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NEPA at Nine: Alive and Well, or Wounded in Action

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NEPA AT NINE: ALIVE AND WELL, OR WOUNDED IN ACTION?

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As this article is being written, the ninth anniversary of the enactment of the National Environmental Policy Act (hereinafter NEPA, or the Act)[1] has passed without much fanfare. This article will pause to analyze the "settled" points which have developed over these nine years. An attempt will also be made to forecast what the future holds in store for NEPA. The Act, while quite short in length and seemingly straightforward in language,[2] has had a rather controversial existence. This article will not attempt to chronicle the *entire* history of the Act. Other writers have, at various points in NEPA's short history, done excellent work in this respect.[3] Rather, this writer will focus on the Supreme Court's efforts at clarifying and interpreting NEPA, with particular attention paid to the two most recent endeavors.[4] Next, attention will turn to efforts to streamline and clarify the NEPA process by

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1. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 (1976)).

2. Anderson, *The National Environmental Policy Act*, ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 239 (1974).

3. *See generally* W. RODGERS, ENVIRONMENTAL LAW (1977); F. ANDERSON, NEPA IN THE COURTS (1973).

4. Kleppe v. Sierra Club, 427 U.S. 390 (1976); Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

the Council on Environmental Quality (hereinafter CEQ) through its newly issued regulations governing NEPA activities.[5] Finally, the article will discuss areas of potential controversy and the future role of the Act generally. Underlying this entire project is the proposition that, contrary to the opinions of some commentators,[6] the courts and the agencies (via court endorsement of their actions) have done nothing to counteract what has been perceived to be the intent and purpose of Congress with regard to NEPA.[7] Environmentalists need not despair; their best interests are still protected. On the other hand, bureaucrats have perhaps been given some relief from what was viewed as a burdensome statute.[8]

I. THE SUPREME COURT AND NEPA

The Supreme Court has dealt with NEPA at length, in written opinions, only four times.[9] Two of these decisions, *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (Scrap)* (hereinafter SCRAP)[10] and *Flint Ridge Development Co. v. Scenic Rivers Ass'n* (hereinafter *Flint Ridge*),[11] will be briefly analyzed first. Following that will be a somewhat closer look at the two most recent cases, *Kleppe v. Sierra Club* (hereinafter *Kleppe*),[12] and *Vermont Yankee Nuclear Power Corp. v. NRDC* (hereinafter *Vermont Yankee*).[13]

SCRAP represented the first substantive NEPA analysis by the Court. The case involved a challenge by several environmental groups to Interstate Commerce Commission (ICC) activities with regard to freight rate increases proposed by the nation's railroads. Substantively, the environmental focus of the case was on the effect the rate increase would have upon the use of recycled, as opposed to virgin, materials. It was SCRAP's contention that the proposed increases discriminated against recycleables.

The case reached the Supreme Court as a result of a decision by a three-judge panel of the District Court for the District of C-

5. 43 Fed. Reg. 55, 990 (1978) (to be codified in 40 CFR §§ 1500-1508.28) (hereinafter reference will be made only to the appropriate CFR section).

6. Comment, URB. L. ANN. 225 (1977).

7. W. RODGERS, ENVIRONMENTAL LAWS § 7.1 (1977).

8. *See* 115 CONG. REC. 40923-928 (1969).

9. The Court has recently handed down another NEPA case. Andrus v. Sierra Club ___ U.S. ___, 99 S. Ct. 2335 (1979). In this case the Court held that proposed curtailment in an appropriation request in the budget of the National Wildlife Refuge System was not required to be accompanied by an EIS, because appropriation requests do not constitute either "Proposals for legislation" or "proposals for major Federal actions." *Id.*

10. 422 U.S. 289 (1975).

11. 426 U.S. 776 (1976).

12. 427 U.S. 390 (1976).

13. 435 U.S. 519 (1978).

olumbia[14] which ordered the ICC to reopen a general revenue proceeding. The court based this order on its view that a final draft environmental impact statement (hereinafter EIS) should have been made available during an initial oral hearing conducted by the ICC to investigate the rate increases proposed by the railroads, and that the EIS which was eventually prepared was deficient. In addition to ordering the ICC to prepare a more thorough EIS,[15] the court ordered hearings held on the statement and reconsideration of the ICC's decision not to hold the proposed rate unlawful.[16]

The Supreme Court reversed the decision of the District Court. The Court rejected the argument that a final EIS was due prior to a final order in a general revenue proceeding.[17] The Court stated that the command of section 102 (2) (C) of NEPA that the EIS "shall accompany the proposal through the existing agency review processes"[18] does not pertain to the point in time when the EIS must be prepared.[19] Rather, the language "simply says what must be done with the 'statement' once it is prepared — it must accompany the 'proposal'."[20] In the context of examining the role of NEPA and the procedures used by the ICC to implement NEPA, the Court also attempted to clarify the NEPA deadline for EIS preparations. "The time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a *proposal* for federal action."[21] Since the ICC had made no proposal, recommendation, or report at the time of the oral hearing, NEPA did not require that an EIS be available during the hearing, contrary to the position of the District Court.[22] In analyzing the sufficiency of the EIS, the Court indicated that the contents and scope of the statement would necessarily vary with the type of federal action being taken.[23] In a general revenue proceeding the crucial inquiry is whether a financial crisis exists to entitle the railroad to a rate increase. This sort of inquiry raises few environmental questions. Therefore, the ICC was found to be justified in preparing a limited impact statement.[24] The Court buttressed its holding by pointing to a collateral ICC proceeding

14. SCRAP v. United States, 371 F. Supp. 1291 (D.D.C. 1974), *rev'd sub nom.* Aberdeen and Rockfish R.R. Co. v. SCRAP, 422 U.S. 289 (1975).
15. 371 F. Supp. at 1306.
16. *Id.* at 1307.
17. 422 U.S. at 320 (1975).
18. 42 U.S.C. § 4332(2) (C) (1976).
19. 422 U.S. at 320.
20. *Id.*
21. *Id.*
22. *Id.* at 320-21.
23. *Id.* at 322.
24. *Id.* at 323-24.

which devoted more specific attention to environmental issues.[25] In sum, the Court found that "environmental issues pervaded the proceeding"[26] and that the impact statement satisfied the requirements of the Act.

The Court's ruling in *SCRAP* perhaps initially gave environmentalists cause for concern. It was thought by some to eliminate the draft impact statement from the NEPA process.[27] The Court's handling of the timing of EIS preparation also caused concern. It seemed to be overruling language in earlier Circuit Court decisions which mandated early EIS preparation.[28] It was felt by some that by not requiring an impact statement until the ICC finalized its order, the Court was going to "severely limit the effectiveness of the impact statement."[29] Thus, the Supreme Court's first encounter with NEPA seemed to some to have left NEPA lying by the roadside, seriously injured.

Ample pause for reflection creates a slightly different analysis of the case. The matter involved unique agency procedures.[30] Nowhere in the opinion did the court explicitly reject the concept of the necessity for a draft impact statement. Indeed, following the decision CEQ issued a memorandum construing SCRAP which strongly reiterated the position that the Court had in no way emasculated the draft to final impact statement process.[31] The Council argued that nothing in the opinion, on this or any other issue, was inconsistent with the CEQ Guidelines.[32] Additionally, the idea of gearing the environmental assessment to the action being taken does not seem to be inherently bad or contrary to the intent of NEPA. Federal agencies are charged with a very wide variety of roles and duties. Accurate and effective environmental analysis must necessarily be the result of procedures which are flexible and varied, within, of course, the confines of section 102 (2) (C) of NEPA.

