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IMPROVING NEPA: NEW REGULATIONS OF THE COUNCIL ON ENVIRONMENTAL QUALITY

*James E. McDermott**

I. INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)[1] was the first major attempt by Congress to establish a national policy to protect the quality and condition of the environment in this country. The Act encouraged a productive and enjoyable harmony between man and his environment and promoted efforts to prevent and eliminate damage to the environment. By endorsing such conservation awareness, NEPA sought to eliminate actions which would endanger the health of mankind or cause irreparable damage to the air, land and water resources of the nation.[2]

In addition to establishing a national environmental policy, NEPA also created the Council on Environmental Quality (CEQ).[3] As part of the Executive Office of the President, CEQ acts as the major presidential research and advisory body on environmental issues. Under NEPA's mandate, CEQ must review the programs and activities of the federal government in order to assess what impact these undertakings have on the environment.[4] In light of this assessment and the policies of NEPA, CEQ must also continually develop and recommend to the President national policies designed to improve the quality of the environment.[5] In addition, CEQ must carry out whatever surveys, investigations or reports the President

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[1] 42 U.S.C. §§ 4321 *et seq.* (1976).

[2] 115 CONG. REC. S. 40,416 (1969) (remarks Senator Henry Jackson).

[3] 42 U.S.C. § 4342 (1976).

[4] *Id.* § 4344 (3).

[5] *Id.* § 4344 (4).

deems necessary in order to fulfill the policies of NEPA.[6]

The primary device used to implement NEPA's environmental goals entails the preparation of an environmental impact statement (EIS) for each major federal action which significantly affects the quality of the human environment.[7] Prior to the enactment of NEPA, there existed little or no supervision over private or public activities which had potentially detrimental effects on the environment. However, subsequent to NEPA's implementation, activities ranging from the construction of a major highway system[8] to the restoration of a federal courthouse[9] all require the prior submission of an EIS.[10] Indeed, despite the fact that a great deal of litigation has tested the EIS mandate in the years since the Act's inception,[11] its basic premise has remained intact, resulting in the preparation of over 10,000 environmental impact statements.[12]

In an effort both to improve the preparation of environmental impact statements and to upgrade the entire NEPA process, President Carter in 1977 directed CEQ to develop and issue a set of Regulations implementing the procedural provisions of NEPA.[13] These Regulations would affect the actions of all federal agencies

[6] *Id.* § 4344 (2), (5), (8).

[7] *Id.* § 4332 (2) (C).

[8] *See* Department of Housing and Urban Development—Environmental Planning Division, New Castle County I-95/Route 40 Growth Corridor Final Areawide Environmental Impact Statement.

[9] *See* Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D. N.Y. 1975).

[10] 42 U.S.C. § 4332 (2) (C) (1976).

[11] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519 (1978); Hart v. Denver Urban Renewal Authority, 551 F.2d 1178 (10th Cir. 1977); Minnesota Public Interest Research Group v. Butz, 358 F. Supp. 584 (D. Minn. 1973), *aff'd.* 498 F.2d 1314 (8th Cir. 1974); Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972); Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971); Cedar Riverside Environmental Defense Fund v. Hills, 422 F. Supp. 294 (D. Minn. 1976); Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D. N.Y. 1975).

See also, S. Deutsch, *The National Environmental Policy Act's First Five Years*, 4 ENV. AFF. 3 (1975). Altogether, there have been nearly 1,000 NEPA cases filed against federal agencies since NEPA's inception eight years ago.

[12] NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 407 (1978).

[13] Exec. Order 11991, 3 C.F.R. 123 (1978). NEPA sets forth a policy statement and procedural provisions for implementing these environmental goals. Its procedures include: (a) requiring the early planning of a project to include consideration of its environmental consequences; (b) an environmental assessment to determine if the proposal is a "major federal action significantly affecting the quality of the human environment"; (c) the preparation of an environmental impact statement if it is such a project; and finally, (d) the incorporation of the EIS into the proposal and a review of the action taken. 42 U.S.C. § 4332 (1976).

and would cover the entire NEPA process.[14] The President believed permanent Regulations were needed in order to replace the advisory Guidelines[15] originally issued in 1970, which only dealt with the EIS phase of NEPA and which were not concerned with providing a comprehensive environmental review or with implementing the EIS after its preparation.

The new CEQ Regulations presumably will improve the procedural aspects of NEPA, thereby furthering the Act's goal of environmental protection. This article examines whether the new Regulations will in fact accomplish that end. First, the article reviews the framework within which the new Regulations were promulgated. A discussion of the three main goals of the Regulations — reducing paperwork, minimizing delays, and improving decisionmaking — then follows. Finally, the article analyzes CEQ's authority, or possible lack thereof, to promulgate these binding Regulations.

II. CEQ's Former Guidelines

In 1970, CEQ issued Guidelines to all federal agencies[16] intended to provide guidance regarding when and how an EIS should be prepared under NEPA.[17] The Guidelines defined the elements constituting a major federal action[18] and discussed the preparation of a draft environmental impact statement.[19]

The Guidelines recommended that the content of the EIS include a description of the project, a discussion of the positive and negative environmental effects of the project and a review of all available alternatives to the proposed action.[20] In addition, the Guidelines advised that the draft EIS be reviewed by appropriate federal, state and local officials,[21] and also urged a public hearing to provide an opportunity to receive comments before the final EIS was prepared

[14] Exec. Order 11991, 3 C.F.R. 123 (1978).

[15] Council on Environmental Quality Impact Statement Guidelines, 40 C.F.R. Part 1500 (1978) (hereinafter CEQ Guidelines).

[16] The CEQ Guidelines have been revised several times and are found in 40 C.F.R. Part 1500 (1978).

[17] It is the responsibility of the respective federal agencies to determine when an EIS must be prepared under NEPA. *See* Steubing v. Brinegar, 511 F.2d 489 (2nd Cir. 1975).

[18] CEQ Guidelines, 40 C.F.R. § 1500.6 (1978), provides that this clause should be construed broadly with a view toward the overall cumulative impact of the proposed action.

[19] *Id.* § 1500.7.

[20] *Id.* § 1500.8.

[21] *Id.* § 1500.9.

and circulated to all concerned parties.[22] In support of these procedural aspects of the EIS, the Guidelines contained a list of special areas of concern showing which agencies have jurisdiction by law or special expertise in any given area.[23] This list greatly assisted agencies in determining which projects required their involvement in the preparation of the EIS.

However, over the years, federal agencies have not always followed the Guidelines.[24] In fact, courts have even held that the agencies did not have to adhere to the Guidelines in order to comply with NEPA.[25] Moreover, since the various agencies operated under their own internal regulations and were comfortable with those procedures, they had little or no incentive to comply with the advisory Guidelines. As a result, various agencies often handled similar situations differently.[26] These divergences naturally led to confusion among state agencies, local officials and the general public; when any of these parties sought federal permits or funding, the applicable standards were oftentimes unclear.[27]

Moreover, in addition to fostering contradictory policy approaches, the Guidelines applied solely to the preparation of the EIS, only one phase of NEPA. They were not applicable to many other integral parts of the Act, including those relating to the pre-EIS phase (including the early planning stages of a project and the initial environmental assessment), the implementation of the EIS or any follow-up review by the agency. Because of their limited scope, problems often resulted from the lack of early environmental planning or comprehensive review during the pre-EIS phase. Similarly, this shortcoming affected the post-EIS phase concerned with the implementation of the statement.

In order both to meet some of the problems which arose under the

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[22] *Id.*

[23] *Id.* Appendix II.

[24] Since each federal agency was responsibile for determining when to prepare an EIS, they all developed their own internal procedures, which were often quite different from the CEQ Guidelines. *See, e.g.* Departmental Policies, Responsibilities, and Procedures for the Protection and Enhancement of Environmental Quality, Department of Housing and Urban Development Circular 1390.1, 24 C.F.R. Part 58 (1978).

