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# EMERGENCY EXCEPTIONS FROM NEPA: WHO SHOULD DECIDE?

*Robert Orsi\**

## I. INTRODUCTION

In 1970, the National Environmental Policy Act (NEPA) became law.<sup>1</sup> The Act established environmental quality as a national priority, and involved all federal agencies in the process of making the environment an essential consideration of national policy.<sup>2</sup>

The framers of NEPA intended that the Act prevent future actions which might endanger public health or cause irreparable damage to the air, land and water resources of the nation.<sup>3</sup> Congress desired

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<sup>1</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1982).

<sup>2</sup> The policy goals of NEPA are set out in § 101(a):

it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of past and future generations of Americans.

Section 101(b) lists six major environmental objectives:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable or unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331 (1982).

<sup>3</sup> 115 CONG. REC. S.40,416 (1969) (remarks of Senator Henry Jackson). For a detailed discussion of the legislative history of NEPA, see E. Hanks & J. Hanks, *An Environmental*

that federal agencies would plan and control use of the environment rather than make arbitrary decisions.<sup>4</sup> NEPA was to be the means of ensuring such planning.<sup>5</sup>

Section 102(2)(C)<sup>6</sup> of NEPA fulfilled this role. Dubbed as the "action-forcing"<sup>7</sup> provision of NEPA, it ensured that all federal agencies would consider the cost to the environment of their actions by setting out several duties that each agency must perform.<sup>8</sup> Section 102(2)(C)<sup>9</sup> directed all federal agencies to prepare a detailed report which would indicate the environmental impact of an action, alternatives to that action, and identify any irreversible commitment of resources to the project. This report is the environmental impact statement (EIS).

Section 102(2)(C) thus mandated that all federal agencies consider the environmental consequences of their actions before acting.<sup>10</sup> Under the statute, each agency was to administer this provision "to the fullest extent possible."<sup>11</sup> The Conference Committee report accompanying NEPA indicates that only a direct conflict between the requirements of NEPA and the agency's statutory mandate would excuse compliance with NEPA.<sup>12</sup> Section 102(2)(C), which grew into

*Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L REV. 230 (1970); R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH, Ch. 2 (1976).

<sup>4</sup> STAFFS OF SENATE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, AND HOUSE COMMITTEE ON SCIENCE AND ASTRONAUTICS, CONGRESSIONAL WHITE PAPER ON A NATIONAL POLICY FOR THE ENVIRONMENT, 90th Cong., 2d Sess. 18 (Comm. Print. 1968).

<sup>5</sup> See *supra* note 3.

<sup>6</sup> 42 U.S.C. § 4332 (1982).

<sup>7</sup> See 115 CONG. REC. S. 40,416 (1969) (remarks of Senator Henry Jackson).

<sup>8</sup> 42 U.S.C. § 4332 (1982) directed all federal agencies to:

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.

<sup>9</sup> 42 U.S.C. § 4332(2)(C)(1982).

<sup>10</sup> See *e.g.*, 115 CONG. REC. § 7815 (daily ed. July 10, 1969).

<sup>11</sup> See § 102, 42 U.S.C. § 4332 (1982).

<sup>12</sup> The Congressional Conference Report accompanying NEPA directed that: each agency of the Federal Government shall comply with the directives set out . . . unless the existing law applicable to such agency's operations *expressly prohibits or makes full compliance with one of the directives impossible*. If such is found to be the case, then compliance with the particular directive is not immediately required

the requirement that a federal agency prepare an EIS before taking any major action significantly affecting the quality of the human environment,<sup>13</sup> has been strictly construed by the courts.<sup>14</sup>

Agencies complied inconsistently with NEPA's requirements in the early 1970s,<sup>15</sup> and in 1977 President Carter issued Executive Order 11,991<sup>16</sup> directing the Council on Environmental Quality (CEQ), NEPA's advisory body, to publish new regulations.<sup>17</sup> These regulations would be binding upon all federal agencies, unless there was a clear conflict of statutory authority.<sup>18</sup> In 1978, CEQ issued such regulations, which forced compliance with the procedural aspects of NEPA and encouraged uniformity in preparation of the EIS.<sup>19</sup> The new binding regulations were to help effectuate the purpose of NEPA—to force agencies to take environmental values into account during the decision-making process.<sup>20</sup> Included within these regulations was § 1506.11, an exception for emergency situations, which freed federal agencies from following the new regulations if CEQ determined that an emergency existed.<sup>21</sup>

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. . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that *no agency shall utilize an excessively narrow construction of its existing authorizations to avoid compliance* (emphasis supplied).