The most controversial, and perhaps most critical, issue in the case concerned the timing question. As indicated earlier, the Court seemed to say the time when a final impact statement is due should be controlled by the appearance of a recommendation or report on a proposal for federal action. The Court overruled lower court

25. *Id.* at 325-26.
26. *Id.* at 327.
27. Druley, *Federal Agency NEPA Procedures,* 7 ENVIR. REP. (BNA) Mono. No. 23, 2 (1976).
28. 422 U.S. at 321 n.20.
29. Note, 49 TEMP. L. Q. 223, 235 (1975).
30. 422 U.S. at 322-28.
31. C.E.Q. Memorandum concerning *Aberdeen & Rockfish R.R. Co. v. S.C.R.A.P.* (reprinted in Druley, *Federal Agency NEPA Procedures,* 7 ENVIR. REP. (BNA) Monograph No. 23, App. C (1976)).
32. These guidelines are found at 40 C.F.R. § 1507 (1979).

decisions requiring early preparation of impact statements.[33] This ruling could be construed to allow last minute, ad-hoc preparation of impact statements justifying decisions or projects. However, a realistic reading of the decision yields a contrary position. An agency is not going to be able to wait until the last minute to prepare an EIS. Impact statement preparation is a time-consuming process.[34] Thus, realistically, agencies will have to begin-preparation of statements well in advance of germination or announcement of a "recommendation or report on a proposal," or formulation of a policy, in order to have a "final" EIS at the time required by the Court in *SCRAP*. Therefore, at this point in NEPA development, it could be forcefully argued that the Court did not really emasculate the Act in the fashion that a cursory reading of *SCRAP* might indicate.

The Court's next opportunity to deal with the Act came in *Flint Ridge Development Co. v. Scenic Rivers Ass'n*.[35] The Court was called upon to construe the relationship between NEPA and the Interstate Land Sales Full Disclosure Act (Disclosure Act).[36] The specific issue facing the Court was whether the procedural mandates of NEPA must yield in the face of a conflict with another federal statute. The Department of Housing and Urban Development (HUD) is charged with administering the Disclosure Act. Under the Act a developer must file with HUD a statement of record and property report containing information about proposed housing developments. This information is clearly intended to protect prospective purchasers against fraud and deceptive practices. It must contain detailed information regarding, among other things, title to the land, topography thereof, streets, general terms and conditions of sale and the background of the developer.[37] The statement becomes effective 30 days after filing, unless the Secretary of Housing and Urban Development determines it to be insufficient.[38] The Secretary cannot evaluate the substance or merit of the project, review being limited to examination of the document to be certain the aforementioned contents are complete.[39]

The plaintiffs in this case demanded that HUD prepare an EIS on a housing development in Oklahoma prior to the disclosure statement becoming effective. HUD refused to do so and litigation

33. 422 U.S. at 321 n.20.
34. COUNCIL ON ENVIRONMENTAL QUALITY, SIXTH ANNUAL REPORT OF THE C.E.Q. 639 (1975).
35. 426 U.S. 776 (1976).
36. 15 U.S.C. § 1701 1-20 (1976).
37. 15 U.S.C. § 1705 (1976).
38. 15 U.S.C. § § 1704 (b) (1976).
39. 15 U.S.C. § 1706 (1976).

ensued. Both the district court[40] and circuit court[41] held that NEPA applied to HUD and that an impact statement must be prepared in conjunction with the disclosure statements.[42]

The Supreme Court was presented with the issues of whether HUD's "action" allowing a disclosure statement to become effective is a major federal action and whether HUD is nonetheless exempt from NEPA due to a statutory conflict arising from the Disclosure Act. The Court chose not to deal with the former issue, finding the latter to be dispositive of the case.[43] The Court determined compliance with NEPA is impossible within the context of the Disclosure Act because of the 30 day deadline under which HUD must act.[44] Writing for a unanimous Court, Mr. Justice Marshall noted that where a "clear and unavoidable conflict in statutory authority exists, NEPA must give way."[45] In the eyes of the Court, this situation presented the epitome of that sort of statutory conflict. Although the Disclosure Act authorized the Secretary of HUD to suspend the effective date of the disclosure statement in order to remedy an inadequate disclosure statement, it did not confer any discretion to suspend the effective date in order to provide time for preparation of an impact statement.[46] The Court noted however that the Secretary had the power to promulgate rules requiring developers to include a wide variety of environmental information in the property reports required by the Disclosure Act.[47]

On its face this case appeared to be one which would provide the Court the opportunity to define a "major federal action" under NEPA. But, as indicated, the Court ducked the question. The two statutes conflicted even if the approval of the statement could be termed a "major federal action."[48] Failure of the Court to deal with this question did not diminish the effectiveness of NEPA; nor did it damage the cause of environmental protection. In fact, by not defining the term, the Court may have left the lower courts with more flexibility in interpreting the Act, which might ultimately prove desirable.

The Court's decision did cause some outcry from commentators. It was suggested by one that the decision stood for

40. Scenic Rivers Ass'n v. Lynn & Flint Ridge Dev. Co., 382 F. Supp. 69 (E.D. Okla. 1974).
41. Scenic River Ass'n v. Lynn & Flint Ridge Dev. Co., 520 F.2d 250 (10th Cir. 1975).
42. Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 783-784 (1976).
43. *Id.* at 787.
44. *Id.*
45. *Id.* at 788.
46. *Id.* at 789-90.
47. *Id.* at 792.
48. *Id.* at 791.

the proposition that practical inconvenience is a basis for avoiding NEPA.[49] This writer further argued that since the Disclosure Act was flexible enough to allow suspension of the effective date, the case could be read to hold that where a conflict *might* exist, NEPA could be avoided.[50] Finally, it contended that the Court could have interpreted the Disclosure Act and NEPA to require the best preparable EIS within the 30 day limit.[51]

This writer suggests that the decision really did little, if any, harm to the purposes of NEPA, both objectively speaking and from an environmentalist's point of view. The best possible EIS within 30 days would provide very little useful information in most instances. The true purpose of the Disclosure Act is protection of the buyer from fraudulent practices. Preparation of an EIS would do nothing to enhance this purpose. Furthermore, the federal action is minimal here; so minimal in fact that a contrary decision might have created an anti-NEPA backlash in Congress.[52] Finally, there is an obvious statutory conflict between NEPA and the Disclosure Act. As the Court noted, Congress clearly intended NEPA to yield in the face of such a conflict.[53] While the Court did nothing to necessarily support the liberal reading given NEPA by some lower courts, it clearly did nothing to limit the application of the Act in *Flint Ridge.*

The Court's next NEPA case, *Kleppe v. Sierra Club*,[54] stirred more criticism than either of the previous efforts. The commentators quickly came out of the woodwork claiming the Court had emasculated the Act.[55] The case specifically focused on coal development in Montana, Wyoming, North Dakota and South Dakota (Northern Great Plains). The Sierra Club and other environmentally concerned plaintiffs brought suit, contending the Department of the Interior should prepare an EIS for coal development of the above region. The District Court ruled against

49. Comment 13 URB. L. ANN. 225, 226 (1977).
50. *Id.* at 236.
51. *Id.*
52. Just this sort of backlash has recently been witnessed in relation to the Endangered Species Act as the result of the Supreme Court's decision in TVA v. Hill, ____ U.S. ____, 98 S. Ct. 2279 (1978). Immediately following the decision, numerous bills geared towards endangering the Endangered Species Act were introduced. (*See* 9 ENVIR. REP. (BNA) 446 (1978)) A bill was passed in the closing hours which arguably does weaken the act. (*See* 9 ENVIR. REP. (BNA) 1168 (1978)).
53. 426. U.S. at 788. The Report indicated that the purpose of the language in section 102, requiring compliance "to the fullest extent possible," is to make clear that agencies shall comply with the directives of section 102 "unless existing law applicable to such agency's operation expressly prohibits or makes full compliance with one of the directives impossible." *Id. See* H.R. REP. No. 91-765, 91st Cong., 1st Sess. (1969) at 115 CONG. REC. 39,071 (1969).
54. 427 U.S. 390 (1976).
55. Note, 26 Emory L.J. 231 (1977); Note, 7 Envt'l L. 181 (1977); Comment, 5 Fla. St. U.L. Rev. 512 (1978); Note, 12 Land and Water L. Rev. 195 (1977); Note, 55 N.C.L. Rev. 484 (1977); Note, 50 Temp. L.Q. 410 (1977).

the plaintiffs, but this decision was reversed by the Court of Appeals.[56]

In resolving the case, the Supreme Court was faced with the issue of when, and under what circumstances, a regional impact statement is required for a group of federal actions.[57] At the time the Court considered the case, site specific impact statements had been prepared for individual leases for mining. Interior was also preparing a national or programmatic impact statement covering the nation-wide policies for coal development. In addition, there had also been several studies done in the Northern Great Plains area, culminating in one initiated in 1972 entitled the Northern Great Plains Resources Program (NGPRP). The gist of the suit was that there was clearly an Interior policy for development of Northern Great Plains coal, thus requiring an impact statement.

