA),⁵¹ declaring the policy of fulfilling the responsibilities of each generation as trustee of the environment for succeeding generations.⁵² In order to effectuate this policy, NEPA established the Council on Environmental Quality (hereinafter referred to as CEQ)⁵³ and also established procedural requirements to insure that federal agencies would consider environmental factors in decision processes.⁵⁴ Both the establishment of CEQ as a federal environmental coordinating agency and the mandate to consider environmental effects of proposed actions are important to the management of the nation's waters.

The duties of the CEQ are to: (1) assist and advise the President in the preparation of environmental quality reports for submission to Congress; (2) gather information concerning the conditions and trends in the quality of the environment; (3) to review and appraise the various programs and activities of the Federal Government in the light of

45. *United States v. Alleyne*, 454 F. Supp. 1164, 1173 (S.D.N.Y. 1978), quoting 33 C.F.R. §209.120(j)(1) (1976); see 33 C.F.R. §325.3 (1980).

46. *Pacific Legal Foundation v. Costle*, 586 F.2d 650, 658-59 (9th Cir. 1978).

47. 33 U.S.C. §1319 (1976 & Supp. III 1979). See generally *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (D.C. Ark. 1978).

48. 33 U.S.C. §1344(s) (1976 & Supp. III 1979). See generally *United States v. Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980).

49. 33 U.S.C. §§1319(c), (d), 1344(s)(4) (1976 & Supp. III 1979).

50. 42 U.S.C. §4321 (1976 & Supp. III 1979).

51. *Id.* §§4321-4347.

52. *Id.* §4331(b)(1).

53. *Id.* §§4341-4347.

54. *Id.* §4332.

NEPA policy for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy; (4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality; (5) to conduct investigations, studies, surveys, research and analysis relating to ecological systems and environmental quality; (6) to report to the President on the state of the environment; and, (7) to furnish studies, reports, and recommendations with respect to matters of policy and legislation as the President may request.⁵⁵

As suggested by these various duties, CEQ is not essentially in itself a decision-making organization.⁵⁶ Although the Council does have some authority to formulate regulations regarding procedural and administrative matters,⁵⁷ it has no authority to mandate a final decision by an agency. Rather, CEQ serves the role of monitoring the programs and activities of federal agencies without generally participating in the decisions involved.⁵⁸

The cornerstone of NEPA's procedural regiment is the environmental impact statement (hereinafter referred to as EIS). The preparation of an EIS is not the only procedural mandate of NEPA, but an EIS does serve as the principal mechanism for insuring that the Federal Government complies with the underlying policy of the Act. The requirement of an impact statement effects NEPA's express purpose to imbed an early formal consideration of the environment in the decision process.⁵⁹ An environmental impact statement performs two primary functions: (1) to serve as an environmental disclosure statement by detailing the environmental effects of a proposed federal action in order to enable those who do not have a part in its compilation to understand and consider meaningfully the factors involved;⁶⁰ and, (2) to compel the decision maker to give serious consideration to environmental factors in making discretionary choices and to help insure the integrity of

55. *Id.* §4344.

56. For a discussion of CEQ's limited role as an arbitrator under its regulations see McDermott, *Improving NEPA: New Regulations of the Council on Environmental Quality*, 8 B.C. ENV'T L. AFF. L. REV. 89 (1979).

57. For example, the CEQ has issued regulations outlining the procedures and format to be used for preparing environmental impact statements. 40 C.F.R. §§ 1500-1508 (1980). The regulations were issued under the authority of Exec. Order No. 11514 (1970), as amended by Exec. Order 1191 (1977).

58. In emergency circumstances which make it necessary for an agency to take action which will have significant environmental effects without observing the procedural requirements of NEPA the agency should consult with CEQ but even in such cases, there is no provision for CEQ to make the final decision on how the agency should proceed to comply with NEPA. 40 C.F.R. §1506.11 (1980).

59. *Citizens for Responsible Area Growth v. Adams*, 477 F. Supp. 994, 998 (D.N.H. 1979).

60. *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974).

the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.⁶¹

The most critical requirement of the EIS process is to reasonably investigate and consider the effects of a proposed action. In arriving at a decision, NEPA mandates that the decision maker be well informed. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,⁶² the Court observed that NEPA is designed to insure a fully-informed and well-considered decision.⁶³ This in turn requires information, coordination and analysis.

Information regarding the effects of a proposed action may come from several sources including the agency, an applicant for a permit or license, consultants, other local, state or federal agencies, and from members of the public. To insure an integrated use of the natural and social sciences and the environmental design arts, impact statements must be prepared using an inter-disciplinary approach.⁶⁴ In addition, the lead federal agency may call upon other federal agencies which have jurisdiction or special expertise for assistance as cooperating agencies.⁶⁵

The importance of an early and open method for identifying significant issues is recognized by the scoping process. This consists of an early public notice in the Federal Register of intent to prepare an EIS, followed by participation of interested persons and agencies to narrow and focus the issues to be considered.⁶⁶ The scoping process can serve to allocate assignments for the preparation of the EIS among the lead and cooperating agencies and identify other environmental statements or assessments related to the action. Consultation requirements can be identified, timing planned, and page limits set to assist in the preparation of a useful document.

Because one of the reasons behind the EIS process is a recognition of the desirability to open up the information gathering process, it is important that interested members of the public be given an opportunity to express their opinions and to input information for consideration by the agency. Beyond the scoping process, this involves providing notices to persons and organizations who are affected by the action or who have expressed an interest.⁶⁷ Public hearings or public meetings are

61. *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

62. 435 U.S. 519 (1978).