H.R. Rep. No. 91-765, 91st Cong., 1st Sess. 9-10, *reprinted in* 2 U.S. CODE. CONG. & AD. NEWS 2776. *See also*, Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 648-9 (1970). *See* *Envtl. Defense Fund v. TVA*, 468 F.2d 1164, 1173-76 (6th Cir. 1972).

<sup>13</sup> § 102(2)(C), 42 U.S.C. § 4332 (1982). This action has been defined to include "almost every form of significant federal activity." *Chelsea Neighborhood Ass'ns v. United States Postal Service*, 516 F.2d 378, 382 (2d Cir. 1975); *Calvert Cliffs Coordinating Committee v. United States AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

<sup>14</sup> *See, e.g., Calvert Cliffs*, 449 F.2d at 1115; *Silva v. Lynn II*, 482 F.2d 1282, 1284-85 (1st Cir. 1973). For a discussion of various methods of reviewing agency decisions to prepare an EIS and the adequacy of the EIS once prepared, see D. MANDELKER, *NEPA IN THE COURTS*, Chs. 8 & 10 (1984).

<sup>15</sup> One commentator noted such inconsistencies as "inconsistent terminology" and "differences on public participation and use in the decision-making process." Liebesman, *The Council on Environmental Quality's Regulations to Implement the National Environmental Policy Act—Will They Further NEPA's Substantive Mandate?*, 10 E.L.R. 50039, 50045 (1980).

<sup>16</sup> Exec. Order No. 11,991, 3 C.F.R. 123 (1978).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, § 2.

<sup>19</sup> *See* Council on Environmental Quality Final Regulations Implementing the Procedural Provisions of NEPA, 43 Fed. Reg. 55,978 (1978) (codified in 40 C.F.R. § 1500 (1986)) (hereinafter CEQ Regulations).

<sup>20</sup> *See supra* note 8.

<sup>21</sup> *See* 40 C.F.R. § 1506.11 (1986) which reads as follows:

This provision makes possible agency action without agency compliance with CEQ's binding regulations. Once CEQ has determined that an emergency exists, it mandates consultation between the agency preparing the EIS and CEQ to prepare alternative arrangements as soon as possible.<sup>22</sup> CEQ has not defined what situations would constitute an emergency, nor has it specified whether § 1506.11 waives the statutory requirements for preparation of an EIS.

While the emergency provision allows noncompliance with CEQ's own regulations, it is capable of a more expansive interpretation. The main case which has reviewed the emergency provision, *Crosby v. Young*,<sup>23</sup> has read the provision to allow CEQ to modify NEPA's requirement that a federal agency prepare and release an EIS before it takes any major action significantly affecting the environment.<sup>24</sup> By extending the court's reasoning in *Crosby*, CEQ may also be able, in a situation it defines as an emergency, to nullify the entire EIS requirement.

This emergency exception represents a danger to the EIS process. NEPA commands federal agencies to prepare an EIS,<sup>25</sup> and does not provide any exception for emergencies. Section 1506.11, a purely regulatory provision, thus modifies the statute. Today, once an "emergency" exists, the clear command of NEPA becomes blurred, and then a federal agency may cut short the EIS process or take a major action before completing the EIS process. Such an interpretation represents a novel precedent that blunts the EIS procedure required by NEPA and could severely harm consideration of environmental factors in agency decision making.

This Comment discusses the appropriateness and legality of § 1506.11. The Comment then uses the *Crosby* case to illustrate the harm that such an emergency exception can cause to consideration of the environmental factors mandated by NEPA. In *Crosby*, a great expenditure of resources occurred before the release of the EIS and

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Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

<sup>22</sup> *Id.*

<sup>23</sup> 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>24</sup> *See id.* at 1387.

<sup>25</sup> *See* 42 U.S.C. § 4332 (1982).

therefore detailed consideration of environmental factors in the EIS occurred too late to affect some of the basic actions already taken.<sup>26</sup>

The Comment next considers how both Congress and the courts have emphasized strict adherence to the EIS requirement, and note how rarely there have been emergency exceptions and in what situations. Thus, a CEQ emergency provision as currently interpreted would seem to encroach upon power that Congress has reserved to itself and the courts have respected.