The Court began its analysis by announcing that in order for the plaintiffs to succeed, there must have "been a report or recommendation on a proposal for major federal action with respect to the Northern Great Plains region."[58] It then held that there was no evidence of an action or proposal of a regional nature, noting that both lower courts had also failed to find evidence of a regional plan.[59] The Court said that without a regional plan or proposal there is nothing which could be the subject of analysis in an EIS.[60] The absence of a regional plan was in contrast to the well-defined national proposal and the local actions which had already been the subject of impact statements.[61] An EIS for a less than clearly defined proposal would be speculative, hazy and unlike that which is envisioned by NEPA.[62]

The circuit court of appeals had ruled an EIS was necessary at a point in time prior to the formal recommendation or report on a proposal if a four-part balancing test devised by the court was satisfied.[63] Using this test, the circuit court had found that irretrievable commitments were about to be made by Interior and that other aspects of the test had been satisfied. It did not order

56. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
57. Kleppe v. Sierra Club, 427 U.S. 390, 398 (1976).
58. *Id.* at 399.
59. *Id.* at 400-401.
60. *Id.* at 401.
61. *Id.* at 400.
62. *Id.* at 402.
63. *Id.* The factors to be analyzed in this test include: 1) the likelihood and imminence of the program's coming to fruition; 2) the extent to which information is available on the effects of implementing the expected program and on alternatives; 3) the extent to which irretrievable commitments are being made and options precluded; and 4) the severity of the environmental effects should the proposal be implemented.

immediate preparation of an EIS, but in its remand did direct the district court to further analyze the facts for application of the four-part test as further activity occurred. The Supreme Court rejected this test as being beyond the power of the courts under NEPA.[64] The Court stated that the Act makes it clear that "the moment at which an agency must have a final statement ready is the time at which it makes a recommendation or report on a *proposal* for federal action."[65]

A contention was also made that a regional impact statement was needed on all of the coal projects in the area inasmuch as they were intimately related. The Court also rejected this argument. It did, however, concede that § 102 (2) (C) of Nepa may require a comprehensive EIS when a number of projects are pending at the same time in a similar area, or on a similar subject.[66] "When several proposals for coal-related actions that will have cumulative or synergistic environmental impact on a region are pending concurrently before an agency, their environmental consequences must be considered together."[67] The Court also indicated in a footnote that it is not necessary to have a completed comprehensive or cumulative impact statement prior to approval of any of the individual projects within the overall program.[68]

As noted above, it was not long before the critics attacked the Court's analysis in this case. The general line of comments dealt with the contention that the Court had emasculated the Act by reiterating its statements in *SCRAP* regarding the timing of EIS preparation. One commentator felt the requirement of an agency proposal to trigger judicial intervention in the NEPA process would stifle environmental planning.[69] The critics further argued the courts' role as a "watchdog" over NEPA was diminished by the *Kleppe* decision.[70] The Court's failure to clarify what is meant by "proposal" has been argued to be yet another defect in the opinion. This omission leaves the agencies in limbo as to when to prepare a final statement; it does not aid the lower courts in determining when their scrutiny of agency actions is proper; and it leaves potential plaintiffs at a loss as to when they may validly challenge agency actions.[71] It has even been contended that the

64. 427 U.S. at 406.
65. *Id.* (quoting from *S.C.R.A.P.*, 422 U.S. at 320).
66. 427 U.S. at 409.
67. *Id.* at 410.
68. *Id.* at 414 n.26.
69. Note, 50 Temp. L. Q. 410, 418 (1977).
70. Comment, 5 Fla. St. U.L. Rev. 512, 524 (1978).
71. *See* Note, 26 Emory L. J. 231 (1977); Note, 7 Envt'l L. 181 (1977).

decision can be read as requiring an explicit, formally announced agency proposal before a final EIS is due under NEPA.[72] If accepted, this argument paves the way for NEPA avoidance up to the point of irreversible commitments of resources. The argument was made that early environmental input in the decision-making process was gone.[73]

Further criticism has also been leveled at the Court for its handling of the question of cumulative or programmatic impact statements. Because programs, particularly research and development policies, are not always clearly defined, it was feared that challenges must be aimed at each individual step of a project; at each individual impact statement.[74] This approach was viewed as a problem for everyone involved. It would increase litigation, not reduce it as hoped. The environmental groups must plan to be in court continuously. It also appeared that a programmatic EIS could, under the Court's decision, be used to hide problems with individual aspects of a large proposal, once it was found to exist.

In the time which has intervened since *Kleppe* was decided, NEPA has not died, the environment has not been forever degraded, and agencies have not retreated back into their little worlds at the expense of the environment. All of this is true because the decision was not as far-reaching as some commentators argued. The decision, like the two already discussed, must be limited to its facts.[75] There was nothing which resembled a regional approach or proposal for coal development. Even the court of appeals did not contend one existed. A national programmatic EIS was being prepared and numerous localized impact statements existed. The Department of Interior was not blatantly ignoring its environmental responsibilities here. As all the parties appeared to concede, "approval of one lease or mining plan did not commit the Secretary to approval of any others."[76]

While this writer would admit disagreement with the Court as to how "clearly" NEPA indicates the timing of final EIS preparation, such disagreement does not lead to a fatalistic view of the decision. The same could be said for the fact the Court did not define or clarify what is meant by a "proposal." Such a definition would be helpful, but lack of one does not spell doom for the Act. Early environmental thought and planning is still possible, indeed

72. Comment, 5 Fla. St. U. L. Rev. 512 (1977).
73. Note, 50 Temp. L. Q. 410, 419 (1977).
74. Note, 26 Emory L. J. 231, 253 (1977).
75. For a contrary view, *see* Comment, 5 Fla. St. U. L. Rev. 512, 521 (1977).
76. Kleppe v. Sierra Club, 427 U.S. at 414, n.26.

required. As the Court itself noted,[77] consultation with other federal agencies which have jurisdiction or expertise in the matter at hand is required prior to preparation of an impact statement.[78] The final impact statement is not created in a vacuum. Consideration of environmental factors must necessarily occur prior to filing a final environmental impact statement.[79] The Court in *Kleppe* was concerned with the timing of *final* impact statement preparation. Contrary to fears expressed following *SCRAP*, agencies have not abandoned the practice of preparing and circulating draft EIS's.[80] Clearly this offers an early, pre-decision opportunity for an agency to consider environmental factors and consequences of a given action and its alternatives. One of the major purposes of the Act is full disclosure to the public of environmental consequences and impacts related to a federal action. The *Kleppe* decision does nothing to frustrate that purpose.

As noted earlier, the Court does clearly indicate that facts and circumstances of a given situation may warrant or require a cumulative or programmatic impact statement. The facts of *Kleppe*, however, did not fit this category. The Court also paved the way for "regional" impact statements when several proposals are interrelated and are pending concurrently.[81] The facts of the case simply did not fall within the Court's view of a regional plan.