63. *Id.* at 588.

64. 40 C.F.R. §1502.6 (1980).

65. *Id.* §1501.6.

66. *Id.* §1501.7.

67. *Id.* §1506.6(b).

appropriate in instances where there is substantial environmental controversy or substantial interest is expressed in holding a meeting or hearing.⁶⁸

The analysis of the information for inclusion and discussion in the EIS is not to be a pro-forma exercise. An EIS should serve as a decision tool and not as a device to pay lip service to NEPA. This requires that an EIS realistically address the substantive issues while at the same time avoid detailed discussion of the trivial. Too often in the past the EIS was a telephone directory of facts. The length of a document is no guarantee of its value, and in fact, a bloated statement may indicate a failure to engage in a meaningful analysis of the issues.⁶⁹

The final step in the NEPA process is the decision itself. In order to provide an understanding of why a particular decision was made, the lead agency prepares a record of decision indicating which alternative is preferred on environmental grounds and discussing preferences of alternatives based upon other factors including economic and technical considerations and agency statutory missions.⁷⁰ NEPA requires good faith consideration of environmental factors and not just formalistic paper shuffling,⁷¹ but the decision is not dictated by these factors alone, nor are they necessarily elevated above other considerations.⁷² The Supreme Court has observed that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" ⁷³

FISH AND WILDLIFE COORDINATION ACT

Whenever the waters of a stream or other body of water are proposed or authorized to be impounded, diverted or otherwise controlled or modified by a federal agency or department or by others under a federal license or permit, the department or agency is required first to consult with the U.S. Fish and Wildlife Service, National Marine Fisheries Service as appropriate, and the state wildlife agency.⁷⁴ This coordination is to be accomplished with a view to the conservation of wildlife resources as well as providing for the development and im-

68. *Id.* §1506.6(c).

69. *See* 43 FED. REG. 55,978 (1978) (comments on Section 40, Code of Federal Regulations, Section 1502.7-page limits).

70. 40 C.F.R. §1505.2 (1980).

71. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1129 (1974).

72. *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

73. *Id.* at 227-28, *noting* *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

74. 16 U.S.C. §662(a) (1976 & Supp. III 1979); Reorg. Plan No. 4 of 1970, 3 C.F.R., *reprinted* in 5 U.S.C. app. at 397 (1970).

provement of these resources in connection with water-resource development.⁷⁵

The Fish and Wildlife Coordination Act⁷⁶ establishes a national policy

recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation⁷⁷

The scope of the implementation of this policy has been addressed by the Supreme Court in *Udall v. Federal Power Comm'n.*⁷⁸ In that case, the Commission awarded a private company a license to construct a hydroelectric power project on the Snake River, concluding that the project should not be developed either by the Federal Government or by a public power supply system. The Court ruled that the issue of federal development was never explored by the Commission and that it should explore all issues relevant to the public interest in this regard, including the wildlife conservation aspect under the Fish and Wildlife Coordination Act.⁷⁹ In reaching its decision, the Court noted that the Commission's inquiry regarding the project should not stop at its usefulness to the proponent or even the needs of the region, but must include an exploration of all issues relevant to the public interest including the protection of wildlife.⁸⁰

While not enlarging the jurisdiction of the Corps of Engineers under the Rivers and Harbors Act of 1899, it is clear that under the Fish and Wildlife Coordination Act, Congress intended that the Corps would consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation.⁸¹ The Senate Report on the Act noted that nursery and feeding grounds of valuable crustaceans and fishes may be affected by dredging and filling operations and that prior to the Act, existing law had no application to dredging and filling of bays and estuaries by private interests.⁸²

75. 16 U.S.C. §662(a) (1976 & Supp. III 1979).

76. *Id.* §§661-666(c).

77. *Id.* §661; *see* *Udall v. Federal Power Comm'n.*, 387 U.S. 428, 443 (1967).

78. 387 U.S. 428 (1967).

79. *Id.* at 443, 450-51.

80. *Id.* at 450.

81. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 607 (1974).

82. S. REP. NO. 1981, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3446-3450.

EPA has a duty to consult with the Fish and Wildlife Service in connection with the issuance of NPDES permits.⁸³ The fact that NPDES permits are exempted from the full requirements of NEPA⁸⁴ renders the consultation requirement of the Fish and Wildlife Coordination Act especially important.⁸⁵ Under the Clean Water Act, the protection of and propagation of fish, shellfish, and wildlife is a goal.⁸⁶ This goal is consistent with, and is to be read in conjunction with the similar policy under the Fish and Wildlife Coordination Act.⁸⁷

A significant feature of the Fish and Wildlife Coordination Act is that federal agencies authorized to construct or operate new water-control projects are authorized to modify or add to the structures and operations of these projects and to acquire lands in order to accommodate the means and measures for conservation of wildlife resources as an integral part of the projects.⁸⁸ The Act provides that the cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for land acquisition, facilities recommended in water-resource project reports, modification of the project and modification of project operations but shall not include the operation of wildlife facilities.⁸⁹ These mitigation measures of the Act have proven to be an integral part of planning water-resource projects.