Third, the Comment examines the legal deficiencies of § 1506.11. This provision may be *ultra vires* with respect to executive order 11,991. While this order authorized regulations to enforce procedural compliance with NEPA, it did not authorize substantive alterations of NEPA. In addition, if the statutory mandate simply does not grant CEQ any power to substantively change the EIS requirement, a reviewing court should not grant CEQ's emergency decisions any deference, since such a provision, as drafted, is not a reasonable interpretation of CEQ's statutory mandate.

The Comment shall then discuss how § 1506.11 may hamper judicial review of an agency's consideration of environmental factors mandated by NEPA. Since courts should only review an EIS to ensure adequate procedural compliance with NEPA,<sup>27</sup> a provision that waives or delays the EIS requirement deprives the court of a critical tool with which to measure compliance. In addition, by allowing a premature commitment of resources to a project, § 1506.11 may deprive a court of any opportunity to provide for remedial measures should an agency inadequately consider NEPA's goals.

Finally, the Comment offers some suggestions for an improved emergency procedure. Should Congress desire to provide in advance for emergency exceptions to NEPA requirements, it could create a procedure that would ensure proper deference to NEPA's goals and build an adequate record for review. Thus, Congress can protect the NEPA process while still allowing for a rapid response to an emergency situation.

## II. *CROSBY V. YOUNG*: FRUSTRATING THE NEPA PROCESS

In the spring of 1980, the General Motors Corporation (GM) informed the City of Detroit that it would phase out two of its auto-

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<sup>26</sup> See *infra* notes 28 to 68 and accompanying text.

<sup>27</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); see also *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 98 (1983).

motive plants in Detroit,<sup>28</sup> an action that would result in a loss of approximately 6,150 jobs.<sup>29</sup> Detroit was then mired in a severe economic depression, brought on in large measure by the slump in the automotive industry.<sup>30</sup> The Chrysler Corporation had recently closed its own automotive plant, costing the city 3,000 jobs.<sup>31</sup>

To replace its aging and now obsolete automotive plants, GM planned to build a new facility. Despite offers to locate the new plant in several states other than Michigan,<sup>32</sup> the company approached Mayor Coleman Young of Detroit with an offer to build the plant within the city<sup>33</sup> if a suitable site could be found.<sup>34</sup> The plant would require an approximately 500 acre site with a rectangular shape and access to both a long haul railroad and a freeway system.<sup>35</sup>

Detroit began looking at nine possible sites for the plant.<sup>36</sup> By midsummer the city began favoring the site of the abandoned Dodge Main automobile plant, which the Chrysler Corporation had shut down in January, and the surrounding neighborhood.<sup>37</sup> The area, called the Central Industrial Park (CIP), encompassed 1,176 buildings, 1,362 households and 3,438 people.<sup>38</sup> In July 1980 the city began purchasing property in the CIP area (which included part of a neigh-

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<sup>28</sup> Testimony of Emmett S. Moten, Jr., Appellee's Appendix at app. 2,3, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Both Detroit and the neighboring city of Hamtramck were involved in planning for the new GM facility. For simplicity, the text shall refer only to Detroit.

<sup>29</sup> See Draft Environmental Impact Statement (DEIS), Central Industrial Park, October 15, 1980, II-5.

<sup>30</sup> See Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. GM and the City of Detroit*, 41 WASH. & LEE L. REV., 49, 60-61 (1984). Detroit's unemployment rate stood at 18.3%, compared to the national average of 7.8%; unemployment among blacks was in excess of 25% and among black youths a staggering 55-60%. See Appellee's Appendix, *supra* note 28 at app. 8. See also Testimony of Mayor Coleman A. Young, Appellee's Appendix, *supra* note 28 at app. 81.

<sup>31</sup> See Bukowczyk, *supra* note 30 at 60.

<sup>32</sup> See Testimony of Mayor Coleman A. Young, Appellee's Appendix, *supra* note 30 at app. 83.

<sup>33</sup> Testimony of Mayor Coleman A. Young, Appellee's Appendix, *supra* note 30 at app. 83.