One indication of the implications of *Kleppe* is the lower courts' reactions. None have required a formally designated proposal prior to requiring an impact statement. The timing of EIS preparation has been left to the discretion of the agencies, but the courts may step in where the agency decision is arbitrary or unreasonable.[82] The courts and the agencies have recognized the need for cumulative and regional impact statements in proper situations.[83] Thorough consideration of environmental factors and compliance with the procedural mandates of section 102 of NEPA are still the keys to proper agency actions.

The Court's latest encounter with the Act concerned primarily the relationship between NEPA and the rulemaking provisions of

77. *Id.* at 406 n.15.

78. *See* NEPA 42 U.S.C. § 4332(2)(C)(1976).

79. 427 U.S. at 418 (Marshall, J., dissenting).

80. The validity of this statement may be discerned by a casual perusal of the Federal Register on almost any day.

81. 427 U.S. at 410. This portion of the opinion appears to allow finding of a "regional" plan or proposal based on action of an agency or simply a general set of facts. Clearly, the Court never expresses a requirement of formal agency designation of a project as a prerequisite to NEPA compliance. *Id.*

82. *See* Concerned About Trident v. Rumsfeld. 55 F.2d 817 (D.C. Cir. 1977) Concerned Citizens v. NRC, 430 F. Supp. 627 (D.R.I. 1977).

83. Sierra Club v. Hodel, 544 F.2d 1036 (9th Cir. 1976). Conservation Law Foundation v.

the Administrative Procedure Act (APA).[84] *Vermont Yankee Nuclear Power Corp. v. NRDC*,[85] was a consolidation of two cases questioning the sufficiency of the procedures followed by the Nuclear Regulatory Commission (NRC) for granting construction and operating licenses for nuclear power plants. In the case dealing with Vermont Yankee Nuclear Corporation, the Court analyzed procedures that began with hearings before the Atomic Safety and Licensing Board and then the Atomic Energy Commission (now NRC) concerning an application for an operating license. The license was granted. Following an appeal to the Atomic Safety and Licensing Appeal Board, the granting of the license was upheld. NRDC objected to the granting of the license, and in particular to the exclusion in the licensing hearings of evidence on the environmental effect of the fuel reprocessing operation. Subsequently, however, rulemaking proceedings were begun to consider the environmental effects of the fuel cycle[86] in nuclear power plants. The Atomic Energy Commission issued a rule and to the extent it differed from the Appeal Board's ruling, the rule prevailed. However, since the impact of the fuel cycle had been found to be minimal, the AEC determined not to apply the rule to Vermont Yankee's environmental reports. NRDC appealed both the adoption of the rule and the granting of Vermont Yankee's license to the Circuit Court of Appeals for the District of Columbia. The court indicated that in the "absence of effective rulemaking proceedings, the Commission must deal with the environmental impact of fuel reprocessing and disposal in individual licensing proceedings."[87] The court then found the rulemaking proceedings, although in compliance with section 553 of the APA, to be insufficient and remanded the matter to the AEC. The AEC ruling on the license application was also remanded.[88]

In the companion case, the focus was an application for construction of a nuclear facility by Consumers Power Company, near Midland, Michigan. The application was initially studied by AEC staff persons and the Advisory Committee on Reactor Safeguards (ACRS). Two environmental groups intervened and

GSA, 427 F. Supp. 1369 (D.R.I. 1977). Note for example that the Department of Energy will prepare a programmatic impact statement for the National Energy Plan. (9 ENVIR. REP. (BNA) 1255 (1978)).

84. 5 U.S.C. §§ 551, 553 (1976).

85. 435 U.S. 519 (1978).

86. The Court partially explains the concept of "fuel cycle" in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, n.6 528 (1978). Essentially, the term refers to a series of activities beginning with the mining of uranium ore and going through final disposal of nuclear wastes. *See also* NRDC v. NRC, 547 F.2d 633.637n.3 (D.C. Cir. 1976).

87. NRDC v. NRC, 547 F.2d 633, 641 (D.C. Cir. 1976).

88. *Id.* at 655.

opposed the application. Hearings were held and a draft EIS was issued. Following a comment period, a final statement was prepared. Further hearings were conducted, in which the intervenors chose not to participate. Ultimately the permit was granted by the Licensing Board and review was denied by the Commission. At about this same time the Council on Environmental Quality revised its Guidelines to require consideration of energy conservation alternatives in the NEPA process. The requirement was to apply only to final environmental impact statements filed after January 28, 1974. The EIS for the licensing of Consumers Power had issued in March of 1972 and did not include a consideration of energy conservation alternatives. Nonetheless, AEC did review the matter, concluding it should decline to reopen the proceedings. Again, appeal to the circuit court followed. The court initially found the Eis to be deficient due to lack of discussion of energy conservation alternatives.[89] The court also determined the ACRS report was defective and that AEC should have remanded it for more investigation.[90] Finally, it found all fuel cycle questions to be controlled by the companion case (*Vermont Yankee*) and remanded all of these issues to AEC.[91]

On appeal the Supreme Court was faced with issues involving the APA and NEPA. It is, of course, difficult to separate these issues completely. However, there will be no discussion or analysis here of the issues solely involving the APA.[92] The primary focus of this author's review of the Court's decision will be on the NEPA and NEPA-related issues.

While substantively this case may have been cause for concern for anti-nuclear forces, it does no discernible damage to NEPA. The first NEPA question dealt with by the Court was whether NEPA requires procedures beyond those set out in section 553 of the APA when an agency is investigating factual issues through rulemaking. The Court apparently had little difficulty in rejecting NRDC's claim that NEPA does require additional procedures.[93] The Court referred to its position in *SCRAP*, that nothing in NEPA explicitly, or by implication, repeals any other statute and reemphasized its holding in *Kleppe* that the only procedures

89. Aeschilman v. NRC, 547 F.2d 622, 628 (D.C. Cir. 1976).
90. *Id.* at 632.
91. *Id.*
92. A thorough, comprehensive and biting analysis of this aspect of the case may be found in K. DAVIS, ADMINISTRATIVE LAW TREATIES §§ 6:35 — ___(2d ed. 1978). *See also* Breyer, Byse, Stewart, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives,* 91 HARV. L. REV. 1804 (1978).
93. 435 v.s. at 548.

mandated by NEPA were those expressly contained in the Act itself.[94] There is certainly nothing inherently devastating with this ruling. The procedures mandated by NEPA and clarified at that time by the CEQ Guidelines[95] call for the careful, conscientious agency to thoroughly consider the environmental ramifications of a particular federal action. Further, nothing in *Vermont Yankee* prevents an agency from employing procedures above and beyond those required by NEPA or the APA if it so desires. All the opinion prohibits is court imposed procedures beyond the statutory minimum.[96]

The Court then analyzed the decision of AEC not to consider the issue of energy conservation alternatives in the Consumers Power application and impact statement. The AEC, in refusing to reopen the Consumers Power proceedings, indicated that consideration of alternatives in the context of NEPA and agency licensing procedures required consideration only of "reasonably available alternatives"[97] and found that the intervenors' energy conservation contentions filed with the Licensing Board did not meet this threshold requirement. It was further determined that the intervenors had failed to present any evidence with regard to their energy conservation contentions. The AEC also determined that since energy conservation is a novel and evolving concept, it was not bound to apply the CEQ's guidelines revision retroactively. The Circuit Court found AEC's action to be arbitrary, capricious and contrary to the mandate of NEPA,[98] rejecting the Commissions' threshhold test, that AEC must do more than sit back and resolve the issues squarely before it. The Commissions' duty is to conduct its own investigation and analysis of issues which an intervenor has adequately presented.