In some instances conflicts have arisen concerning whether an agency has fully complied with its responsibilities under the Act. The focus of such cases often revolves around the question of mitigation. One such case that examines the issue of mitigation is *Cape Henry Bird Club v. Laird*.⁹⁰ The case concerned the construction of Gathright Dam on the Jackson River in Virginia by the Army Corps of Engineers. The project was an earth and rock-fill dam creating a lake which would remove about twelve miles of the Jackson as a free-flowing river. The purpose of the dam was for flood control and water quality control. The plaintiffs contended that the Corps had not complied with the Fish and Wildlife Coordination Act because there was no plan to mitigate the loss of the Gathright area to the Virginia Commission of Game and Inland Fisheries. The plaintiffs argued that under the Act the Corps had a duty to mitigate the loss to the state.⁹¹ A large portion of the area acquired for the project was originally part of a wildlife

83. 40 C.F.R. §122.12(e) (1980).

84. 33 U.S.C. §1371(c)(1) (1976 & Supp. III 1979).

85. *Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 290 (2d Cir. 1976).

86. 33 U.S.C. §1251(a)(2) (1976 & Supp. III 1979).

87. 532 F.2d at 290.

88. 16 U.S.C. §662(c) (1976 & Supp. III 1979).

89. *Id.* §662(d).

90. 359 F. Supp. 404 (W.D. Va. 1973).

91. *Id.* at 417.

management area owned by Virginia. The plaintiffs alleged that the amount paid to the state for the land was inadequate, thereby resulting in a failure of the Corps to fully mitigate the loss of the wildlife area to the state. The court determined that it was not its duty to decide whether the price was adequate, finding that the determination was one to be made solely between the Corps and the state.⁹² The court also refused to interject itself into the agreement between the State and the Corps regarding other mitigation measures to be taken.⁹³ The court observed that the Fish and Wildlife Coordination Act only requires that the Corps attempt to mitigate losses by discussing and consulting with the appropriate state and federal agencies. Although the Corps may recommend mitigation plans to Congress, it has no authority to provide for mitigation under the Act in the absence of specific congressional authorization.⁹⁴

The limits of an agency's responsibility to provide mitigation were also explored in *Akers v. Resor*⁹⁵ where the plaintiffs sought to stop construction of a channel enlargement and realignment of the Obion and Forked Deer Rivers in Tennessee. Pursuant to the Fish and Wildlife Coordination Act, the Corps submitted a mitigation report to Congress. That report was not in accordance with a mitigation recommendation made by the Fish and Wildlife Service, with the Corps commenting that the Service's recommendation to reduce the channel work was incompatible with the flood control purpose of the project and that the alternate recommendation to acquire 12,500 acres of land for the use of the Game and Fish Commission was not economically justifiable. Later, the Corps prepared another mitigation plan including a proposal to acquire 14,400 acres for mitigation purposes. The plan had not yet been submitted to Congress. By that time, however, the Tennessee Game Commission was contending that 44,425 acres should be acquired, and the Fish and Wildlife Service was urging that even more acreage should be acquired. The new mitigation plan of the Corps was also declared inadequate by the Bureau of Recreation of the Department of the Interior, the United States Forest Service and the Tennessee Health Department.

Plaintiffs contended both that the Corps failed to consult in good

92. *Id.*

93. The type of mitigation measures agreed to are illustrative. They included: the grant of a long-term or permanent license to the Commission for the use of a lodge; providing vehicular access in designated areas; providing for hunter usage of a buffer strip around the lake; setting aside some timber area for fish propagation purposes, purchasing six downstream access points for future licensing to the Commission, and; granting responsibility for regulating fish and wildlife activities and boating on the lake to the Commission. *Id.* at 417.

94. *Id.*

95. 339 F. Supp. 1375 (W.D. Tenn. 1972).

faith with the other agencies and that the Corps could not proceed with the project until a mitigation proposal had been tendered to Congress.⁹⁶ The court stated that the legislative history of the Act contemplated that a plan of mitigation be submitted to Congress by the construction agency when Congress is asked to appropriate funds for the project even though the project had already been generally authorized.⁹⁷ The court held that the Fish and Wildlife Coordination Act must be administered in accordance with NEPA and that the Corps must submit a mitigation plan to Congress before it proceeded.⁹⁸ In considering the consultation requirement in relation to the Fish and Wildlife Coordination Act, the court only said that the Corps must consult in good faith with the other agencies and give their recommendations due consideration.⁹⁹

The question of interplay between the Fish and Wildlife Coordination Act and NEPA has also been raised in relation to joint compliance. The courts have generally accepted that if an agency complies in good faith with NEPA, it will automatically take into consideration all of the factors required by the Fish and Wildlife Coordination Act.¹⁰⁰

In addition to mitigation for federal projects, mitigation is sometimes appropriate for private actions affecting fish and wildlife resources where a permit is required. Because the issuance of these permits is within the purview of the Fish and Wildlife Coordination Act, mitigation can be a method for insuring that the issuance of a permit for a private action is consistent with the policy of the Act. The decision in *Sierra Club v. Alexander*¹⁰¹ illustrates the process. Pyramid Company wanted to develop a regional shopping mall in New Hartford. Because part of the proposed site consisted of wetlands, the developer applied for a federal 404 permit, in addition to state permits. In order to mitigate the destruction of the wetlands, Pyramid proposed measures including detention basins to provide storm capacity and the creation of some new wetlands.¹⁰² After the public notice was issued by the Corps, there was a meeting attended by representatives of the federal agencies

96. *Id.* at 1380.

97. *Id.* The court referred to S. REP. NO. 1981, 85th Cong., 2d Sess., reprinted in [1958] U.S. CODE CONG. & AD. NEWS 3446.

98. 339 F. Supp. at 1380.

99. *Id.*

100. *Environmental Defense Fund v. Froehle*, 473 F.2d 346, 356 (8th Cir. 1972); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971), *aff'd* 470 F.2d 289 (8th Cir. 1972).