<sup>34</sup> GM had a definite plan for the configuration of the site. It had recently built plants at Lake Orion and Oklahoma City (so-called "Green Fields" structures—large one story complexes) which were identical in size and shape to the plant GM wanted to build in Detroit. See Letter from Thomas A. Murphy, Chairman of GM, to Mayor Coleman A. Young and Howard Woods, Chairman of the Economic Development Corporation of the City of Hamtramck (October 8, 1980) (summarizing GM's conditions discussed during the summer). See also *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468 (Mich. 1981).

<sup>35</sup> See L. Bachelor, *Urban Industrial Renewal in Detroit: A New Partnership or an Old Conspiracy*, p. 6 (1981) (unpublished manuscript).

<sup>36</sup> See DEIS, *supra* note 29 at § 2.

<sup>37</sup> See Bachelor, *supra* note 35, at 7-8.

<sup>38</sup> For a discussion of the Poletown area during this time, see Bukowczyk, *supra* note 30.

borhood known as Poletown). Detroit began preparing for establishment of the CIP by doing title work in Poletown,<sup>39</sup> to take advantage of a new Michigan "quick-take" eminent domain statute,<sup>40</sup> a measure passed to facilitate economic plans such as this one.

At that time, Detroit also began preparing a Draft Environmental Impact Statement (DEIS)<sup>41</sup> for the project. The DEIS considered alternative sites, even though Detroit had begun purchasing property in the CIP area.<sup>42</sup> In August the city began scoping sessions.<sup>43</sup> During these sessions, issues concerning the CIP area that were salient to the EIS process were identified. A scoping document was released on August 29th, 1980.

That same day the city requested an advance of \$60,500,000 for a loan guarantee<sup>44</sup> from the Department of Housing and Urban Development (HUD), for commitment to the CIP area. HUD could not approve this request until completion and release of the EIS, since HUD's approval would represent federal agency action on a project requiring an EIS. At this time the city was still preparing the DEIS, not the final EIS.

On September 10, 1980, however, and again on September 22, Detroit formally requested that CEQ modify its procedural duties under NEPA, under the emergency provisions of the CEQ regulations.<sup>45</sup> The city contended that its horrendous economic condition constituted just such an emergency. It relied on the fact that the Governor of Michigan had declared a statewide economic emergency.<sup>46</sup> In addition, GM had set a firm deadline for the city: if Detroit did not turn over the CIP parcel (cleared of buildings) to GM by

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<sup>39</sup> Testimony of Emmett S. Moten, Jr., Appellee's Appendix, *supra* note 28 at app. 71.

<sup>40</sup> Michigan Economic Development Corporations Act, 1980 PA 87, M.C.L. 125.1602, M.S.A. 5.3520 (22).

<sup>41</sup> The DEIS is required under CEQ Regulations 40 C.F.R. § 1502.9 (1986). The DEIS must satisfy as fully as possible the EIS requirement. In the DEIS the agency must attempt to discuss all major points of view on the environmental impacts of the proposed action. *Id.* Once the agency releases the DEIS, it must solicit comments on the document before preparing a final EIS. *See* 40 C.F.R. § 1503.1 (1986).

<sup>42</sup> *See* testimony of Emmett S. Moten, Jr., Appellee's Appendix, *supra* note 28 at app. 90.

<sup>43</sup> Scoping sessions are required under CEQ Regulations 40 C.F.R. § 1501.7 (1986). Scoping sessions define the issues to be addressed in the EIS. The preparing agency invites all affected parties to participate in the scoping process.

<sup>44</sup> *See Crosby*, 512 F.Supp. at 1380.

<sup>45</sup> *See* Defendants' Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Preliminary Injunction at 53, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>46</sup> Letter from Emmett S. Moten, Jr., Director, Community & Economic Development Department, City of Detroit to Gus A. Speth, Chairman, CEQ (Sept. 22, 1980)(requesting § 1506.11 exception).