[25] For example, in Clarke Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973), the court held that, where HUD had found no requirement of an EIS based on its internal procedures, the requirements of NEPA were met, despite the fact that an EIS might have been required under the CEQ Guidelines.

[26] NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 399 (1978).

[27] *Id.*

Guidelines and to further effectuate the policies of NEPA, CEQ has promulgated a new set of Regulations.[28] The Regulations are binding rather than advisory, and apply to the entire NEPA process, not just the preparation of the EIS. Basically, they attempt to simplify NEPA in order to improve its utility.

III. CEQ's New Regulations

A. *Overview*

Pursuant to a 1977 directive from President Carter, CEQ promulgated a new set of binding Regulations implementing the procedural provisions of NEPA.[29] Compliance by all federal agencies is mandatory.[30] The authority for the Regulations rests on several grounds, including the Executive Order itself,[31] NEPA,[32] the Environmental Quality Improvement Act,[33] Section 309 of the Clean Air Act,[34] the constitutional duty of the President to ensure that the laws are faithfully executed[35] and the President's statutory power to delegate his executive authority to appropriate officials.[36]

In developing the Regulations, CEQ employed a thorough and lengthy process. In June, 1977, three days of public hearings were held on the entire NEPA process. CEQ received testimony from public officials, public interest and environmental organizations, business interests and private citizens.[37] The general consensus was

[28] Council on Environmental Quality Final Regulations Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978 (1978) (to be codified in 40 C.F. R. § 1500) (hereinafter CEQ Regulations).

[29] Exec. Order 11991 § 1, 3 C.F.R. 123 (1978), *amending* Exec. Order 11514 § 3(h), 3 C.F.R. 902 (1966-1970 Compilation).

[30] Exec. Order 11991 § 2, 3 C.F.R. 123 (1978) *adding* Exec. Order 11514 § 2(g), 3 C.F.R. 902 (1966-1970 Compilation).

[31] Exec. Order 11991, 3 C.F.R. 123 (1978).

[32] 42 U.S.C. §§ 4321 *et seq.* (1976).

[33] *Id.* §§ 4371 *et seq.*

[34] 42 U.S.C. § 7609 (Supp. I 1977).

[35] U.S. Const. art. II, § 3.

[36] 3 U.S.C. § 301 (1976). The bases of authority set forth in the text are those upon which CEQ itself relied. They are found in the preamble to the CEQ Regulations, 43 Fed. Reg. 55, 978 (1978).

[37] Among the diverse witnesses were representatives from the United States Chamber of Commerce, representing business; the Building and Construction Trades Department of the AFL-CIO, representing labor; the National Conference of State Legislatures, representing state and local governments; and the Natural Resources Defense Council, representing environmental groups. Also testifying were representatives of many federal agencies, and the public at large. Ninth Annual Report of the Council on Environmental Quality 401 (1978).

that, although NEPA greatly benefitted the public, the process had become unnecessarily cumbersome and needed to be streamlined. Witnesses noted that lengthy and complex EIS's were making it increasingly difficult to distinguish the significant from the trivial.[38]

In August, 1977, CEQ sent to all federal agencies and interested parties a thirty-eight page questionnaire summarizing the issues raised at the hearings.[39] After compiling responses to the questionnaire, CEQ prepared Draft Regulations which it then circulated among the federal agencies for comments. After the Draft Regulations were published in the Federal Register on June 9, 1978,[40] additional comments were received from the public. Finally, after compiling all these comments, CEQ prepared the final Regulations, publishing them on November 29, 1978.[41]

This section will first discuss some of the general changes which the Regulations mandate, such as their binding effect on all federal agencies, their applicability to the entire NEPA process, and their introduction of uniform terminology and procedures. The second part of this section discusses CEQ's role under the Regulations, which will be somewhat different than its role under the Guidelines.

1. General Changes

Since the effective date of the Regulations was July 30, 1979,[42] roughly eight months after publication, the various federal agencies have had ample time to familiarize themselves with the new Regulations and determine what changes must be made in their internal procedures in order to conform to the Regulations.[43] In fact, agencies which administer programs under section 102(2)(d) of NEPA[44] or section 104(h) of the Housing and Community Development Act of

[38] *Id.*

[39] Over 300 of the questionnaires were completed and returned to CEQ. *Id.*.

[40] The Draft Regulations are found at 43 Fed. Reg. 25,230 (1978).

[41] The Final Regulations were published in 43 Fed. Reg. 55,978 (1978).

[42] CEQ Regulations, 43 Fed. Reg. 56,002 (1978) (to be codified in 40 C.F.R. § 1506.12).

[43] Most federal agencies should not have any problems conforming to the Regulations because they have been circulating in draft form for quite some time, thereby giving each agency ample opportunity to comment on them and to provide input in their development. CEQ was quite willing to consider the comments it received, as evidenced by the fact that 72 of the 94 sections were changed. Preamble to CEQ Regulations, 43 Fed. Reg. 55,990 (1978). CEQ in one instance even allowed the affected agency, the General Services Administration, to redraft a section which would have been particularly troublesome for it. Seminar by CEQ Spokesman Michael Kane (November 3, 1978).

[44] 42 U.S.C. § 4332 (2) (D) (1976).

1974[45] have an additional four months before the Regulations become effective.[46] This extra time is necessary because state and local agencies, which jointly administer these programs, are generally slower to respond to changes in federal procedure than are federal agencies.

The new Regulations are designed to make the NEPA process more useful to decisionmakers and the public by reducing paperwork, avoiding unnecessary delays and reaching better decisions.[47] In consequence, they incorporate several general changes designed to improve the review process and achieve these goals. First, their most obvious and most important alteration lies in the requirement which makes the Regulations binding on all federal agencies.[48] This constitutes a drastic change from the merely advisory nature of the Guidelines.[49] Now, every federal agency is compelled by Executive Order[50] to comply with the Regulations issued by CEQ, except where such compliance would be inconsistent with other statutory requirements.[51] Since the Regulations apply to all federal agencies, there will now be one set of standards implementing NEPA to which all agencies must conform, thereby resulting in a consistently higher level of environmental review and greater certainty that each agency is in fact meeting the NEPA requirements.

The second change in the Regulations makes them applicable to the entire NEPA process, from the early planning stages, through

[45] *Id.* § 5304. These two sections refer to federally funded, state administered housing programs which still require an EIS under NEPA.

[46] CEQ Regulations, 43 Fed. Reg. 56,002 (1978) (to be codified in 40 C.F.R. § 1506.12).

[47] Preamble to CEQ Regulations, 43 Fed. Reg. 55,978 (1978).

[48] CEQ Regulations, 43 Fed. Reg. 56,002 (1978) (to be codified in 40 C.F.R. § 1507.1).

[49] *See* Clarke Civic Club v. Lynn, 476 F.2d 421 (4th Cir. 1973).

[50] Exec. Order 11991 § 2, 3 C.F.R. 123 (1978).

[51] This exception for "other statutory requirements" is not intended to be a major loophole by which federal agencies can avoid their responsibilities under the Regulations and NEPA, but is a very narrow exemption designed to apply only where there is a specific statute expressly releasing the agency from the EIS obligation. For example, 15 U.S.C. § 793(C)(1) (1976) states that "no action taken under the Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1976) shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA." *See* South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646, 661 (1st Cir. 1974); Congress obviously did not want its environmental regulations to be delayed by NEPA, the keystone of its environmental regulatory structure. *See also* American Smelting and Refining Co. v. Federal Power Commission, 494 F.2d 925 (D.C. Cir. 1974), for an example of an inherent statutory conflict which can excuse compliance with NEPA. The case involves the duty of the F.P.C. under the Natural Gas Act, 15 U.S.C.]§] 717 *et seq.* (1976), to prevent discriminating practices in times of gas shortages - a situation calling for prompt action which requires no filing of an EIS.

the environmental assessment and the preparation of the EIS, and ultimately to the final follow-up report by the responsible agency.[52] While the former Guidelines dealt only with the actual preparation of the EIS,[53] the new Regulations are broader, more closely paralleling NEPA's provisions governing agency responsibility.[54] For exam-

[52] CEQ Regulations, 43 Fed. Reg. 55,991 (1978) (to be codified in 40 C.F.R. § 1500.3).