101. 484 F. Supp. 455 (N.D.N.Y. 1980).

102. Exec. Order No. 11990, 42 Fed. Reg. 26961 (1977) states that each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands in carrying out the agency's responsibilities including water resources planning and licensing activities. In accordance with this national policy no permit is granted for work in important wetlands unless it is determined "that the

and Pyramid. The meeting and mitigation procedures failed to satisfy the Fish and Wildlife Service. The permit was issued over the unresolved objection. The court held that while the Corps had a duty to consult with the Fish and Wildlife Service, it had no obligation to make a decision which corresponded with the Fish and Wildlife Service position.¹⁰³

THE ENDANGERED SPECIES ACT

The Endangered Species Act¹⁰⁴ plays an important part in the management of water resources. The motivation behind the Act is fourfold:

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction. . . .¹⁰⁵

The Act requires the establishment of lists of endangered and threatened species and the issuance of regulations for the conservation of such species.¹⁰⁶ In addition, the Act requires interagency cooperation for the protection of endangered and threatened species and their critical habitat.¹⁰⁷

The interagency cooperation provisions of the Act affirmatively command all federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or result in the destruction or modification of such

benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits."

See 33 C.F.R. §320.4(b)(4) (1980).

103. 484 F. Supp. at 470.

104. 16 U.S.C. §§1531-1543 (1976 & Supp. III 1979).

105. *Id.* §1531.

106. *Id.* An endangered species means "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of Class Insecta . . . whose protection . . . would present an overwhelming and overriding risk to man." *Id.* §1532(4). A threatened species means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* §1532(15).

107. *Id.* §1536.

species.¹⁰⁸ In the snail darter case, *Tennessee Valley Authority v. Hill*,¹⁰⁹ the Supreme Court declared the prohibition to be absolute, allowing of no exception.¹¹⁰ The Court held that although the Tellico Dam had been virtually completed, the project had to be abandoned because filling the reservoir would destroy the critical habitat of the snail darter.¹¹¹

The decision prompted a strong reaction in Congress, resulting in consultation and exemption procedures being added to the Act.¹¹² Consultation between the Secretary¹¹³ and the agency is the first step in the process of determining whether a proposed action violates the Act. After the conclusion of that consultation period, the Secretary is required to provide to the action agency a written statement setting forth the Secretary's opinion and a summary of information detailing how the agency action affects the species or its critical habitat. If the opinion is based on inadequate information, the federal agency has a continuing obligation to make a reasonable effort to develop that information.¹¹⁴ The actions that the agency can take during the period when the information is unavailable may be limited, pending a more complete evaluation.¹¹⁵

If the Secretary's opinion is that the action would violate the Act, the federal agency, the governor of the state in which the action would occur, or the permit/license applicant may apply for an exemption. A review board, comprised of an individual selected by the Secretary, a resident of the affected state selected by the President and an administrative law judge, is appointed to investigate the situation and report to the Endangered Species Committee.¹¹⁶

The Endangered Species Committee is composed of seven members:

108. *Id.*, as amended by Act of Nov. 10, 1978, PUB. L. No. 95-632, §3, 92 Stat. 3752 and Act of Dec. 28, 1979, PUB. L. No. 96-159, §4, 93 Stat. 1226.

109. 437 U.S. 153 (1978).

110. *Id.* at 173.

111. *Id.* at 172-73.

112. 16 U.S.C. §1536 (1976 & Supp. III 1979), as amended by Act of Nov. 10, 1978, PUB. L. No. 95-632, §3, 92 Stat. 3752 and Act of Dec. 28, 1979, PUB. L. No. 96-159, §4, 93 Stat. 1226. These additions to the Act did not change the basic prohibition under Section 7. "The statutory language cited in *TVA v. Hill* remains unchanged, and the legislative history reflects Congressional approval of the Supreme Court's approach in that case." *North Slope Borough v. Andrus*, 486 F. Supp. 332, 351 (D.D.C. 1980). The legislative history referred to is H. REP. No. 697, 96th Cong. 1st Sess. 13, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 2577.

113. Secretary may mean the Secretary of Interior, Secretary of Commerce or Secretary of Agriculture depending on the particular context. 16 U.S.C. §1532(10) (1976 & Supp. III 1979).

114. H. REP. No. 697, 96th Cong., 1st Sess., 12, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 2577.

115. *North Slope Borough v. Andrus*, 486 F. Supp. 332, 352-53 (D.D.C. 1980).

116. The report of the review board is to address two issues: first, whether an irresolvable conflict exists, and; second, whether the federal agency and the exemption applicant have carried out their consultation responsibilities in good faith, making an effort to develop and fairly consider reasonable modifications or alternatives. 16 U.S.C. §1536(g)(5) (1976 & Supp. III 1979).