The Supreme Court again rejected the circuit court's resolution of this issue. The Court recognized the requirement for thorough consideration of alternatives under NEPA. But, the alternatives required under the Act are those which are reasonable and not wildly speculative.[99] Furthermore, an agency's consideration of alternatives pursuant to section 102 (2) (C) cannot

94. *Id.*
95. 40 CFR 1500-1508.28.
96. *Id.* at 524.
97. *Id.* at 533.
98. 547 F.2d at 629.
99. 435 U.S. at 551. The Court pointed out that even the District of Columbia Circuit, the court which decided this case below, has expressly stated in another decision that only "reasonable" alternatives need be the subject of analysis in the EIS. *Id. See* NRDC v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

be criticized simply because the agency neglected to analyze *every possible* alternative.[100] Inclusion of speculative and far-fetched alternatives adds nothing of value to an EIS and may indeed cloud other more validly presented issues. Specifically, the Court found "energy conservation" as a subject for discussion of alternatives was almost limitless in scope and thus very unwieldy.[101] Moreover, the fact that the effective date of the CEQ's Guidelines revision, requiring consideration of energy conservation alternatives, was not until two years after the final EIS preparations for licensing Consumers Power, demonstrated to the Court that the concept of energy conservation alternatives is an evolving one.[102] Therefore, the Licensing Board acted within its statutory authority in granting the license.[103] The Court did note that it is "incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions."[104] The Court thus found no heavy or impossible burdens placed upon intervenors by AEC's threshold test and therefore rejected the portion of the circuit court's decision finding fault with the test. Finally, the Court reiterated its overall view of NEPA. It saw that Act as *setting forth* substantial substantive goals, but *mandating* only procedures to be implemented by the agencies.[105] The Court recognized that the purpose of the Act is to guarantee that agencies make environmentally thoughtful and informed decisions. However, the Court concludes that the power of the courts in reviewing NEPA activity does not include the power to substitute their judgment for agency judgment on the merits of a project, or even to conduct substantive review of agency decisions.[106]

Vermont Yankee does not represent a setback to environmentalists insofar as NEPA analysis is concerned.[107] It clarified that NEPA does not amend or repeal any other statutes. It held that NEPA does not require procedures in agency rulemaking beyond those mandated by the APA. The Court's statements regarding the role of the intervenor could be read as placing an affirmative duty on such parties to initially raise questions as to alternatives. Such a reading would relieve the agencies of their clear

100. 435 U.S. at 551.
101. *Id.*
102. *Id.*
103. *Id.* at 553.
104. *Id.*
105. *Id.* at 558.
106. *Id.*
107. Although, considering the philosophical issues surrounding proliferation of nuclear power, the decision is a blow to environmentalists and anti-nuclear forces.

duty under NEPA to take the initiative with regard to considering alternatives. A more reasonable interpretation of this portion of the Court's opinion is one which requires agency consideration only of "reasonable alternatives." Where an intervenor, or environmental plaintiff, wishes consideration of more obscure alternatives, it will be the duty of that party to raise questions and concerns about the particular proposition. This latter interpretation does not allow agency avoidance of NEPA duties. It will, in fact, allow avoidance of time consuming speculative analysis of remotely relevant alternatives. Finally, the Court reiterated its belief that the Act is *essentially* procedural. None of these statements or holdings inflicted any damage on NEPA from an environmental viewpoint. The agencies are still bound to make their decisions in an environmentally sound manner. Full and thorough consideration of a wealth of alternatives is still necessary. The idea that NEPA contains substantive goals has been confirmed by the Court. The Court did clarify that judicial review under NEPA is "limited" to procedural review. This does not necessarily cripple NEPA either. The procedural mandates of the Act are so broad that thorough procedural review will generally go to the substance of a particular federal action.[108]

NEPA has not been emasculated by the Supreme Court in any of the cases discussed above. Clearly, the Act is alive and functioning quite well. The Court has not interpreted it totally to the liking of hard-line environmentalists and has undoubtedly declined to assert jurisdiction over cases in which environmentalists had a strong interest.[109] It is also clear the Court has not taken an "activist" role with regard to NEPA. On the other hand, it has not, as argued above, stripped the lower courts or agencies of their powers and duties under the Act. It has not even seriously hampered the courts or agencies.

II. NEW CEQ REGULATIONS: AN ADDITIONAL SHOT IN THE ARM FOR NEPA

CEQ's new regulations (hereinafter the regulations) for the implementation of NEPA[110] should dispell all lingering doubts as to

108. *See generally* W. RODGERS, ENVIRONMENTAL LAW §§ 7.4-5 (1977). For an analysis of NEPA application to rulemaking in particular *see* Comment, 126 U. Penn L. Rev. 148 (1977). Note this article was written prior to the Court's decision in *Vermont Yankee*.

109. *See, e.g.*, County of Suffolk v. Sec. of Interior, 562 F.2d 1368 (2nd Cir. 1977); Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976).

110. 43 Fed. Reg. 55, 990 (1978). The regulations will be found ultimately at 40 C.F.R. §§ 1500-1508.28.

the Act's continued viability. This development comes on the heels of *Vermont Yankee* and naturally takes into account the other Supreme Court interpretations of NEPA discussed above. The regulations are intended to replace not only the existing CEQ Guidelines, but also more than 70 sets of existing agency regulations for NEPA implementation. CEQ's action is in response to an Executive Order issued by President Carter.[111] The regulations will provide all federal agencies with uniform procedures and, unlike the Guidelines, will be binding on all the agencies.[112] CEQ has expressed an intention that the regulations accomplish the following goals: 1) reduction of paperwork, 2) reduction of delay, and 3) better decision making.[113] An analysis of whether CEQ has successfully incorporated these goals, as well as judicial interpretations of NEPA, in the regulations follows in this section of the article.

The reduction of paperwork in the NEPA process is an admirable goal. Impact statements have, on occasion, become so lengthy that the public has undoubtedly had difficulty dealing with them.[114] The most obvious paperwork reduction measure proposed by CEQ is a page limitation on impact statements. For routine proposals the limit will be 150 pages, while complex or far-reaching proposals may have statements up to 300 pages.[115] Such a requirement is a readily available, mechanical way to keep the size of the statements under control. The only difficulty which might arise is an agency contending it has a "complex" project which will require a 300 page EIS. This rule will not directly affect the decision-making process and will not provide a basis for challenging the adequacy of an impact statement.[116] The limits are a reasonable step.

The regulations will require more in-depth analysis, as opposed to sheer bulk.[117] Impact statements are directed to be concise, with discussion of environmental impacts to be

111. Exec. Order No. 11,991, 3 C.F.R. 123 (1977 Comp.).

112. 40 C.F.R. § 1500.3. There is one exception to the binding nature of the regulations. They will not be binding where they are inconsistent with other statutory requirements of the agency. *Id.*

113. 43 Fed. Reg. 55, 978-80 (1978).

114. For example, the recently issued Department of Interior final EIS for Development of Coal Resources in Southwestern Wyoming is about 5 inches thick! This statement covers only a small aspect of coal development nationally. Documents of this size can be quite intimidating to the lay public, for whom an EIS is, in part, intended.

115. 40 C.F.R. § 1502.7.

116. *Id.* The limits do not seem to be mandatory due to the "shall *normally*" phraseology. This language appears to give a bit of flexibility to the requirements.

117. 40 C.F.R. § 1502.2(a).

proportional to their significance.[118] The "scoping process"[119] required should assist the agencies in keeping the statements concise and relevant to significant impacts. The impact statements must be in plain language in order to be understood by both the general public and the decision makers.[120] In an attempt to encourage uniformity, the regulations have established a detailed recommended format for impact statements.[121]

Emphasis on alternatives under consideration is also required.[122] CEQ's position appears to be that this is the "heart" of a thorough EIS and thus the proper place for emphasis. By keying in on the critical portions of an impact statement and downplaying excess baggage, it is apparently hoped that impact statements will be more readable, more compact and thus enable the goal of better decision-making to be achieved.