[53] CEQ Guidelines, 40 C.F.R. § 1500.1 (1978).

[54] 42 U.S.C. § 4332 (2) (1976). This section provides that each agency of the Federal government shall:

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

(B)identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of the Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

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

(i)the environmental impact of the proposed action,

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

(iii)alternatives to the proposed action,

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

(v)any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 USCS § 552], and shall accompany the proposal through the existing agency review processes;

(D)Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i)the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii)the responsible Federal official furnishes guidance and participates in such preparation,

(iii)the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv)after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such

ple, NEPA requires that agencies consider the environmental consequences of the proposed action during the early planning stages,[55] that they cooperate with other federal, state and local officials on environmental matters,[56] and that they develop long range environmental policies which equate environmental factors with economic and technical factors in the decision-making process.[57] The earlier Guidelines considered none of these factors. However, under the new Regulations, agencies must undertake each of these actions,[58] thereby providing a much broader range of review which hopefully will lead to a more balanced and meaningful consideration of environmental issues.[59]

Third, in conjunction with the broadened scope of review, the Regulations provide for the uniform application of terminology and

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State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et. seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

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

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

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

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

(I)assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

[55] *Id.* § 4332(2)(A).

[56] *Id.* § 4332(2)(C).

[57] *Id.* § 4332(2)(B), (F).

[58] CEQ Regulations, 43 Fed. Reg. 55,992, 55,993, 56,001, 56,003 (1978) (to be codified in 40 C.F.R. § 1501.1, § 1501.2, § 1501.7, § 1506.6, § 1507.2).

[59] The intent of NEPA is not just to require an EIS stating the environmental consequences of a proposal but to genuinely consider those factors when the real decisions on the project are made. The procedures in the Regulations attempt to ensure that environmental factors will be seriously considered in every proposed federal action. *See* Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973); Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323, 1340 (S.D. N.Y. 1975).

procedures by all federal agencies.[60] Previously, each agency utilized its own terminology and procedures when reviewing environmental matters, thereby leading to confusion on the part of those members of the public dealing with different departments in the federal bureaucracy.[61] In contrast, under the Regulations, all agencies will now be using consistent terminology in describing their procedures and similar standards in determining when to prepare an EIS.[62] In particular, the Regulations establish a specific format for the preparation of EIS's in order to make them similar in appearance and content and, hopefully, increase their comprehensability and utility.[63] This emphasis upon the use of consistent, uniform terminology coincides with the President's directive that all federal regulations be simple, clear and written in plain English.[64]

Thus, overall, the new CEQ Regulations require each agency to develop procedures which conform to the Regulations and which cover not only the preparation of the EIS but all phases of NEPA. Since each agency will be employing similar standards, there will be a consistent level of environmental review throughout the federal government, producing an Environmental Impact Statement which can be easily utilized by decisionmakers and the public from any field of discipline.

2. *CEQ's Role under the Regulations*

As an indirect result of the Regulations, the status of CEQ will change.[65] Until now, CEQ has acted merely as an information-gathering and advisory body for environmental issues in the Execu-

[60] CEQ Regulations, 43 Fed. Reg. 56,003 (1978) (to be codified in 40 C.F.R. § 1508.1).

[61] For instance, the Regulations provides for an "environmental assessment" to determine if an EIS is required under NEPA. In the past, each agency used different terminology and different standards to meet this requirement. Some examples are: "survey" used by the Corps of Engineers; "initial assessment" used by the Department of Transportation; "environmental analysis" used by the Forest Service; "normal or special clearance" used by the Department of Housing and Urban Development; "environmental analysis report" used by the Department of the Interior; "marginal impact statement" used by the Department of Health, Education, and Welfare. It is easy to see how a person who had to deal with several agencies could not understand what was going on. Preamble to CEQ Regulations, 43 Fed. Reg. 55,979 (1978).

[62] CEQ Regulations, 43 Fed. Reg. 55,992 (1978) (to be codified in 40 C.F.R. § 1501.3, § 1501.4).

[63] *Id.* at 55,995 (to be codified in 40 C.F.R. § 1502.10).

[64] Exec. Order 12044, 43 Fed. Reg. 12,661 (1978).

[65] There is nothing in the Regulations which explicitly changes the status of CEQ, but the change necessarily results from many provisions of the Regulations.

tive Office of the President, its main duty being the preparation of technical reports and studies.[66] However, under the Regulations, CEQ will not just passively assess federal programs in light of NEPA's policies, but will instead become actively involved in supervising federal compliance with environmental legislation.[67]

CEQ's role has expanded in three directions. First, under the Regulations, each federal agency must prepare and publish internal implementing procedures in order to conform the Regulations to the particular characteristics of the specific agency.[68] In developing these procedures each agency must consult with CEQ. Moreover, CEQ has the ultimate authority to review and approve these procedures prior to their implementation.[69] Therefore, for the first time, CEQ will be involved in the actual internal implementation of NEPA by each federal agency.[70]

The second way in which the Regulations increase CEQ's function in the regulatory process concerns its role as arbitrator. If a dispute arises regarding which agency has primary environmental responsibility on a project, CEQ can designate both the lead agency and the cooperating agencies.[71] Also, if a dispute arises concerning the potential environmental impact of a project, CEQ may take the initiative in trying to reach a resolution.[72] However, CEQ cannot, independently, make the ultimate determination resolving a conflict.[73]

Finally, CEQ will possess emergency powers. As part of its normal

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[66] *See* Clarke Civic Club v. Lynn, 476 F.2d 421, 423 (5th Cir. 1973).

[67] 42 U.S.C. § 4344 (3) (1976).

[68] CEQ Regulations, 43 Fed. Reg. 56,003 (1978) (to be codified in 40 C.F.R. § 1507.3). These procedures will not just be a reissuance of each agency's old internal procedures. Instead, they must implement the Regulations for the agency's particular area of concern. For example, the Department of Transportation will develop procedures adapting the Regulations to specific projects such as highway construction, public transportation, etc.; likewise, the Department of Housing and Urban Development must implement the Regulations into various housing projects, etc.

[69] *Id.*

[70] CEQ's involvement in the internal operating standards of each agency should lead to a greater level of environmental review by each agency. However, it could also lead to problems if CEQ does not recognize the inherent differences of each agency and allow them the flexibility needed to develop practical procedures.

[71] CEQ Regulations, 43 Fed. Reg. 55,992 (1978) (to be codified in 40 C.F.R. § 1501.5 (e), (f)).

[72] *Id.* at 55,998 (to be codified in 40 C.F.R. § 1504).

[73] The Regulations stop short of giving CEQ the power to make a ruling on a particular project, but CEQ can make a recommendation and send the matter to the President for such a ruling. *Id.* at 55,999 (to be codified in 40 C.F.R. § 1504.3 (f) (7)). However, it seems likely that the President would almost invariably follow this recommendation.

operations, CEQ may update the Regulations through memos, handbooks and other supplementary material in order to keep them up-to-date regarding environmental developments and trends.[74] However, if an emergency situation arises, CEQ can authorize an agency to act without complying with the Regulations to the degree necessary to control the emergency.[75] While the chances of such a situation occurring are slight, CEQ nonetheless does have the rather broad authority to allow a circumvention of the Regulations.

B. Objectives of the Regulations

President Carter's Executive Order of May 24, 1977 directed CEQ to develop Regulations

> designed to make the environmental impact statement more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives.[76]

In compliance with this mandate, CEQ developed the Regulations with the objectives of reducing paperwork, avoiding unnecessary delays and reaching better decisions.[77] All of these objectives are interrelated; procedures designed to meet one objective often promote the fulfillment of the other objectives. For example, procedures designed to reduce paperwork by eliminating extraneous materials will also help produce a better document, just as procedures designed to avoid delays by getting early input from all involved parties will also lead to better decisionmaking due to that increased involvement. Therefore, although the procedures described in one particular subsection may be mainly designed to fulfill a single objective, they may also lead to the attainment of the other goals of the Regulations.