(1) the Secretary of Agriculture; (2) the Secretary of the Army; (3) the Chairman of the Council of Economic Advisors; (4) the Administrator of the EPA; (5) the Secretary of the Interior; (6) the Administrator of the National Oceanic and Atmospheric Administration; and (7) an individual from each affected state, appointed by the President. The committee is charged with making a final determination. The committee can grant an exemption if, by a vote of not less than five of its members, it determines that: there are no reasonable and prudent alternatives to the agency action; the benefits of the action clearly outweigh the benefits of alternative courses of action which would conserve the species or its critical habitat; it is in the public interest; and the action is of regional or national significance. The committee must also establish reasonable mitigation and enhancement measures. The consultation and exemption procedures provide a mechanism for considering unusual cases. It would be a mistake, however, to consider the exemption procedure to be a viable method for escaping from the fundamental purposes of the Endangered Species Act. No exemptions have been granted.¹¹⁷

THE COASTAL ZONE MANAGEMENT ACT

The Coastal Zone Management Act (hereinafter referred to as CZMA)¹¹⁸ focuses on the establishment of effective management, beneficial use, protection, and development of the coastal zone.¹¹⁹ The impetus behind the CZMA is the realization that the coastal zone is a valuable but fragile resource which must be managed.¹²⁰ The idea of management is the key to the Act. The Act does not establish specific mandates for determining how this management is to be effected. Rather, it establishes an opportunity for the coastal states to implement their own management systems for the coastal zone, with an assurance of cooperation from the Federal Government.¹²¹

117. The Tellico Dam was not granted an exemption by the committee. Recently, however, snail darters have been found in several waterways in Texas. *Wall St. J. Apr. 23, 1981, at 1, col. 3.*

118. 16 U.S.C. §§1451-1464 (1976 & Supp. III 1979).

119. *Id.* §1451(a). The term coastal zone means the coastal waters, including the underlying land, and the adjacent shorelands and associated waters, strongly influenced by each other. It includes islands, transitional and intertidal areas, salt marshes, wetlands and beaches. *Id.* §1453(1).

120. *Id.* §1451.

121. *Id.* §1451(h). The CZMA also states:

The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal

A state coastal management program establishes broad guidelines on priorities of uses in particular areas and a planning process for implementing those guidelines.¹²² Essential to this is the necessity for a state to have the authority to implement and enforce the program.¹²³ By establishing that it has the ability to manage its coastal resources, a state is given the assurance that federal actions as well as private actions will be consistent with the state's coastal program.¹²⁴

In many ways the federal consistency provisions are the focus of the Act because they allow the state a significant measure of control which it would not otherwise have. There are two components to the consistency provisions. The first component is for federal activities and federal development projects. A federal activity is any function performed by or on behalf of a federal agency, other than the issuance of a license or permit.¹²⁵ A federal development project is considered as a sub-category of federal activity "involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources."¹²⁶

The Act provides:

(c)(1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs.¹²⁷

The second component is any activity requiring a federal license or

agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter, and (d) to encourage the participation of the public, of Federal, state, and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.

Id. §1452.

122. *Id.* §1454(b).

The CZMA lists nine specific program requirements focusing on the need for an adequate state organization and coordination of the program with relevant federal and state agencies, local governments, regional organizations, port authorities and other interested parties.

Id. §1455(c)(1).

123. *Id.* §1455(c)(7).

124. For a discussion of the consistency provisions of the CZMA in relation to Section 404 of the Clean Water Act, see generally Blumm, *Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency*, 5 COLUM. J. OF ENV'T'L L. 69 (1978).

125. 15 C.F.R. §930.31(a), (c) (1980).

126. *Id.* §930.31(b).

127. 15 U.S.C. §1456 (1976 & Supp. IV 1980).

permit. An applicant for a license to conduct an activity affecting land or water uses in the coastal zone must provide the federal agency with a certification that the proposed activity complies with the state's program.¹²⁸ At the same time, the applicant submits a copy of that certification with information concerning the activity to the state, providing the state with an opportunity to review the activity for consistency with its coastal zone program.¹²⁹ The state then issues a public notice and may hold a public hearing to assist it in determining whether it will concur with the applicant's consistency certification.¹³⁰ If the state objects to the consistency certification, the federal agency may not issue the license or permit, unless allowed to do so by the Secretary of Commerce.¹³¹

There is a very significant difference between the consistency requirements for federal activities and federal licenses or permits. For federal activities, it is the federal agency which has primary responsibility for determining whether its actions are consistent with the state coastal program.¹³² In addition, the federal agency is required only to conduct the activity, to the maximum extent practicable, consistent with the state program. For licenses and permits, however, the state may determine that the proposed activity is not consistent with its program, and the federal agency is bound by that determination unless it is overruled by the Secretary of Commerce. Likewise, there is no limitation that the activity must comply to the maximum extent practicable; it must comply.¹³³ The CZMA provides an effective method to give a state substantial control over its coastal resources while also insuring that the state has a program which is capable of effective management. It is notable that while outlining broad goals, the Act does not mandate the standards which the states must use in their coastal programs. It is an integral concept of the CZMA that the development and application of such standards be left to the states rather than the Federal Government.

ARCHAEOLOGICAL AND CULTURAL RESOURCES

Over the past several years, the consideration of cultural resources

128. 16 U.S.C. §1456(3)(A) (1976 & Supp. III 1979).

129. 15 C.F.R. §§930.57-59 (1980).

130. *Id.* §§930.60-63.

131. 16 C.F.R. §§930.65, 930.120-134 (1980). The Secretary may allow issuance of the permit by determining that the activity is consistent with objectives and purposes of the CZMA or is necessary in the interest of national security.

132. There is a mediation process available if the state disagrees with the determination of the federal agency but it is not binding on the agency. 15 C.F.R. §§930.110-116 (1980).

133. Of course, the applicant may alter his plans to comply with the state coastal program requirements.

has become an integral part of the management of the nation's water resources. The role of cultural resources is of particular importance to water resource planning because sites of prehistoric and historic significance are often located along waterways. Coordination of the cultural resource aspects of a proposed activity is, therefore, a consideration that must be addressed and integrated in the management process.