Several provisions are included which are aimed at minimizing confusion and repetition. Summaries of the substance of the EIS must be included and circulated in lieu of the full EIS where the document is unusually long and complex.[123] Circulation of the summary, of course, should not be seen as a way of hiding problems or deficiencies in a project. It is intended as a paperwork reduction and clarification tool. Utilization of program or policy statements and tiering of statements from broad scope to narrow scope is directed by the regulations and is seen as a way to cut down repetition.[124] It is indicated that tiering "may also be appropriate for different stages of actions."[125] The regulations also require extensive cooperation with state and local agencies and officials, as well as cooperation among the various federal agencies. The purpose here is expressly to reduce duplication of efforts.[126]

There are two other regulations which will definitely reduce agency paperwork and, perhaps, indirectly benefit the public. One of these is the availability of categorical exclusions from the regulations and, of course, NEPA. Naturally, this would be for actions which would not significantly affect the environment.[127] This regulation obviously means agencies may have one less

118. 40 C.F.R. § 1502.2 (b), (c).
119. 40 C.F.R. § 1501.7. The concept of "scoping" is analyzed further in conjunction with CEQ's goal of better decisionmaking. *See infra* notes 159-60 and accompanying text.
120. 40 C.F.R. § 1502.8.
121. 40 C.F.R. § 1502.10.
122. 40 C.F.R. §§ 1500.4(f), 1502.14.
123. 40 C.F.R. §§ 1502.12, 1502.19.
124. 40 C.F.R. § 1502.20.
125. *Id.*
126. 40 C.F.R. §§ 1506.2, 1505.3.
127. 40 C.F.R. § 1508.4.

category of actions to which NEPA applies and can, theoretically, turn their full attention to more environmentally significant issues. The other section would allow a "Finding of No Significant Impact" to be issued where no EIS will be required.[128] The document must include a brief environmental assessment of proposed action and a brief statement of reasons why the action will have no significant impact.[129] A record of the agency decision is thus preserved in case of challenge and paperwork has been significantly reduced.

CEQ also intends to reduce delay in the NEPA process through promulgation of these regulations. This, too, is an admirable goal. Preparation of an impact statement is inherently time-consuming and any efforts to cut down the required time, without jeopardizing the quality of work product, is clearly desirable. The NEPA process also has a history of being interrupted and thus delayed by litigation.[130] In a vein similar to paperwork reduction efforts, the most obvious delay reduction facet involved is encouragement of time limits for EIS preparation. No universally applicable limits are set. It is left to the agencies, with ample CEQ guidance, to set up timetables for the process.[131] There are, however, specific time limits established for review and comment on impact statements.[132]

The bulk of the delay reducing measures focus on the early planning stages of the NEPA process. There is an emphasis on interagency cooperation early in the process, as well as elaborate provisions intended to resolve swiftly and fairly conflicts among potential "lead agencies."[133] The regulations require agencies to integrate planning efforts and the NEPA process at the earliest possible stage.[134] The agencies are further directed to utilize the "scoping" process to quickly identify crucial issues, as well as irrelevant issues.[135] Finally, the agencies are to begin impact statement preparation at the earliest possible stage of the planning process.[136] This is to ensure that the document will be an integral part of the decision-making process and not merely used to justify an already made decision. This aspect of the regulations further designates the proper timing of statements where the agency is

128. 40 C.F.R. § 1508.13.
129. *Id.*
130. *See, e.g.,* Minnesota Public Interest Research Group v. Butz, 541 F.2d 1292 (8th Cir. 1976); EDF v. Corps, 470 F.2d 289 (8th Cir. 1972).
131. 40 C.F.R. § 1501.8.
132. 40 C.F.R. § 1506.10.
133. 40 C.F.R. §§ 1501.5, 1501.6.
134. 40 C.F.R. § 1501.2.
135. 40 C.F.R. § 1501.7. *See infra* accompanying text and notes 159-160.
136. 40 C.F.R. § 1502.5.

responding to some outside initiative, and where the agency is involved in adjudication.[137] This section, combined with the definition of "proposal"[138] contained in the regulations, should silence the critics of *Kleppe*. NEPA requirements cannot be avoided merely by failing to formally designate or announce a proposal. NEPA compliance cannot be put off until the last possible moment and then used to justify the decision. A clear mandate for early environmental consideration is found in the regulations.

The requirements for categorical exclusions and "findings of no significant impact" will also aid the agencies in reducing delay.[139] The regulations also provide an accelerated NEPA schedule for legislative proposals.[140] The section eliminates the "scoping" requirement and the necessity of a final impact statement. It also allows reduction of the review and comment period.[141] At first glance, this section appears to sanction avoidance of crucial NEPA requirements, which would result in inadequate impact statements. However, the legislative process has been a traditionally incompatible framework for NEPA compliance.[142] The courts have had difficulty with NEPA and legislative proposals.[143] NEPA compliance simply is not required for all legislative proposals.[144] Furthermore, the legislative process is subject to such constant changes that "traditional" NEPA compliance is very difficult. That is to say, an individual piece of legislation proposed by an agency, and theoretically accompanied by an EIS, may not look at all like the proposal originally submitted once it is passed. A very good argument can be made that a full and complete EIS represents a lot of wasted agency time and effort. It is suggested, therefore, the short cuts allowed for legislative proposals in the regulations will have no detrimental effects on the NEPA process. In fact, this section may even provide a basis for better impact statements for legislative proposals by "integrating" the NEPA process with schedules inherent in the legislative process.[145]

Potentially the most controversial delay reduction factor is a section clearly delineating when judicial review of the NEPA process is allowable.[146] The section states CEQ's intention that

137. *Id.*
138. 40 C.F.R. § 1508.23.
139. 40 C.F.R. §§ 1508.4, 1508.13.
140. 40 C.F.R. § 1506.8.
141. *Id.*
142. W. RODGERS, ENVIRONMENTAL LAW § 7.2 (1977).
143. Atchinson, Topeka and Santa Fe Railway Co. v. Callaway, 431 F. Supp. 722 (D.C. Cir. 1977); Wingfield v. OMB, 9 ERC 1961 (1977); Sierra Club v. Andrus, 11 ERC 1625 (1978), *rev'd on other grounds*, ____ U.S. ____ 99 S.C.T. 2335 (1979).
144. *Sierra Club v. Andrus*, 11 ERC 1625.
145. 40 C.F.R. § 1506.8.
146. 40 C.F.R. § 1500.3.

judicial review of NEPA activity, particularly compliance with the regulations, not occur until after an agency has filed a final impact statement. Review may also occur after a finding of no significant impact. An argument could be made that such a provision drastically diminishes the role of the courts vis-a-vis NEPA. However, the great bulk of NEPA litigation over the years has focused either on the details of a final impact statement or on the agency's failure to file an impact statement. This section of the regulations contains another clause which should mitigate any criticism of the concept. Judicial review is possible where the agency may be taking "action that will result in irreparable injury."[147]

The most idealistic, and at the same time the most significant, goal of the regulations is to provide for better decision making. Obviously, CEQ intends the entire set of regulations to form the basis for better decisions. It should also be clear at this point that many of the sections noted above will assist the agencies in making better decisions. Several specific sections, however, stand out and require further analysis. For the sake of discussion these will be divided into those which provide for mechanically better decisions and those which provide for substantively better decisions. The delineations are not always clear, but it does not matter so long as the ultimate goal of "better decision making" is remembered.