1. Reducing Paperwork

The most direct means which the Regulations employ to reduce the volume of paper entails limiting the length of the EIS, thereby

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[74] *Id.* at 56,001 (to be codified in 40 C.F.R. § 1506.7). The provisions for keeping the Regulations current precludes the agencies from avoiding compliance with the Regulations in the future by claiming that they are obsolete.

[75] *Id.* at 56,002 (to be codified in 40 C.F.R. § 1506.11). This provision is to be considered only in an emergency situation and is not a means to avoid compliance with the Regulations.

[76] Exec. Order 11991 § 1, 3 C.F.R. 123 (1978).

[77] Preamble to CEQ Regulations, 43 Fed. Reg. 55,978 (1978).

requiring it to be concise and to the point. The previous Guidelines did not specify the proper length of an EIS,[78] so that many impact statements consisted of several hundred pages.[79] While it may at first seem that a lengthy EIS would evidence a thorough environmental study, in fact long-winded narratives generally contain so much extraneous material that they are impractical and of little value. To combat this verbosity, the Regulations limit the length of the EIS to 150 pages,[80] unless they concern a project of unusual complexity, in which case there is a 300 page limitation.[81] Regardless of the actual number of pages, impact statements should, in all cases, be concise and limited to the essential requirements of NEPA.[82]

One reason for the excessive length of past impact statements is the NEPA requirement that the EIS consider and review alternatives to the proposed action.[83] Often, agencies would include a discussion of every conceivable alternative in order to be sure that they were satisfying the statutory requirements. In contrast, the new Regulations emphasize that only real alternatives should be considered.[84] The EIS must contain a detailed analysis of each real alternative, including the alternative of no action at all,[85] plus a discussion substantiating the agency's preferred course of action.[86] Peri-

[78] CEQ Guidelines, 40 C.F.R. § 1500.8 (1978), provides only general language as to what should be included in the EIS, thereby prompting some agencies to include the proverbial "kitchen sink" so the EIS would be considered sufficient.

[79] In the past, there were even multivolume EIS's which exceeded 1,000 pages—one in particular contained seventeen volumes and 9,600 pages. NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 398 (1978). At the present time, the average length of an EIS is over 200 pages. Seminar by CEQ Spokesman Michael Kane (November 3, 1978).

[80] CEQ Regulations, 43 Fed. Reg. 55,995 (1978) (to be codified in 40 C.F.R. § 1502.7).

[81] *Id.*

[82] *Id.* at 55,994 (to be codified in 40 C.F.R. § 1502.2(c)).

[83] 42 U.S.C. § 4332 (2) (C) (iii) (1976).

[84] CEQ Regulations, 43 Fed. Reg. 55,996 (1978) (to be codified in 40 C.F.R. § 1502.14). The courts have repeatedly held that the EIS does not have to contain an exhaustive treatment of every conceivable alternative, but need only discuss those alternatives which are reasonable. *See* North Carolina v. Federal Power Commission, 533 F.2d 702, 707 (D.C. Cir. 1976); Friends of the Earth v. Coleman, 513 F.2d 295, 297 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). If litigation is to arise over the Regulations, it is likely that one of the issues will be the definition of a real alternative.

[85] CEQ Regulations, 43 Fed. Reg. 55,996 (1978) (to be codified in 40 C.F.R. § 1502.14(d)). In a period when expansion is often viewed as the normal state of affairs, the Regulations are designed to make every agency consider the fact that a viable alternative is no action at all. *Id.*

[86] *Id.* at 55,966 (to be codified in 40 C.F.R. § 1502.14(e)). If the agency does not choose the

pheral or insignificant matters should be confined to a brief discussion.[87] Thus, in general, when preparing an EIS, agencies should always avoid useless bulk and instead focus their effort and attention on important issues.[88]

One interesting innovation in the Regulations requires a fifteen page summary of the EIS.[89] The agency must prepare and attach this summary to the EIS, explaining in simple language the major conclusions, areas of controversy and unresolved issues. With this synopsis, interested parties may quickly review any EIS. Indeed, the synopsis can even be circulated in place of the EIS when the statement is unusually long.[90] Thus, because the summary will make the EIS much more useful and understandable, it will broaden the range of interested people who will utilize the EIS and thereby make the impact statement the environmental tool which it was originally intended to be.

Besides limiting the length of the EIS, the Regulations also seek to reduce paperwork by utilizing the Scoping process.[91] This process requires the early involvement of federal, state and local officials in identifying important issues and commenting on the proposal, thereby avoiding wasted time and effort on extraneous matters.[92] Moreover, since commentators must contribute their input early in the process, Scoping avoids the undue procrastination which has often led to delays.[93] Indeed, the Scoping process fulfills all three objectives of the Regulations. First, it reduces paperwork by identifying the issues, thereby not wasting agency effort on extraneous material. Moreover, it avoids delays by having interested parties

environmentally preferable course of action, it must justify the reasons why it undertook an alternative course of action. *Id.*

[87] CEQ Regulations, 43 Fed. Reg. 55,994 (1978) (to be codified in 40 C.F.R. § 1502.2(b)).

[88] *Id.* at 55,996 (to be codified in 40 C.F.R. § 1502.15).

[89] *Id.* at 55,996 (to be codified in 40 C.F.R. § 1502.12).

[90] *Id.* at 55,997 (to be codified in 40 C.F.R. § 1502.19). The EIS or the fifteen page summary must be distributed to the President, CEQ, all cooperating agencies, all agencies involved in the project in any way, local officials, and any interested citizens or organizations. It is a public document. *Id.*

[91] *Id.* at 55,993 (to be codified in 40 C.F.R. § 1501.7). The Scoping process is an innovation of the Regulations which was not present in the Guidelines. *Id.*

[92] *Id.*

[93] The Scoping process may, however, lead to a conflict between business interests (who would prefer to allow everyone to have their say on a proposal early in the process and then allow no new environmental issues to be raised) and environmental groups (who would prefer to be able to raise environmental issues at any time during the project). There is no clear-cut solution to this potential conflict in the Regulations.

provide their input early in the process. Finally, it reaches better decisions by involving more people in the review procedure, thereby producing a more clearly focused environmental assessment.

The mandate of the Regulations requiring the EIS to use plain language and consistent terminology[94] also will reduce paperwork by decreasing the amount of explanatory material needed in the impact statement. The use of a clear, consistent format will preclude repeating something several times in the EIS and result in tighter organization.[95] Moreover, the format outlined in the Regulations must be used by all agencies unless there is a compelling reason not to do so, in which case the substance of the EIS must still be the same.[96] Consequently, this consistent format for EIS's will enable all interested parties to analyze the statement and easily find the information needed, even if they have never previously dealt with the particular agency.

Duplication of effort is one of the primary causes of needless paperwork. In order to reduce it somewhat, the Regulations allow a federal agency to issue a joint EIS with a state or local agency, provided the applicable state statute requires the local agency to prepare an EIS in a cooperative venture with the federal agency.[97] Also, a federal agency may adopt a previously prepared EIS; as long as the agency reviews the EIS to ensure its applicability to the current project, it will meet the NEPA requirements.[98] For example, a housing project to be built next to one constructed a few years earlier will have substantially the same environmental conse-

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[94] See text at notes 53-57, *supra*.