The National Historic Preservation Act (hereinafter referred to as NHPA)¹³⁴ was passed to recognize that the historical and cultural foundations of the nation should be preserved and to mandate a role for the Federal Government in that preservation effort.¹³⁵ The NHPA authorizes the Secretary of the Interior to establish a National Register of sites, buildings, structures and objects which are significant in American history, architecture, archaeology and culture.¹³⁶ One of the significances of the National Register is that an agency having either direct or indirect jurisdiction over a proposed activity must take into account the effect on a National Register property.¹³⁷

This requirement has been translated into regulations by the Advisory Council on Historic Preservation.¹³⁸ The regulations require a series of cultural resource milestones that must be met during the consideration of water resource activities including both direct federal projects and licensing or permitting processes. The responsibilities of federal agencies include both the identification¹³⁹ of cultural resources and consideration of the effects on those resources.¹⁴⁰

In order to accomplish these two objectives the process depends heavily on coordination with those agencies which possess expertise in cultural resources. In identifying properties which would be eligible for listing on the National Register, the action agency is called upon to consult with the state historic preservation officer.¹⁴¹ The agency then makes a determination of what further actions should be taken to identify previously undiscovered eligible properties.¹⁴² This may include a

134. 16 U.S.C. §§470-470n (1976 & Supp. III 1979).

135. *Id.* §470(b). The broad scope of the Act has been noted by the courts. *See United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981).

136. 16 U.S.C. §470a (1976 & Supp. III 1979).

137. *Id.* §470f.

138. 36 C.F.R. §800 (1979). The Advisory Council was established by Title 16, United States Code, Section 470i. The regulations were issued pursuant to Title 16, United States Code, Section 470j and Executive Order 11593. The implementing regulations of the Corps of Engineers for civil works projects are found at Title 33, Code of Federal Regulations, Section 305. The Corps regulations for regulatory functions are in Title 33, Code of Federal Regulations, Section 325. They are in accord with regulations of the Advisory Council.

139. 36 C.F.R. §800.4(a) (1979).

140. *Id.* §800.4(b).

141. *Id.* §800.4(a). A state historic preservation officer is the appropriate state official responsible for cultural resources. *Id.* §800.2(m) (1979).

142. *Id.* §800.4(a)(2).

cultural resources survey of the affected area.

If the identification process reveals eligible properties, the next step is to determine the effect which the proposed undertaking will have on the property. Again, the effect determination is made by the agency in consultation with the state historic preservation officer.¹⁴³ Where the agency determines that the proposed undertaking could have adverse effects on an eligible property, an expanded consultation process kicks in, requiring coordination with the Advisory Council as well as the state historic preservation officer. This coordination process culminates in a memorandum of agreement which outlines the action which will be taken to avoid, mitigate or minimize adverse effects.¹⁴⁴

Also of particular application to water resource projects is the Archaeological and Historic Preservation Act,¹⁴⁵ also known as the Reservoir Salvage Act. The Act is designed to provide for the preservation of historic and archaeological data which might otherwise be lost or destroyed as the result of flooding or by alteration of the terrain caused as a result of any federal construction project.¹⁴⁶ The Act requires a federal agency to give written notice to the Secretary of the Interior before undertaking an activity which could have adverse effects on historical or archeological data. The agency may request the Secretary of the Interior to undertake recovery, protection and preservation of the threatened data, or the agency itself may use funds appropriated for the project to provide recovery, protection and preservation of the threatened data.¹⁴⁷ The Archaeological and Historic Preservation Act works in conjunction with the National Historic Preservation Act to provide a comprehensive system for coordination between agencies responsible for water resource management and the Department of Interior to insure appropriate consideration of cultural resources.

THE CONCEPT OF COORDINATION

Water resource management decisions are no longer made behind closed doors. The effect of the laws discussed in this article has been to open doors and build corridors of coordination. These corridors are two-way conduits which serve to disseminate information from the agency as well as allowing a flow of information and comment to the agency. This process of coordination, properly designed and implemented, is dynamic rather than static, encouraging a dialogue. In the

143. *Id.* §800.4(b).

144. *Id.* §800.6.

145. 16 U.S.C. §469-469c (1976 & Supp. III 1979).

146. *Id.* §469.

147. *Id.* §§469a, 469a-1.

decision processes involving water resource activities it is important that the decision maker receive input from a variety of sources, and it is also important that the agency provide output.

Input and output are both part of the coordination process but they serve basically different purposes.¹⁴⁸ The primary purpose of input is to result in better decisions.¹⁴⁹ The ultimate standard of water resource decisions is the public interest.¹⁵⁰ In order to assure that decisions are made in the public interest, the decision maker should have the benefit of relevant information. While the individual making the decision and his staff will generally have expertise in the area, it cannot be assumed that they possess all relevant information. The input the decision maker receives from other sources expands the information base by providing new information and by providing information which may contradict that which the decision maker already has.

The purpose of output is more complex. Initially, the purpose of output in the coordination process is to provide notice to interested and affected persons and organizations regarding the proposed water resource activity.¹⁵¹ This notice is important because it provides the awareness necessary for those interested to be able to then provide input to the process. The concept of output also serves to educate. This is one of the key functions of an environmental impact statement.¹⁵² Not only are other agencies and the public notified of the existence of a proposed activity; they are also provided detailed information regarding the effects of the action and possible alternatives. This education process in turn allows those interested or affected to provide better input back into the system. Lastly, output serves to explain the reasons for the decision after it has been made.¹⁵³

The first part of the coordination process is to provide initial notice of the proposed activity. Because water resources affect so many different elements of the society, the process of notifying appropriate individuals and organizations requires some consideration. The notice should provide enough information concerning the proposal to assist interested parties in evaluating its likely impact.¹⁵⁴ It is also of assist-

148. 40 C.F.R. §1500.1(b) (1980).