The regulations will require agencies to adopt regulations governing their NEPA activities.[148] The natural response to this requirement is confusion. After all, these regulations are supposed to replace existing regulations and instill uniformity. Actually the procedures required by section 1505.1 are to supplement the CEQ regulations and to aid in implementing them.[149] These inhouse regulations are not supposed to paraphrase NEPA.[150] Essentially the purpose appears to be to ensure compliance with substantive NEPA goals, procedural NEPA mandates and the CEQ regulations. This is accomplished by each agency setting up procedures which key note "typical" agency activities which will be subject to NEPA and the regulations.[151] The procedures will also highlight the points in these activities at which various NEPA procedures or considerations are brought into play. The agencies must also set out requirements clarifying what sorts of documents

147. *Id.*
148. 40 C.F.R. § 1505.1.
149. 40 C.F.R. § 1507.3(a).
150. *Id.*
151. 40 C.F.R. § 1507.3(b).

and records will be a part of the official record of various agency actions and what documents and records will accompany the EIS.[152] Yet another section of the regulations *requires* agencies to make a public record of its decision and reasons thereof,[153] in addition to the impact statement or a finding of no significant impact. This documentation of agency action is still another way of informing the public, making the agency accountable to the public. It will also aid the courts in reviewing NEPA controversies.[154]

The regulations contain several mandates which should readily assist in producing substantively better decisions. There is an express command to apply NEPA early in the agency planning process.[155] At the early stages of the planning process the agencies must begin the "scoping" required by the regulations.[156] The purpose behind the "scoping" process is early identification of significant issues to be analyzed in the NEPA process. The section sets out extensive and rather elaborate requirements for "scoping." These include clear delineation of significant issues, allocation of EIS preparation assignments, reception of input from relevant government and private sources, identification of issues which may overlap or conflict with on-going activities of other federal agencies, and coordination of timing and scheduling of the decision making process.[157] The "scoping" process should provide a good framework for early environmental considerations by agencies. The agencies should be able to use the process to immediately put all their resources into the environmentally significant aspects of a particular action. This requirement will make it difficult for agencies to ignore until the last minute environmental impacts of potential plans or programs. The "scoping" process should be an excellent mechanism for preventing preparation of impact statements which do no more than justify agency decisions.

As noted above, CEQ views consideration of alternatives as the most crucial aspect of the NEPA process. Accordingly, extensive directions are given to the agencies for inclusion in this portion of the process.[158] Agencies must present their alternatives in "comparative form."[159] The intent here is to fully inform the

152. 40 C.F.R. § 1505.1(c)(d)(e).
153. 40 C.F.R. § 1505.2.
154. In the past the courts have had difficulty analyzing NEPA questions due to inadequate records. *See, e.g.*, Hanly v. Mitchell, 460 F.2d 640, 646 (2nd Cir. 1972).
155. 40 C.F.R. § 1501.2.
156. 40 C.F.R. § 1501.7.
157. 40 C.F.R. § 1501.7(a).
158. 40 C.F.R. § 1502.14.
159. *Id.*

public of the pros and cons of the various alternatives. It should also bring the key issues of the plan or program into focus. Only reasonable alternatives need be discussed; but for those which are eliminated, the agency must give some sort of justification for the elimination.[160] This requirement, coupled with the requirement of detailed analysis,[161] should ensure that no alternatives are short-changed during the process. The proposed regulations required early identification of the environmentally preferable alternative and the reason for such designation.[162] This requirement does not appear in the final regulations. It was removed in an attempt to give the agencies some flexibility.[163] The environmentally preferable alternative is, however, required to appear in the decision record.[164] This weakens one of the most desirable aspects of the regulations. The public and other agencies should be informed early in the process as to the best alternative from an environmental viewpoint. By allowing designation after the impact statement is prepared, at least the appearance of less than thorough consideration of alternatives is created.

The agency is further required to clearly identify the alternative which it prefers and to set reasons for the choice.[165] This section leaves the agencies no option. They must analyze and investigate *all* reasonable alternatives, not merely those suggested by outsiders and not just those within their jurisdiction. Full consideration of alternatives ideally results in environmentally sound decisions. A complete record of the process assists in reaching the goal of a better decision.

The regulations encourage the agencies to tier their impact statements where appropriate.[166] In other words, where a far-reaching policy is announced or broad program is formulated, a broad EIS should be prepared. Subsequently, as agency focus narrows, for example to regional or local levels, necessary impact statements should narrow their focus. The idea is to avoid duplication of efforts. The primary benefit is allowance of agency concentration on the issues at hand at the particular stage being discussed. In the *Kleppe* context this regulation would require national level coal issues to be the heart of the programmatic EIS, regional (theoretically) issues to be the crux of a regional impact

160. 40 C.F.R. § 1502.14(a).
161. 40 C.F.R. § 1502.14(b).
162. § 1502.14(c) of proposed regulations, 43 Fed. Reg. 25, 230 (1978).
163. 43 Fed. Reg. 55, 990 (1978).
164. 40 C.F.R. § 1505.2(b).
165. 40 C.F.R. § 1502.14(e).
166. 40 C.F.R. § 1502.20.

statement and site specific issues to be the focal point of statements for an individual coal mine or related project.[167] It should be noted that this concept does not allow for avoidance of cumulative impacts; it merely allows greater attention to be paid to matters immediately before the agencies.

A final tool for better decision-making is a series of sections defining key terms found in the Act and the entire NEPA process. These definitions clarify vague language and in some instances incorporate court interpretations. The "human environment" is defined by the regulations.[168] The definition excludes actions which will have solely economic and social impact. This section should eliminate reliance on NEPA as a tool to prevent closing of military bases,[169] to obtain more favorable trucking routes,[170] to avoid imposition of racially mixed low income housing,[171] and other such actions. The term "major federal action" is also defined.[172] This too has been the subject of litigation[173] and the section should cut down the frequency of such controversies by delineating the types of actions which fall within this term. "Significantly" is also included in this portion of the regulations.[174] This term has also been a major source of controversy in NEPA litigation.[175] The elaborate definition contained in this section should aid the agencies in making their threshold decisions as to NEPA applicability and aid the public in scrutinizing these same agency decisions. The final significant term defined by the regulations is "proposal."[176] This is obviously an attempt to fill in the gaps left by the Supreme Court in *SCRAP* and *Kleppe*. The section makes clear that a proposal could well exist "in fact" as well as by formal agency announcement. This supports the arguments raised earlier that *SCRAP* and *Kleppe* do not cripple NEPA by allowing agencies to put off compliance until the last possible moment. According to the definition, a proposal is the stage at which an agency has a goal and is beginning to consider possible ways of accomplishing that goal. This offers some assistance in implementing the *Kleppe* holding. It provides a discernable point at which the agency should

167. For yet another actually utilized example of tiering see County of Suffolk v. Dept. of Interior, 562 F.2d 1368 (2nd Cir. 1977).

168. 40 C.F.R. § 1508.14.

169. *See, e.g.*, National Ass'n of Gov't Employees v. Rumsfeld, 418 F. Supp. 1302 (D.C. Cir. 1976).

170. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975).

171. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975).

172. 40 C.F.R. § 1508.18.

173. *See, e.g.*, Scottsdale Mall v. State of Indiana, 549 F.2d 484 (7th Cir. 1977); Carolina Action v. Simon, 389 F. Supp. 1244 (M.P.N.C. 1975).

174. 40 C.F.R. § 1508.27.

175. *See, e.g.*, Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Julius v. Cedar Rapids, 349 F. Supp. 88 (N.D. Iowa 1972).

176. 40 C.F.R. § 1508.23.

have prepared a final EIS. Naturally, if an agency has complied with these regulations, NEPA factors will have been a focal point for some time.