[95] CEQ Regulations, 43 Fed. Reg. 55,995 (1978) (to be codified in 40 C.F.R. § 1502.10). The standard format for an EIS is as follows: Cover Sheet Summary; Table of Contents; Purpose of and Need for Action; Alternatives Including Proposed Action; Affected Environment; Environmental Consequences; List of Preparers; List of Agencies, Organizations, and Persons to Whom Copies of the Statement are Sent; Index; Appendices. *Id.*

[96] *Id.*

[97] *Id.* at 56,000 (to be codified in 40 C.F.R. § 1506.2). Most states have a so-called "mini-NEPA" statute which imposes similar requirements on state agencies to those which NEPA imposes on federal agencies. For example, *see* Massachusetts Environmental Policy Act, MASS. GEN. LAWS ANN. c.30 §§ 61 *et seq.* (West 1979); California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21,000 *et seq.* (West Supp. 1978); Washington State Environmental Policy Act, WASH. REV. CODE ANN. §§ 43.21C *et seq.* (Supp. 1978). The issuance of a joint statement will avoid the preparation of two separate impact statements on the same project which contain the same information. For a fuller discussion, *see* McGuire, *Emerging State Programs to Protect the Environment: "Little NEPA's" and Beyond*, 5 ENV. AFF. 567 (1976).

[98] CEQ Regulations, 43 Fed. Reg. 56,000 (1978) (to be codified in 40 C.F.R. § 1506.3).

quences, so that the EIS prepared for the first project may be used for the second, as long as it is brought up-to-date. Finally, the EIS may incorporate materials by reference,[99] and it may combine with any other relevant documents in order to avoid duplication.[100] Thus, unlike past practices which oftentimes duplicated research, the Regulations provide a mechanism for streamlining research. They not only reduce the actual volume of paperwork, but also lead to a more sharply focused EIS and, in turn, to better decisionmaking.

2. Avoding Unnecessary Delays

The second major objective of the Regulations is avoiding unnecessary delays in the entire NEPA process.[101] The past history of the statute evidences both administrative delays in fulfilling the NEPA requirements and judicial delays in litigating the adequacy of EIS's.[102] Since the Regulations can provide at least a partial solution to the problems associated with agency procrastination, the resulting increase in administrative efficiency may also indirectly expedite some of the judicial delays associated with the review of impact statements.

Setting time limits would, of course, be the most direct method of reducing delays. However, unlike page limitations,[103] fixed time constraints on the NEPA process do not present a practical solution. The extreme differences in the scope, complexity, and environmental consequences of the various projects which the federal government undertakes result in great differences in the amount of time necessary for preparing an adequate environmental review. Thus, the Regulations seek to minimize delays by encouraging lead agencies to set individual time limits for each project, based on such factors as the size and complexity of the proposal, the state of the art, the number of agencies involved and the potential for environmental harm.[104] However, because CEQ can impose no sanctions if the time limits are not met, or even established, the time con-

[99] *Id.* at 55,997 (to be codified in 40 C.F.R. § 1502.21). This provision avoids the inclusion in the EIS of other studies, reports, etc., which increase the bulk of the EIS; rather, they may simply be referred to in order to incorporate the information which they contain. *Id.*

[100] *Id.* at 56,000 (to be codified in 40 C.F.R. § 1506.4).

[101] *Id.* at 55,991 (to be codified in 40 C.F.R. § 1500.5).

[102] NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 407-409 (1978).

[103] See text at notes 72-77, *supra*.

[104] CEQ Regulations, 43 Fed. Reg. 55,994 (1978) (to be codified in 40 C.F.R. § 1501.8). *See also* Preamble to CEQ Regulations, Comments Section 43 Fed. Reg. 55,982 (1978).

straints will in all probability serve merely as target dates rather than absolute deadlines.[105] Nevertheless, despite the lack of enforceable time limits, the Regulations do require that the initial environmental assessment of a project be made in the early planning stages of a proposal,[106] thereby avoiding those delays which normally occur when environmental factors are not considered until the planning phase of a project has been substantially completed.

The Regulations also promote greater and earlier interactions among different federal agencies and programs as a mechanism for reducing delays in the NEPA process. For example, the Regulations require that the EIS be prepared concurrently with environmental studies mandated by other federal acts,[107] such as the Fish and Wildlife Coordination Act,[108] the National Historic Preservation Act of 1966[109] and the Endangered Species Act of 1973.[110] In addition, the Regulations seek to encourage early interagency consultation. NEPA requires the proposing agency to consult with agencies which have jurisdiction by law[111] or special expertise over a particular project.[112] To generate early involvement by these other entities, the Regulations require that an agency with jurisdiction by law over a project become a cooperating agency at the outset of a project,[113] and that an agency with special expertise be designated a cooperating agency either at the request of the lead agency or upon its own initiative.[114] This early involvement of all interested agencies will

[105] Even though one goal of the Regulations is to reduce delays, the main purpose of NEPA and the Regulations is to engage in a meaningful environmental review, and that fundamental purpose will not be sacrificed simply to speed up the process. *See* Preamble to CEQ Regulations, 43 Fed. Reg. 55,979 (1978).

[106] CEQ Regulations, 43 Fed. Reg. 55,992 (1978) (to be codified in 40 C.F.R. § 1501.2).

[107] *Id.* at 55,997 (to be codified in 40 C.F.R. § 1502.25).

[108] 16 U.S.C. §§ 661 *et seq.* (1976).

[109] *Id.* §§ 461 *et seq.*

[110] *Id.* §§ 1531 *et seq.*

[111] An example of an agency with jurisdiction by law is one with approval rights or veto rights over some aspect of the project, or where a statute compels their involvement. For example, the Environmental Protection Agency Administrator is required by the Clean Air Act to comment on certain projects. 42 U.S.C. § 1857(h)(7) (1976).

[112] 42 U.S.C. § 4332(2)(C) (1976). The original CEQ Guidelines contain a listing of which agencies have jurisdiction by law or special expertise on various environmental areas of concern. CEQ Guidelines, 40 C.F.R. § 1500 Appendix II (1978).

[113] CEQ Regulations, 43 Fed. Reg. 55,993, 56,004 (1978) (to be codified in 40 C.F.R. § 1501.6(b), § 1508.5). The requirements of a cooperating agency are basically to assist the lead agency in the preparation of the EIS and throughout the NEPA process. *Id.* at 55,993 (to be codified in § 1501.6(A)).

[114] *Id.* at 55,993 (to be codified in 40 C.F.R. § 1501.6(b)). There has been some concern that

reduce potential delays by eliminating unnecessarily late criticism of a completed draft EIS.[115]

Another mechanism to avoid repetition and delays permits agencies to engage in different levels of environmental review through tiering procedures.[116] The Regulations authorize agencies to prepare a broad EIS covering general matters, in effect a kind of environmental policy statement for all activities undertaken in a particular field.[117] These broad statements can then be tailored and incorporated by reference[118] into a more specific EIS focusing on one particular project,[119] with only minor changes made to reflect the unique aspects of each undertaking. Since these policy statements can be applied to many different projects, they enable agencies to conduct greatly expedited environmental assessments and to develop more comprehensive systems of environmental review.

Moreover, since the Regulations seek to augment administrative efficiency they should also help to reduce legal delays by providing clearer standards pertaining to the preparation of an EIS. Since NEPA was implemented, court injunctions have delayed over 200 federal projects pending review of either the adequacy of the EIS or the failure of an agency to prepare one.[120] Assuming the legal adequacy of the standards promulgated in the Regulations, adherence by all agencies to their provisions will result in less frequent challenges to the adequacy of the EIS, thereby decreasing litigation. Indeed, trivial departures from the Regulations should not lead to

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this provision might allow a lead agency to appropriate the staff of another agency which has some special expertise in a particular area. This would especially affect the Environmental Protection Agency, which would have special expertise on a wide range of activities. To prevent this from happening, the Regulations allow a cooperating agency to cite other program commitments as precluding it from becoming involved to the degree requested by the lead agency. Whether this leads to the problem of agencies constantly trying to "beg off" projects remains to be seen. *Id.* at 55,993 (to be codified in 40 C.F.R. § 1501.6(c)).

[115] NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 398 (1978).

[116] CEQ Regulations, 43 Fed. Reg. 56,006 (1978) (to be codified in 40 C.F.R. § 1508.28).

[117] *Id.* at 55,995 (to be codified in 40 C.F.R. § 1502.4(b)). These broad statements may evaluate proposals geographically, generically or by stages of technological development as well as any other appropriate criteria. *Id.*.