149. One of the goals of the CEQ regulations is to foster better decisions, 43 Fed. Reg. 55978, 55979 (1978) (Summary of Major Innovations in the Regulations.) (This section was not codified in the Code of Federal Regulations).

150. See 33 C.F.R. §320.4(a) (1980).

151. *Sierra Club v. Alexander*, 484 F. Supp. 455, 470-71 (N.D.N.Y. 1980); 33 C.F.R. §325.3 (1980); 40 C.F.R. §1506.6(a) (1980).

152. *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975); *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974).

153. 40 C.F.R. §1505.2 (1980).

154. 33 C.F.R. §325.3(a) (1980).

ance for the notice to include a brief section on the factors which will be used in evaluating the proposal.¹⁵⁵ Notices should be sent to concerned federal and state agencies, local governmental bodies, interested organizations and interested or affected parties.¹⁵⁶

After the public has been notified of a proposed activity, the coordination process shifts from output to a combination of output and input. The mechanisms during this pre-decision stage vary and may include correspondence, informal discussions, scoping meetings, public hearings or public meetings.¹⁵⁷ These are tools designed to facilitate the process of focusing the issues, assimilating information and formulating alternatives.

An important new feature at this stage of the coordination process is the scoping process. Formally introduced by the CEQ regulations, the concept of a scoping process is to increase efficiency in the decision process.¹⁵⁸ The scoping process is keyed to compliance with NEPA and is defined as an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."¹⁵⁹ By inviting early participation by interested parties, an agency is able to define the issues which are significant and eliminate issues which are not significant or have been covered by prior review. This allows an agency to focus its attention and concentrate on the essential, thereby reducing delay and saving money. Too often in the past, environmental reviews of water resource projects considered insignificant effects in detail, resulting in voluminous documents which were, practically unusable by a decision maker. It has now been recognized that an environmental statement is most effective where it is short, precise and analytical.

One question that arises in regard to the information process concerns the use of data which is prepared by consultants or by a permit or license applicant. In many cases an agency does not have the resources to perform a complete study of a proposed activity itself. Instead, the agency or the applicant may contract with a consulting firm to prepare a report for the agency. The courts have decided that this procedure is proper if the agency makes an independent evaluation of the informa-

155. *Id.* §325.3(b).

156. *Id.* §325.3(c). In *Sierra Club v. Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980), the court noted the importance of the public notice requirement for a Finding of No Significant Impact under NEPA. The court held that, although the Corps did not use the proper list in issuing notices, the purpose of the notice requirements had been satisfied because there was substantial public input.

157. 40 C.F.R. §1501.7 (1980).

158. *Id.*

159. *Id.*

tion provided.¹⁶⁰ Because of the potential for pro-project bias in such consultant reports, it is important for the agency to use a sharp eye in its review to insure that information relied upon is accurate and sufficiently complete.

THE ROLE OF CONSENSUS IN THE DECISION PROCESS

*Consensus est voluntas plurium ad quos res pertinent, simul juncta.*¹⁶¹

In examining the role of consensus in water resource management, it is necessary to consider both aspects of the decision process: (1) the formulation of policy; and, (2) the evaluation of individual projects. In both aspects decisions must be made and in both aspects conflicts arise.

Resources involving the waters of the United States are held in trust by the Federal Government for the public benefit.¹⁶² This is the bedrock of all water resource policy: the public interest is paramount.¹⁶³ This simple axiom degenerates, however, into a tangle of conflicting values when it becomes necessary to consider what constitutes the public interest. In practice, water resource management is guided by various component policies, each with its particular application and emphasis.¹⁶⁴ These policies are established in statutes, executive orders and regulations.

The formulation of these component policies is a continuing process which is influenced by the shifting winds of public opinion, political leadership, economic conditions and organizational pressures. The impetus behind policy formulation has come from a variety of sources, each with an individual concept of the public interest. To some extent these competing interests can be reconciled by balance and compromise but in some instances policy aims are mutually exclusive.

This type of confrontation is illustrated by the basic issue of regulation by the Federal Government. On one hand there exists the fundamental concept of private ownership and control of private property.¹⁶⁵ On the other hand is the desire to insure uses that are consistent with the public interest.¹⁶⁶ This issue manifests itself in cases which must delineate the duties of the Government while protecting individual

160. *Sierra Club v. Alexander*, 484 F. Supp. 455, 467 (N.D.N.Y. 1980); *East 63rd Street Ass'n v. Coleman*, 414 F. Supp. 1318, 1328 (S.D.N.Y.), *aff'd*, 538 F.2d 309 (2d Cir. 1976).

161. Consent is the conjoint will of several persons to whom the thing belongs. BLACK'S LAW DICTIONARY 276 (5th ed. 1979).

162. *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922).

163. See 33 C.F.R. §320.4(a)(1) (1980).

164. This is demonstrated by the several statutes described in the text accompanying notes 4-143 *supra*.

165. *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

166. See generally *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1949).

property rights. The decision of the Supreme Court in *Kaiser-Aetna v. United States*¹⁶⁷ demonstrates the complex nature of the endeavor. In that case the Corps of Engineers sued Kaiser-Aetna, a development corporation, seeking a declaratory judgment that there was a right of public access to a pond which had been developed by the defendant. The pond was contiguous to a navigable bay in Hawaii but was separated from the bay by a barrier beach. Kaiser-Aetna had notified the Corps that it planned to dredge the pond and to construct a channel connecting the pond to the bay. The Corps acquiesced in the proposals. After the work had been accomplished a dispute arose concerning whether Kaiser-Aetna was required to obtain a permit from the Corps under Section 10 of the Rivers and Harbors Act of 1899 for future work and whether Kaiser-Aetna could deny public access to the pond.