May 1, 1981, GM would build its plant elsewhere.<sup>47</sup> It was this firm deadline that led to the request for the emergency exception. The emergency was thus economic in nature, not environmental. The city needed to have financial resources in place to start buying and preparing the land, and to commence eminent domain proceedings. Without a funding commitment from HUD by October 1, 1980, the city could not ensure that the site would be ready by GM's deadline. The city also claimed that it needed to relocate elderly residents out of the neighborhood before winter.<sup>48</sup>

Due to these pressures, Detroit alleged—and CEQ agreed—that the CIP project could not go forward unless federal financial assistance was in place by October 1. On September 24, CEQ gave the city its emergency exemption, with the proviso that Detroit prepare the EIS before making any final decision.<sup>49</sup> Six days later, the Detroit Economic Development Corporation approved the completed project plan.<sup>50</sup>

HUD subsequently granted the city a \$60,500,000 loan guarantee. On October 15, 1980, Detroit released the DEIS, the Detroit Common Council approved the project plan for the CIP site.<sup>51</sup> Within a month the city began condemnation proceedings on the land within the CIP. Since Detroit could now commit funds to the CIP project, it seems unlikely that the final EIS could have had much effect in substantially altering the project.

There has been much criticism of Detroit's handling of the decision-making process.<sup>52</sup> The dissenting judge in a suit brought to block condemnation of the CIP property<sup>53</sup> stated that the way that Detroit "marshalled and applied its resources",<sup>54</sup> and acquired millions of dollars to spend on the CIP project before an EIS had been prepared, released, and commented upon, made the CIP "a fait accompli before

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* In fact, the elderly were not relocated before winter and the site was not to be turned over to GM until July 1. See Plaintiff's Trial Memorandum Regarding Claim I; Supplemental Memorandum on Claim II and III, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>49</sup> Letter from Gus A. Speth, Chairman, CEQ to Coleman A. Young, Mayor of Detroit (Sept. 24, 1980)(granting § 1506.11 exemption).

<sup>50</sup> The Detroit Economic Development Corporation was the official sponsor of the project. It was created by Michigan Public Act 338 (1974, amended 1978). It was responsible for creating plans for the project and designating a project area. However, for this project city staff had taken over many of the Corporation's functions. For a detailed discussion of the Corporation, see Bachelor, *supra* note 35 at 11-12.

<sup>51</sup> See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 468 (Mich. 1981).

<sup>52</sup> See, e.g., *id.* at 470-471 (Ryan, J., dissenting); Bukowczyk, *supra* note 30 at 66-67.

<sup>53</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

<sup>54</sup> *Id.* (Ryan, J., dissenting).

meaningful objection could be registered.”<sup>55</sup> Detroit simply may not have given itself time to encourage citizen participation or objection in the EIS process, time which could have had an effect on Detroit’s final decision. While it was supposed to be considering alternative sites and configurations, Detroit was purchasing land and following GM’s site configuration on the CIP.

Soon after the final EIS comment period expired and Detroit announced the final decision on the CIP site and configuration, residents of the Poletown area filed a suit based on NEPA, *Crosby v. Young*,<sup>56</sup> in federal court on March 17, 1981. By this time the city either owned, paid for, or had entered into a contract for 1,267 out of 1,674 parcels of land,<sup>57</sup> and the Wayne County Circuit Court confirmed Detroit’s title to all the land involved on March 27, 1981.<sup>58</sup>

The suit made several allegations, including the charge that CEQ could not grant exemptions to the statutory requirements of NEPA.<sup>59</sup> In discussing the emergency provision, the court noted that executive order 11,991 gave CEQ responsibility for enforcing NEPA.<sup>60</sup> Therefore, CEQ had the responsibility for interpreting NEPA’s procedural provisions.<sup>61</sup> Accordingly, the court accorded substantial deference to CEQ’s emergency provision,<sup>62</sup> and noted that CEQ could therefore “interpret the provisions of NEPA to accommodate emergency circumstances.”<sup>63</sup> The court went on to describe the gravity of the economic emergency facing the Detroit area, and noted alternative arrangements that Detroit and CEQ had made.<sup>64</sup> Since the court held CEQ’s interpretation of NEPA in substantial deference, it held that these alternative arrangements fulfilled NEPA’s requirements.<sup>65</sup>

The court was undoubtedly correct in stating that CEQ has responsibility for interpreting NEPA’s procedural provisions.<sup>66</sup> The court, however, failed to examine whether CEQ’s emergency pro-

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<sup>55</sup> *Id.*

<sup>56</sup> 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>57</sup> Defendants’ Brief, *supra* note 45 at 2.