[118] *Id.* at 55,997 (to be codified in 40 C.F.R. § 1502.21).

[119] *Id.* at 55,997 (to be codified in 40 C.F.R. § 1502.20).

[120] NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALTIY 408 (1978). As of December, 1978, thirty-seven actions have been delayed up to three months, twenty-one actions have been delayed from three to six months, twenty-three actions have been delayed from six to twelve months, ninety-two actions have been delayed over twelve months. In fifty-nine cases an injunction was still in effect as of December, 1978. *Id.* at 409.

any cause of action;[121] using those standards as the yardstick, courts should be readily capable of dismissing spurious suits. Moreover, if a legitimate dispute does arise, the Regulations recommend that litigation commence after the EIS is filed rather than during its preparation. The final EIS might well resolve the problem so that premature litigation would only result in needless delays.[122]

3. Reaching Better Decisions

The ultimate goal of the Regulations is, of course, to provide better and more meaningful environmental decisions via the NEPA process.[123] Indeed, the mechanisms in the Regulations for reducing paperwork[124] and avoiding unnecessary delays[125] also partly tend to achieve an improved EIS and better decisionmaking. These changes constitute more than mere bureaucratic efforts to reduce or hasten the review process. In fact, they represent an attempt to streamline and improve the review process so that environmental factors will become a part of every major decision by every federal agency.[126]

The Regulations seek to improve the environmental decisionmaking process of NEPA in several ways. First, upon completion of a project, each agency must prepare a "record of decision".[127] The record of decision reports the final action taken by the agency, states alternatives which were available, sets forth the environmentally preferable alternative, explains why this course of action was not chosen if another option was selected, and describes the steps taken to minimize the harm to the environment.[128] Under the Guidelines, an EIS was usually quickly forgotten after its preparation, since agencies did not have to show how it was used. Now, each federal agency will be accountable for actions taken under the EIS because the record of decision mandates that it explain the reasons for undertak-

[121] CEQ Regulations, 43 Fed. Reg. 55,991 (1978) (to be codified in 40 C.F.R. § 1500.3).

[122] *Id.*

[123] *Id.* at 55,991 (to be codified in 40 C.F.R. § 1500.1(c)).

[124] See Section (III) (B) (1), *supra*.

[125] See Section (III) (B) (2), *supra*.

[126] A meaningful consideration of environmental consequences is, of course, the fundamental purpose of NEPA. 42 U.S.C. § 4331 (1976).

[127] CEQ Regulations, 43 Fed. Reg. 55,999 (1978) (to be codified in 40 C.F.R. § 1505.2).

[128] *Id.* In order to minimize harm to the environment, the lead agency may condition funding of a project or the granting of permits, etc. upon a showing that the proper measures of mitigation will be implemented. *Id.* at 56,000 (to be codified in 40 C.F.R. § 1505.3).

ing a particular course of action. Thus, a degree of accountability will exist which will undoubtedly compel more thorough analyses.

Second, in keeping with the concept of meaningful decisions, the Regulations provide that every EIS be compiled in a professional manner.[129] The preparers of the EIS should have the specific expertise to present a thoroughly professional statement. As evidence of that expertise, their names and qualifications must clearly appear in the EIS itself.[130] Moreover, the EIS should be prepared in a broad, interdisciplinary manner, integrating the natural and social sciences with the environmental arts.[131] The lead agency has the responsibility to see that this professional approach exists in the preparation of each EIS.[132]

Finally, while NEPA only required an EIS for major federal actions significantly affecting the quality of the human environment,[133] the Regulations expand this mandate. They broaden the definition of "effects"[134] to encompass both direct and indirect impacts,[135] including ecological, aesthetic, historical, cultural, economic, social and health-related effects.[136] Therefore, all future EIS's will have to cover a broad spectrum of the human environment and must weigh such intangibles as the impact of the federal action upon the quality of urban life and its possible cultural effects.[137]

In sum, the Regulations seek to reduce paperwork by imposing a page limitation on the EIS, eliminating superfluous material by focusing only on important issues, adding a fifteen page summary, requiring the early involvement of all interested parties and avoiding duplication of effort. In order to avoid delays, the Regulations encourage time limitations on the EIS process, foster early cooperation among agencies, permit different levels of environmental re-

[129] *Id.* at 56,001 (to be codified in 40 C.F.R. § 1506.5).

[130] *Id.* at 55,996 (to be codified in 40 C.F.R. § 1502.17).

[131] *Id.* at 55,995 (to be codified in 40 C.F.R. § 1502.6).

[132] *Id.* at 56,001 (to be codified in 40 C.F.R. § 1506.5).

[133] 42 U.S.C. § 4332 (2) (C) (1976).

[134] The NEPA mandate is for actions "affecting" the human environment. The Regulations have broadened the scope of environmental "effects". To make this semantic transition, the Regulations define "affecting" as will or may have an effect upon. CEQ Regulations, 43 Fed. Reg. 56,003 (1978) (to be codified in 40 C.F.R. § 1508.3).

[135] *Id.* at 56,004 (to be codified in 40 C.F.R. § 1508.8).

[136] *Id.* at 56,004 (to be codified in 40 C.F.R. § 1508.8(b)).

[137] Seminar by CEQ Spokesman Michael Kane (November 3, 1978).

view and try to avoid litigation which delays a project. All of these procedures will lead to better and more meaningful decisions, as will other provisions requiring the professional and interdisciplinary preparation of the EIS. Consequently, the Regulations should not be considered mere bureaucratic changes of procedure without substance. Rather, they genuinely seek to improve the NEPA process and provide a consistently high level of environmental review.

IV. Authority for the Regulations

Initially, CEQ was considered only an advisory body designed to provide the President with a consistent source of information on environmental issues.[138] However, with the issuance of binding Regulations, questions may arise as to CEQ's authority to undertake their promulgation. The basis for this authority, as stated in the Regulations themselves,[139] rests on NEPA,[140] the Environmental Quality Improvement Act of 1970,[141] Section 309 of the Clean Air Act,[142] Executive Orders 11514[143] and 11991[144] and the constitutional duty of the President to see that the laws are faithfully executed.[145] This section first analyzes the establishment of CEQ and judicial pronouncements relating to its status. It then examines the changes brought about by Executive Order 11991, concluding with an analysis of the scope and validity of that Executive Order.

A. Establishment of CEQ under NEPA and Executive Order 11514

In enacting NEPA, Congress established the three-member Council on Environmental Quality (CEQ) in the Executive Office of the President[146] as the major environmental resource body for the President.[147] Congress also supplemented the establishment of CEQ by

[138] *See* Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 423 (5th Cir. 1973).

[139] CEQ Regulations, 43 Fed. Reg. 55,991 (1978) (to be codified in 40 C.F.R. § 1500.3).

[140] 42 U.S.C. §§ 4321 *et seq.* (1976).

[141] *Id.* §§ 4371 *et seq.*

[142] 42 U.S.C. § 7609 (Supp. I 1977).

[143] 3 C.F.R. 902 (1966-1970 Compilation).

[144] 3 C.F.R. 123 (1978).

[145] U.S. Const. art. II, sec. 3.

[146] 42 U.S.C. § 4342 (1976). The Council members, as of December, 1978, are Charles Warren (Chairman), Gus Speth, and Jane H. Yarn. Ninth Annual Report of the Council on Environmental Quality 582 (1978).

[147] The duties and functions of CEQ are:

creating the Office of Environmental Quality,[148] which provides the professional and administrative staff for CEQ.[149] In order to implement these provisions, in 1970 President Nixion issued Executive Order 11514.[150] The Executive Order set forth an environmental policy statement,[151] outlined the responsibilities of the federal agencies under NEPA[152] and specifically detailed the duties and func-

(1)to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USCS § 4341];

(2)to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act [42 USCS §§ 4331 et seq.], and to compile and submit to the President studies relating to such conditions and trends;

(3)to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act [42 USCS §§ 4331 et seq.] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4)to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5)to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6)to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7)to report at least once each year to the President on the state and condition of the environment; and

(8)to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

42 U.S.C. § 4344 (1976). See also text at notes 4-6, *supra*.

[148] Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371 *et seq.* (1976).