The majority opinion held that the pond was a navigable water of the United States and that while the Corps could exercise jurisdiction over the pond it could not require Kaiser-Aetna to allow public access without paying just compensation under the Fifth Amendment.¹⁶⁸ The Court stated that the consent of the Corps created expectancies including a right to exclude which could only be taken away under the eminent domain powers of the Government.¹⁶⁹ A strong dissent argued that the doctrine of navigational servitude require the right of public access to all navigable waters.¹⁷⁰

Aside from the specific holding of the case, *Kaiser-Aetna* demonstrates the basic complexity of water resource management policy and the type of significant questions which have remained unanswered. Faced with a fundamental constitutional policy issue, the Court was unable to achieve a consensus in its decision. Instead, the majority opinion is fragmented, without a clear definition of the scope of the holding. The dissent reveals an undisguised antipathy for the majority opinion. *Kaiser-Aetna* is a poignant lesson of the lack of consensus in water resource policy, even with respect to fundamental principles.

Consensus is also elusive when individual project decisions are made. There are primarily two reasons for this. First, water resource policies are usually general and as a result leave considerable room for interpretation and judgment in their application. It is not surprising that the coordination process usually reveals substantial differences in the interpretation of the meaning and application of water resource policies to the decision at hand. Because many policy components are

167. 444 U.S. 164 (1972).

168. *Id.* at 180.

169. *Id.*

170. *Id.* at 180-192 (Blackman, J. dissenting).

not quantifiable, the weight given to the components depends on the discretion of the decision maker.¹⁷¹ Second, despite intensive engineering and scientific efforts, the factual analysis of water resource activities also depends on judgment. Although some effects can be identified and predicted reliably, others lie beyond the scope of scientific certainty.¹⁷² Decision makers, like policy makers, must face a variety of conflicting input and must make decisions where compromise is not able to achieve consensus.

Aside from the question of whether consensus can be achieved is the issue of how much emphasis should be placed upon its pursuit.¹⁷³ A reasonable effort to achieve a consensus signals an evaluation process which is receptive to the consideration of alternatives and modifications. It also demonstrates that information and opinion from more than a single source are being considered. When seen in this perspective consensus can be a valuable tool in water resource management.

At the same time it must be recognized that consensus is not in itself the ultimate goal and that its blind pursuit can be manipulated for purposes of delay and to force decisions which are not in the best interests of the public. A party sensing an unfavorable decision may suggest a continuing series of proposals, counter-proposals and meetings, hoping to delay the decision as long as possible. A decision maker who places undue emphasis on consensus can be manipulated into an ad infinitum merry-go-round.

An additional problem with an inflexible search for consensus is that it can lead to weak decisions. This can happen where an objector to a proposed project is bought off by an agreement to incorporate a suggested modification even though the decision maker realizes that the benefits of the modification do not justify the cost. Such unwarranted modifications may be adopted, not because they are considered to be in the public interest, but because their acceptance is the easy course of action. The reason why consensus may be so sought after, even where the result is not necessarily the best available, is because a party who does not agree with a decision may make life difficult for the decision maker by filing a lawsuit, instigating unfavorable press against the decision or bringing political pressure to bear.

Consensus has a legitimate role in the decision process when it is recognized as a part of the overall goal of reaching decisions which are

171. See 33 C.F.R. §320.4 (1980).

172. For a discussion of the complexity of determining the effects of a project see generally *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350 (S.D. Fla. 1981).

173. While the Endangered Species Act requires a consensus, there is no such requirement in the other statutes previously discussed. See text accompanying notes 4-143 *supra*.

in the public interest. It is, however, the public interest, not the consensus itself which is the ultimate goal.¹⁷⁴ By recognizing this, various interest groups can be given the opportunity to provide input to the coordination process and a reasonable effort can be made to achieve agreement. If agreement is not reached after a reasonable period of time, a decision should be made, recognizing any outstanding objections.¹⁷⁵ This role of consensus both expedites decisions and places emphasis on the public interest.

CONCLUSION

The importance of water resource management has been recognized by a series of federal statutes, regulations and court decisions developed in response to the needs of the nation. One of the most notable aspects of the policy formulated by these laws and decisions is the concept of coordination. Coordination serves a dual purpose of providing input to the decision process and at the same time opening up the process to scrutiny by the public.

Although the decision maker retains discretion for judging the merits of a proposed project, the process mandates a hard look and thorough analysis before a decision is made. It requires that the information relied upon and the reasons for the decision be disclosed.

The public interest rather than consensus is the governing standard. Reasonable efforts to achieve consensus can assist the decision process by encouraging consideration of modifications which would improve the proposed activity. Where the consensus rabbit is pursued without consideration of the associated "costs" the result may be delay and decisions which mandate unwarranted project changes. In order to avoid an unreasonable emphasis on consensus, the decision maker must be willing to withstand heat from unsatisfied opponents. The recognition of consensus as tool, rather than as the ultimate goal, ties water resource decisions more closely with the public interest.

174. 33 C.F.R. §320.4 (1980); *see* *Sierra Club v. Alexander*, 484 F. Supp. 455, 470 (N.D.N.Y. 1980).

175. 33 C.F.R. §325.8 (1980) (establishes the authority of Corps officers to issue permits over the unresolved objections of other federal agencies).