<sup>58</sup> *Id.*

<sup>59</sup> Plaintiffs’ Reply in Support of Their Motion for a Preliminary Injunction in Opposition to Defendant’s Motions for Summary Judgment, and in Support of Plaintiffs’ Motion for Summary Judgment on Claims II and III at 30, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>60</sup> *Crosby*, 512 F.Supp. at 1386.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1386, 1387.

<sup>66</sup> *See* Exec. Order No. 11,991, 3 C.F.R. § 123 (1978).

vision, as used in the *Crosby* case, was a reasonable interpretation of CEQ's power under NEPA. NEPA requires an EIS in every proposal for major federal action.<sup>67</sup> Executive Order 11,991 gave CEQ the power to determine the procedure by which a federal agency can comply with the EIS requirement.<sup>68</sup> The *Crosby* court did not discuss the narrow nature of the executive order, which did not go beyond creation of a procedural interpretation of NEPA. CEQ's emergency exception is not a mere procedural interpretation of NEPA; it is a substantive alteration of NEPA's EIS requirement, and, therefore, a violation of NEPA. While there is no question of Detroit's dire economic situation, the court did not compare CEQ's emergency provision against the statute itself and its subsequent history, to determine whether Congress intended a waiver of NEPA's requirements and creation of alternative arrangements when poor economic conditions exist. Finally, by according substantial deference to CEQ's interpretation of NEPA, the court failed to do its own inquiry into what types of emergency situations would justify a departure from NEPA, and whether CEQ was the proper agency to be making such a determination. The court instead allowed the agency charged with interpreting procedural aspects of NEPA to alter the EIS requirement.

The Comment examines how Congress and the courts have stringently construed the EIS requirement, and the reasons for such a narrow construction, indicating that a broad emergency exception would be inappropriate unless Congress itself were to mandate such a procedure.

### III. THE EIS REQUIREMENT AND ITS EXCEPTIONS

#### A. *The Stringency of the EIS Requirement*

Congressional passage of NEPA indicated a desire for controlled and planned use of the environment.<sup>69</sup> The EIS requirement is the keystone of NEPA, designed to force all federal agencies to consider the environmental ramifications of their actions.<sup>70</sup> The purposes of the EIS requirement are twofold, in furtherance of that goal: first, the EIS should "provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with a project in the light of its environmental

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<sup>67</sup> See 42 U.S.C. § 4332(2)(C) (1982).

<sup>68</sup> See *supra* note 16.

<sup>69</sup> See *supra* note 4.

<sup>70</sup> See *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972).

consequences."<sup>71</sup> The EIS process fulfills the legislative intent that environmental factors be considered throughout the agency decision-making process.<sup>72</sup> Thus, an agency must consider the environmental impacts of its actions "at every distinctive and comprehensive stage of the process."<sup>73</sup>

Presumably, this means that Section 102(2)(C) requires advance review of environmental factors. The EIS would thus ensure environmentally informed decisionmaking at all stages of a project's progress. An EIS released after a decision has been made can hardly be an aid in the decision-making process. Thus, even CEQ's own regulations mandate that agencies "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values."<sup>74</sup> The EIS, then, is "the outward sign that environmental values have been considered."<sup>75</sup>

A second and equally important function of the EIS is public disclosure.<sup>76</sup> The public has a substantial role in the enforcement of NEPA. One commentator has called the public a "consultant" in the decision-making process.<sup>77</sup> Therefore, the preparer should make the EIS available to the public before decisions can be made,<sup>78</sup> and also solicit public comments before completing the final EIS.<sup>79</sup> These requirements give the public a role during the decision-making process, when comments can have a real, constructive impact.

In addition to ensuring that citizens are granted a voice in the decision-making process, the EIS exposes the preparing agency to public criticism to ensure informed decision making.<sup>80</sup> An impact statement should be sufficiently detailed for the "public to make an informed evaluation,"<sup>81</sup> and is only sufficient if it enables "those who did not have a part in its compilation to understand and consider

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<sup>71</sup> *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

<sup>72</sup> See *Calvert Cliffs*, 449 F.2d at 1117-18.

<sup>73</sup> *Id.* at 1119.

<sup>74</sup> 40 C.F.R. § 1501.2 (1986).

<sup>75</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

<sup>76</sup> See *Environmental Defense Fund v. Corps of Eng'rs of the United States Army*, 325 F.Supp. 749, 759 (E.D. Ark. 1971).