[149] 42 U.S.C. § 4372(d)(1). There are presently over fifty staff members. NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 582 (1978).

[150] 3 C.F.R. 902 (1966-1970 Compilation).

[151] Exec. Order 11514 § 1, 3 C.F.R. 902 (1966-1970 Compilation). Section 1 states:

The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Id.

[152] *Id.* § 2. Section 2 states:

Consonant with Title I of the National Environmental Policy Act of 1969, hereafter referred to as the "Act", the heads of Federal agencies shall:

(a)Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those

tions of CEQ.[153] Although the Executive Order directed CEQ to

directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b)Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

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

(d)Review their agencies' statutory authority, administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purpose and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes, and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1, 1970.

(e)Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f)Proceed, in coordination with other agencies, with actions required by section 102 of the Act.

Id.

[153] *Id.* § 3. Section 3 states:

The Council on Environmental Quality shall:

(a)Evaluate existing and proposed policies and activities of the Federal Government directed to the control of pollution and the enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment. This shall include continuing review of procedures employed in the development and enforcement of Federal standards affecting environmental quality. Based upon such evaluations the Council shall, where appropriate, recommend to the President policies and programs to achieve more effective protection and enhancement of environmental quality and shall, where appropriate, seek resolution of significant environmental issues.

(b)Recommend to the President and to the agencies priorities among programs designed for the control of pollution and for enhancement of the environment.

(c)Determine the need for new policies and programs for dealing with environmental problems not being adequately addressed.

(d)Conduct, as it determines to be appropriate, public hearings or conferences on issues of environmental significance.

(e)Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed

develop and issue Guidelines to aid federal agencies in the preparation of EIS's,[154] it was totally silent regarding compulsory agency compliance with these Guidelines.

In interpreting the authority of CEQ and the weight of the Guidelines, the courts have held that CEQ did not possess any regulatory powers, and that the Guidelines were merely advisory. In *Hiram Clarke Civic Club v. Lynn,*[155] the Court of Appeals for the Fifth Circuit viewed the CEQ Guidelines as advisory and, unlike agency regulations, lacking the force of law.[156] The case involved a suit to enjoin the construction of a federally funded housing project because the EIS did not conform to the CEQ Guidelines. Because the Department of Housing and Urban Development had complied with its internal procedures to determine when and how an EIS should be prepared, the court held that its possible noncompliance with the CEQ Guidelines raised no legal issues.[157] CEQ was deemed solely a research resource and advisory body lacking authority to issue regulations mandating compliance with NEPA.[158]

Other courts have agreed with this assessment of the status of CEQ. In one instance,[159] the court characterized CEQ's function as

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public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality.

(f)Coordinate Federal programs related to environmental quality.

(g)Advise and assist the President and the agencies in achieving international cooperation for dealing with environmental problems, under the foreign policy guidance of the Secretary of State.

(h)Issue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act.

(i)Issue such other instructions to agencies, and request such reports and other information from them, as may be required to carry out the Council's responsibilities under the Act.

(j)Assist the President in preparing the annual Environmental Quality Report provided for in section 201 of the Act.

(k)Foster investigations, studies, surveys, research, and analyses relating to (i) ecological systems and environmental quality, (ii) the impact of new and changing technologies thereon, and (iii) means of preventing or reducing adverse effects from such technologies.

Id.

[154] *Id.* § 3(h).

[155] 476 F.2d 421 (5th Cir. 1973).

[156] *Id.* at 424, 426.

[157] *Id.* at 426. The Court did not address the issue as to whether the HUD procedures did or did not conform to the CEQ Guidelines. *Id.*

[158] *Id.* at 423, 424.

[159] National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

non-regulatory and limited to information-gathering and coordination of federal actions under NEPA.[160] CEQ's sole duty was to review federal programs and activities and to keep the President informed of their status.[161] Another court[162] viewed the CEQ Guidelines as hortatory and without the force of law, thereby concluding that they were merely advisory in nature.[163]

The statutory language of NEPA also indicates that CEQ's proper role is advisory only. Throughout the statute, Congress referred to CEQ primarily in supervisory rather than regulatory terms.[164] There does not appear to be any language which purports to give CEQ any regulatory powers. In the debate over the establishment of CEQ, some legislators expressed concern that the functions of CEQ would conflict with those of the recently created Environmental Quality Council — an interdepartmental, cabinet-level body established by the President.[165] However, the hearings on NEPA made clear that the two bodies would have different functions. The Cabinet Committee would be responsible for implementing the directives of the

[160] *Id.* at 656.

[161] *Id.*

[162] Continental Illinois National Bank and Trust v. Kleindist, 382 F. Supp. 107 (N.D. Ill. 1973).

[163] *Id.* at 114, 119. However, there have been a few courts which have indicated that CEQ's role should be more than just advisory, since it is the agency entrusted with the responsibility of developing and recommending national environmental policies. They have held that even though CEQ is not strictly charged with the administration of NEPA, their interpretation of the Act should be entitled to great deference and their Guidelines afforded substantial weight. *See* Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975); Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2nd Cir. 1972); Carolina Action v. Simon, 389 F. Supp. 1244 (M.D. N.C. 1975). *See also, Recent Development, Ely v. Welde: The Application of Federal Environmental Policy to Revenue Sharing Programs,* 1972 DUKE L.J. 667, 677 (1972).

[164] Congress uses such phrases in the statute as: assist and advise, 42 U.S.C. § 4344 (1); gather information, *id.* § 4344(2); analyze and interpret, *id.* § 4344(2); review and appraise, *id.* § 4344(3); develop and recommend policies, *id.* § 4344(4); conduct investigations, studies, surveys, research, and analyses, *id.* § 4344(5); document and define changes, *id.* § 4344(6); report, *id.* §4344(7); make and furnish studies, *id.* § 4344(8). For the full text of Section 4344, see note 153, *supra.*

[165] H.R. REP. No. 91-378, 91ST CONG., 1ST SESS., *reprinted in* (1969) U.S. CODE CONG. AND AD. NEWS 2751. The Environmental Quality Council was established by the President in Executive Order 11472, 3 C.F.R. 792 (1966-1970 Compilation). In order to avoid confusion after CEQ was established by NEPA, the name was changed to the Cabinet Committee on the Environment by Executive Order 11514 § 4, 3 C.F.R. 902, 904 (1966-1970 Comp.). The Cabinet Committee consists of the President, Vice President, and Secretaries of Interior; Agriculture; Health, Education, and Welfare; Transporation; Housing and Urban Development; and Commerce. Exec. Order 11472 § 101(C), 3 C.F.R. 792 (1966-1970 Comp.).

President, coordinating federal activities and resolving internal policy disputes between the agencies.[166] On the other hand, CEQ would provide a consistent and expert source of information for review of national policies and environmental trends, both on a short term and long term basis.[167] The information supplied by CEQ would constitute the data base upon which the Cabinet Committee would rely in making policy decisions on environmental affairs.[168] Under this scenario, CEQ seemingly would not have the authority to issue binding Regulations.

Thus, a review of Executive Order 11514, the legislative history of NEPA, and judicial decisions all point to a lack of power in CEQ to issue binding regulations. Such unanimity defined the unchallenged status of CEQ before the issuance of Executive Order 11991.[169]

B. Executive Order 11991

In 1977, Executive Order 11991 amended Executive Order 11514[170] in order to change the duties of CEQ and the responsibilities of the federal agencies in two significant ways. The first revision authorized and directed the issuance to all federal agencies of CEQ Regulations compelling implementation of the procedural provisions of NEPA.[171] The second revision directed federal agencies to comply

[166] H.R. REP. No. 91-378, 91st Cong., 1st Sess., *reprinted in* (1969) U.S. CODE CONG. AND AD. NEWS 2751, 2754, 2755. *See also* 115 CONG. REC. 26,572 (1969).