As should be clear now, the regulations are a valid attempt to streamline and improve the NEPA process. They provide some answers to questions, either left open or only partially answered by the Courts. The substantive aspects of NEPA are very much in evidence in the regulations. The time frames provided and the reduction of paperwork envisioned should improve the process. There is finally a clear policy running through the regulations of public awareness and public participation. Informed decision-making and full disclosure as integral parts of the daily agency process should be a giant step closer to reality when these regulations become effective.[177]

III. WHAT DOES THE FUTURE HOLD FOR NEPA?

As noted early in this article, after almost nine years of existence many rules regarding NEPA are clear. The Supreme Court has been responsible for some clarification and some confusion. CEQ's regulations should clarify more aspects of the process. It would, of course, be naive to think the regulations themselves will not also become a source of controversy in the future. Not all is clear with NEPA. Some issues remain unresolved. There are facets of the Act which still require definitive judicial interpretation. Other issues, of course, may arise which have not yet been the subject of judicial scrutiny.[178]

One unresolved NEPA issue expressly excluded from the CEQ regulations is the application of NEPA to major federal actions abroad.[179] The question has been expressly left open in two recent cases, involving highway construction in Central America[180] and spraying of Mexican marijuana.[181] Another case has recently been filed in which the plaintiffs are contending NEPA is applicable to construction of housing on a United States Army installation in West Germany.[182] The factual setting of this case may well be such

177. The effective date is July 30, 1979; until that time the CEQ Guidelines remain effective. C.F.R. § 1506.12.

178. This type of issue is naturally *more* speculative than others covered in this section and will not be further discussed. The same can be said of the possibility of congressional amendment of the Act.

179. The preamble to proposed CEQ NEPA regulations does not refer to possible international applications. 43 Fed. Reg. 55, 978-990 (1978).

180. Sierra Club v. Adams, ___ F.2d ___ (11ERC 1454) D.C. Cir. 1978).

181. NORML v. United States, ___ F. Supp. ___ (11 ERC 1841) (D.D.C. 1978).

182. 9 Envir. Rep. (BNA) 1169 (1978).

that the court will be unable to avoid answering the question. An answer to the question may well come from another source much sooner. The President has recently issued an Executive Order setting out categories of actions abroad for which NEPA compliance will be required.[183] The order excludes from NEPA compliance activities involving export licenses, permits, and other export-related actions which might have an environmental impact in foreign countries.[184] Nuclear reactor construction and other activities will require NEPA compliance. Within government, the application of the Act abroad has been a source of controversy between CEQ and the Department of State. Both have been consulted during formulation of the Executive Order.[185] It is likely the Executive Order will not be the final word. It is a safe bet the courts will still be called upon to clarify the foreign application of NEPA.

Another issue which remains somewhat unresolved is the applicability of the Act to the full range of agency decision-making processes. In other words, is NEPA applicable to "policy" decisions and, if so, when in the formulation of agency policy is it applicable? In the same vein, is NEPA applicable to broad, undefined "programs?" If so, what exactly is a program? Professor McGarity argues that NEPA application should not be mechancial.[186] He advocates early consideration of NEPA factors and mandates when agencies are merely formulating policies, as opposed to more concrete programs. *Kleppe* did not explicitly deal with this question. A narrow reading of *Kleppe* would preclude application in the situations he advocates. However, a more generous interpretation of the case, in conjunction with the CEQ regulations, would necessitate NEPA procedures to be part and parcel of the policy making process.

The question of what is the proper scope of a programmatic EIS was also not thoroughly dealt with in *Kleppe.* The Court gave some guidance, but only in passing.[187] The CEQ regulations also shed some light on the question.[188] Lower courts have attempted to grapple with the question also, but appear to be content to handle it on a case by case basis.[189]

Another question which has never been clearly answered is the

183. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).
184. *Id.*
185. *Id.*
186. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex. L. Rev. 801 (1977).
187. *See supra* note 67 and accompanying text.
188. 40 C.F.R. § 1502.4.
189. *See, e.g.*, Nebraska v. Rural Electrification Administration, ___ F. Supp. ___ (12 ERC

effect of CEQ or the Environmental Protection Agency's (EPA) opposition to another agency's project. Such opposition would be registered as a result of their roles as reviewers of impact statements.[190] The courts have never clearly dealt with the question, although Mr. Justice Douglas, in the role of circuit justice, indicated such disapproval must be given substantial deference by the courts in determining the adequacy of an EIS.[191] The CEQ regulations set up definite procedures for referral of controversial decisions to CEQ and cooperating agencies.[192] However, they do not give CEQ, or any other agency veto power, and no guidance is given to the courts as to the weight accorded such a ruling. There is a live controversy as this is written which could provide some answer to the question. CEQ and EPA have both objected to the Denver Foothills Project, a proposal to add to the sewage treatment capacity for metropolitan Denver.[193] The Department of Interior and Department of Agriculture had both approved minor portions of the project.[194] The next step is Army Corps of Engineers approval of a construction permit, to which EPA has also lodged an objection.[195] Regardless of whether the permit is granted, litigation is sure to follow. Such litigation may well require resolution of the question of the impact of EPA or CEQ objection to a proposal.

There are numerous other questions which may surface. The issue of whether "inaction" can be action for purposes of triggering NEPA is also in dispute and may soon be resolved.[196] The Supreme Court may well provide some insight into the extent of NEPA compliance necessary for proposals for legislation.[197] Finally, an issue thought to be dead has recently been revived. This issue is the scope of NEPA compliance necessary on the part of EPA. EPA is currently generally exempt from NEPA requirements for most of its activities.[198] The rationale is that most of EPA's actions are

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1156) (1978). *See also* note, 30 Stan. L. Rev. 767 (1978) in which the author advocates an interesting, probably quite workable test, for determining if a programmatic impact statement is necessary in a given setting.

190. EPA reviews most impact statements pursuant to section 7609 of the Clean Air Act and refers those deemed unsatisfactory or unsound to CEQ for further review. 42 U.S.C. § 7609 (1978).

191. Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301 (1974).

192. 40 C.F.R. §§ 1504.1, 1504.2, 1504.3.

193. 8 Envir. Rep. (BNA) 1816 (1978).

194. *Id.*

195. 9 Envir. Rep. (BNA) 154 (1978).

196. *See* Defenders of Wildlife v. Andrus, ____ F. Supp. ____, (9ERC 2111) (D.D.C. 1977); Alaska v. Andrus, 429 F. Supp. 958 (D. Alas. 1977). A thought provoking analysis of this issue can be found in Fergenson, *The Sin of Omission: Inaction as Action Under Section 102 (2) (C) of the National Environmental Policy Act of 1969,* 53 Ind. L. J. 97 (1978).

197. *See supra* note 9.

198. *See, e.g.,* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

environmentally protective. However, in a recent report, the Government Accounting Office questioned the validity of this exemption.[199] GAO indicated it felt a voluntary program of EIS preparation conducted by EPA has been inadequate. It recommended Congress re-evaluate the efficacy of EPA's exemption.[200] EPA responded, quite naturally, with opposition to GAO's position. EPA contended EIS preparation would unduly interfere with its environmentally protective programs. Congress, not the courts, may well provide the answer to this question.

There are undoubtedly other issues which could be included above as unresolved and possibly subject to future dispute. The above are the most significant, however. Resolution of these issues will probably not substantially alter the present environmentally positive assessment of NEPA. As noted above, the Act has at times been subject to differing, controversial interpretations. Generally speaking, however, the Act is functioning effectively. Environmental factors must be considered throughout the decision-making process. Alternatives to proposed actions must be thoroughly investigated and considered. The public must be kept informed throughout this process of the factors entering into the final decision. The courts, while not empowered to make a substantive decision on the merits of a project, are certainly available to review the sufficiency of agency procedures under NEPA and the overall adequacy of impact statements prepared by the agencies. NEPA has become a way of life for federal agencies. It has not brought them to a standstill. Niether has the Supreme Court brought NEPA to a standstill. NEPA is not dying on the vine as the result of Supreme Court interpretations of the Act. Finally, the CEQ regulations are an indication that the federal government itself is continuously striving to improve the process.

199. 9 Envir. Rep. (BNA) 976 (1978).
200. *Id.*