<sup>77</sup> W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 7.4, p. 727 (1977); see also *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1073-4 (1st Cir. 1980).

<sup>78</sup> 40 C.F.R. § 1500.1(b) (1986).

<sup>79</sup> 40 C.F.R. § 1503.1(a)(4)(1986).

<sup>80</sup> *Silva v. Lynn II*, 482 F.2d 1282, 1284-5 (1st Cir. 1973); see also Comment: *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation*, 11 *FORDHAM URB. L.J.* 527, 532, 547-8 (1983).

<sup>81</sup> *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

meaningfully the factors involved."<sup>82</sup> By requiring this public input during, and not after, the decision-making process, the EIS ensures that agency decisions are not made in a vacuum, and forces the agency to make the most reasoned, considered decision possible.

In summary, the EIS is proof that an agency has considered the environmental impacts mandated by the statute. By forcing decision-makers to consider environmental factors and by giving the public an opportunity to review and criticize those same factors, the EIS upholds the integrity of the decision-making process.<sup>83</sup>

Given the importance of the EIS, reviewing courts have ensured the dual function of the document by reviewing whether an agency has complied with the procedural requirements of NEPA.<sup>84</sup> Accordingly, courts have held NEPA's requirements to be not flexible and have required compliance with NEPA "to the fullest extent possible,"<sup>85</sup> regardless of the administrative difficulties, delays or costs due to compliance.<sup>86</sup> For example, in *Grazing Fields Farm v. Goldschmidt*,<sup>87</sup> Massachusetts state officials had prepared an EIS under the authority of the Federal Highway Administration which favored a planned highway expansion.<sup>88</sup> The state, however, later prepared an addendum to the EIS which responded to new concerns. This addendum never became part of the federal EIS, and the final EIS merely discussed the new concerns in a footnote.<sup>89</sup> The appeals court rejected the federal agency's contention that the EIS, when considered with other documents supporting the decision, and the administrative record, was adequate.<sup>90</sup> The court, while indicating that its review was essentially to ensure procedural compliance with NEPA,

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<sup>82</sup> *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974).

<sup>83</sup> *Silva v. Lynn II*, 482 F.2d 1282, 1284-5 (1st Cir. 1973). See also *Johnston v. Davis*, 698 F.2d 1088, 1091 (10th Cir. 1983); *Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1011, 1029 (2d Cir. 1983).

<sup>84</sup> *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

<sup>85</sup> See *Calvert Cliffs*, 449 F.2d at 1119. This case discussed for the first time in detail the procedural requirements of § 102(2)(C) of NEPA. The court noted that the procedural requirements of § 102(2)(C) were not flexible, but established a "strict standard of compliance." *Id.* at 1112. The language of § 102(2)(C) required agencies to comply with NEPA's directives "to the fullest extent possible unless there is a clear conflict of statutory authority," and therefore "considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." (emphasis in original) *Id.* at 1115.

<sup>86</sup> *Id.*

<sup>87</sup> 626 F.2d 1068 (1st Cir. 1980).

<sup>88</sup> *Id.* at 1070.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1070, 1071.

ruled that studies or memoranda not contained within an EIS can not make a defective EIS adequate.<sup>91</sup>

The court rested its opinion on the importance of the EIS as a full disclosure document: the EIS involves other federal agencies in the decision-making process and allows public oversight of the process.<sup>92</sup> Other documents in the administrative record but not in the EIS do not reach the EIS' audience, and hinder "the endeavors of watchdogs"<sup>93</sup> and "mute[s] those most likely to identify problems and criticize decisions."<sup>94</sup> In sum, a court will require adherence to the EIS process since the document is proof that all relevant actors have had an opportunity to contribute to a decision. To further that end, strict procedural compliance is necessary.