[167] H.R. REP. No. 91-378, 91st Cong., 1st Sess., *reprinted in* (1969) U.S. CODE CONG. AND AD. NEWS 2751, 2756, 2758.

[168] *Id.* at 2755.

[169] 3 C.F.R. 123 (1978).

[170] 3 C.F.R. 902 (1966-1970 Comp.).

[171] Exec. Order 11514 § 3, 3 C.F.R. 902 (1966-1970 Comp.), *amended by* Exec. Order 11991 § 1, 3 C.F.R. 123 (1978). Section 3 of Executive Order 11514 is set out in full at note 159, *supra*. Section 1 of Executive Order 11991 states:

> Subsection (h) of Section 3 (relating to responsibilties of the Council on Environmental Quality) of Executive Order No. 11514, as amended, is revised to read as follows:
>
> "(h)Issue regulations to Federal agencies for the implementation of the procedural provisions of the Act (42 U.S.C. 4332(2)). Such regulations shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. They will be designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives. They will require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses. The Council shall include in its regulations procedures (1) for the early

with the Regulations issued by CEQ.[172] Thus, CEQ was clothed with the authority to issue Regulations and to compel federal agencies to abide by its directives. The ultimate validity of these Regulations, however, depends on the ability of the President to issue an Executive Order granting such regulatory authority to CEQ. Since prior judicial interpretations and the legislative history of NEPA indicate that CEQ did not previously possess such authority, the issue obviously centers on whether the executive has the power to bestow such authority on a previously restricted body.

Generally, Executive Orders and Presidential proclamations receive the full force and effect given to Congressional legislation, provided they are issued pursuant to a statutory mandate or delegation of authority from Congress.[173] In the absence of this delegation of authority, the President may not act as a lawmaker.[174] The Executive cannot rely solely on the constitutional provision which entrusts him with the duty to ensure that the laws are faithfully executed;[175] that provision, standing alone, alone, does not give an Executive Order the force and effect of law.[176] Therefore, valid issuance of the Executive Order depends on whether NEPA authorizes the promulgation of binding Regulations.

Although NEPA does not expressly authorize the President to direct the promulgation of binding Regulations implementing the Act, the statute does imply that such authority exists. NEPA requires CEQ to perform several functions for the President. These

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preparation of environmental impact statements, and (2) for the referral to the Council of conflicts between agencies concerning the implementation of the National Environmental Policy Act of 1969, as amended, and Section 309 of the Clean Air Act, as amended, for the Council's recommendation as to their prompt resolution."

Id.

[172] For the text of the duties of the federal agencies, as found in § 2 of Executive Order 11514, see note 158, *supra*. Section 2 of Executive Order 11991 states:

The following new subsection is added to Section 2 (relating to responsibilities of Federal agencies) of Executive Order No. 11514, as amended:

"(g)In carrying out their responsibilties under the Act and this Order, comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements".

Executive Order 11991 § 2, 3 C.F.R. 123 (1978).

[173] *See* Independent Meat Packers v. Butz, 526 F.2d 228 (8th Cir. 1975); Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969); Farkas v. Texas Instruments, Inc., 375 F. 2d 629 (5th Cir. 1967); Farmer v. Philadelphia Electric Co., 329 F.2d (3rd Cir. 1964).

[174] Independent Meat Packers v. Butz, 526 F.2d 228, 235 (8th Cir. 1975).

[175] U.S. CONST. art. II, sec. 3.

[176] *See* Youngstown Sheet and Tubing Co. v. Sawyer, 343 U.S. 579 (1952).

duties include recommending national environmental policies to the President,[177] reviewing activities of the federal government to determine compliance with the Act,[178] and furnishing whatever reports and studies are requested by the President on environmental affairs.[179] All these functions are an integral part of the NEPA process. However, nowhere does NEPA state what actions the President must take in response to CEQ's activities. The natural implication is that the President must have the authority to implement these reports and recommendations which CEQ must provide. The Congressional scheme would certainly appear purposeless if the President could only receive these recommendations without being able to act upon them. Moreover, Congress certainly would not have established CEQ as part of the Executive Office of the President if it intended the President to merely forward these recommendations to it for action; if that were Congress's intent, it would instead have established CEQ as a Congressional agency rather than an Executive agency. Therefore, the only logical result is that the President has the power to implement CEQ's recommendations, presented to him in the form of the Regulations. The binding nature of the Regulations does not result from any inherent authority given to CEQ by NEPA; rather, it flows directly from the President's authority, implied from NEPA, to implement the recommendations which that statute requires CEQ to provide. The Regulations thus are not promulgated under CEQ's authority, but under the President's own implied authority.

There also exists another indirect source of statutory authority for the Regulations. NEPA requires the President to prepare an annual Environmental Quality Report[180] which must contain, among other

[177] 42 U.S.C. § 4344 (4) (1976).

[178] *Id.* § 4344(3).

[179] *Id.* § 4344(2), (8).

[180] *Id.* § 4341. Section 4341 states:

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the

things, a program for remedying the deficiencies of existing activities of the federal government in implementing the policies of NEPA.[181] Because NEPA requires the preparation of a program and not just a report, the President inferentially has the authority to implement that program. The CEQ Regulations may be deemed to constitute such a program; by means of the Executive Order, the President has delegated authority to CEQ[182] to develop the Regulations as his program for remedying the deficiencies in federal compliance with NEPA. Since the Regulations constitute the program mandated by NEPA, the President has the authority to implement them and make them binding on all federal agencies.

Despite the fact that implicit statutory authority does exist for the Regulations they most likely will be subjected to judicial challenges. However, rather than taking the form of direct attacks on the validity of the Regulations,[183] the challenges will probably be indirect. A federal agency might continue to operate under its old procedures and not bother to comply with the Regulations, resulting in the filing of a suit by a public interest or environmental group[184] seeking to enjoin a project due to the inadequacy of the EIS. Since the responsible agency will most likely be operating under its own internal procedures, the plaintiffs will claim that those procedures do not conform to the CEQ Regulations. Such a scenario, of course, will not come about if all agencies comply with the Regulations.[185] However, given the inherent inertia of the bureaucracy, such a situ-

programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Id.

[181] *Id.* § 4341 (5).

[182] The President is allowed to delegate authority to appropriate officials. 3 U.S.C. § 301 (1976).

[183] No federal agency is likely to challenge the Regulations in court; instead, an agency would just ignore them if it didn't wish to undertake compliance. The agency thus would continue to operate under its own procedures.

[184] Over two-thirds of the plaintiffs in the nearly 1,000 NEPA cases to date have come from such a group. NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 408 (1978).

[185] If all federal agencies revise their procedures to comply with the Regulations, the Regulations will have achieved their purpose and NEPA will be improved. However, due to the differences in present agency practices and bureaucratic inertia, there most likely will be a few recalcitrant agencies.

ation seems only remotely possible. Thus, some type of judicial challenge to CEQ's new Regulations is almost certain to occur.

V. Conclusion

The National Environmental Policy Act (NEPA) set forth a national policy concerning the protection and enhancement of the quality of the environment. To implement this policy, NEPA charged all federal agencies with certain responsibilities and created the Council on Environmental Quality (CEQ) to review all federal actions under NEPA. Soon after the Act's enactment, CEQ issued Guidelines to the agencies to assist them in implementing the Act. Recently, to further meet its goals, CEQ has, pursuant to Executive Order, promulgated new, binding Regulations implementing the procedural provisions of NEPA. Implied statutory authority exists for the President to direct CEQ to develop and issue these Regulations and to order the agencies to comply with them.

The new Regulations will greatly improve the NEPA process. There will now be a unified approach by all federal agencies in implementing the procedural provisions of NEPA. This new approach will lead to greater consistency, improved decisions, and a more informed public better able to understand the procedures of the various federal agencies. The new Regulations will also enhance the primary purpose of NEPA—the protection of the environment. As envisioned by the Act, environmental considerations will become a significant part of the decision-making process and will be considered early in the planning stages of every major federal action.