A federal decision taken before the completion of the EIS process would frustrate the goals of timely comment and criticism. Therefore, courts have long required that agencies prepare an adequate EIS *before* taking action.<sup>95</sup> An opinion by the 8th Circuit Appeals Court in *Minnesota Public Interest Research Group v. Butz*<sup>96</sup> illustrates the reasoning behind this requirement. In *Butz*, the district court enjoined logging operations in a wilderness area until the Forest Service prepared, among other documents, the EIS.<sup>97</sup> On an appeal of the injunction, the appeals court noted that, even though the agency had completed a draft EIS, there was no compliance with NEPA until the Forest Service released the final EIS.<sup>98</sup> To lift the injunction would allow logging while the agency was still preparing the final EIS, and thus the logging would be federal action before the completion of the NEPA process. The court noted:

Until the final statement has been filed it would only serve to give a judicial recognition to the "futility" of the NEPA process if the District Court dissolved its injunction on the basis of the draft statement. That would constitute an admission that the

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<sup>91</sup> *Id.* at 1072.

<sup>92</sup> *Id.* at 1073.

<sup>93</sup> *Id.* at 1073, 1074.

<sup>94</sup> *Id.* at 1074.

<sup>95</sup> *Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975).

<sup>96</sup> 498 F.2d 1314 (8th Cir. 1974).

<sup>97</sup> *Id.* at 1316.

<sup>98</sup> *Id.* at 1323, 1324. The court noted that the DEIS could not be the basis for an agency decision. It stated:

[A] draft statement is not the basis of an agency decision. Its function is to elicit comment that will contribute to a final statement, and it is the final statement that is supposed to serve as the basis for agency assessment of the environmental implications of the project.

*Id.*, quoting *Sierra Club v. Mason*, 365 F.Supp. 47 (D. Conn. 1973).

final decision has already been made without consideration of the public reaction and comments to the draft statement.<sup>99</sup>

The court's reasoning for upholding the injunction indicates that a critical function of the reviewing court is to ensure that an agency has critically evaluated environmental consequences before taking action.<sup>100</sup> Without timely compliance, environmental harm may occur while an agency is preparing the EIS.

The strict procedural requirement of the EIS seems to indicate that a reviewing court should view any exceptions to NEPA's procedures suspiciously. A broad emergency exception—especially an undefined one—would frustrate the goals of the EIS as outlined above. An emergency decision might preclude a full consideration of environmental factors. In addition, if action is taken before release of an EIS, there is little opportunity for the public to impact the NEPA process. Therefore, courts should narrowly construe exceptions to NEPA's procedures. The next section will examine occasions when courts have allowed such exceptions.

### *B. Exceptions from the NEPA Process*

Exceptions from the EIS requirement are rare. In the past, Congress explicitly acted to exempt certain programs from NEPA. If Congress has not acted explicitly to exempt a program, a court will allow an exception from the EIS requirement only where Congress created a direct conflict between NEPA and another statute and that conflict precludes compliance with NEPA.<sup>101</sup> This section briefly discusses how both types of exceptions from the EIS requirement indicate that Congress did not intend CEQ to have the power to excuse compliance, but rather reserved such power to itself.

Congress has allowed exceptions to the EIS process in limited circumstances, such as exempting agencies with goals parallel to NEPA's.<sup>102</sup> Congress also has acted explicitly in rare instances to

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<sup>99</sup> *Id.* at 1324.

<sup>100</sup> *See e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1975).

<sup>101</sup> *Calvert Cliffs*, 449 F.2d at 1115 n.12. There is no national security exemption from NEPA. *See Concerned about Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977), but under the Freedom of Information Act, in certain situations the government may not have to disclose whether it complied with NEPA. *Weinberger, Secretary of Defense v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143-46 (1981).

<sup>102</sup> Congress has, for instance, exempted the Environmental Protection Agency (EPA) from NEPA's requirements in certain situations, because EPA carries out its own program for environmental protection, which is considered the functional equivalent of NEPA. Thus, Congress has protected EPA's jurisdiction over air and water quality by exempting EPA's

continue a program that otherwise would be delayed or stopped by NEPA.<sup>103</sup> For example, NEPA litigation caused a stoppage of work on the Alaska pipeline. Congress was able to restart the project by enacting legislation making the President's decisions on the adequacy of an EIS conclusive and denying judicial review.<sup>104</sup>

An exception from NEPA is far more likely to occur, however, when Congress has acted to create direct conflicts with the NEPA statute, based on either a specific deadline or a strict time constraint. In these cases an agency may not be able to comply with NEPA due to the statutory conflict.<sup>105</sup> In these cases the courts must, of necessity, scrutinize carefully for evidence of statutory conflict.

The Supreme Court considered this issue in *Flint Ridge Development Company v. Scenic River Association of Oklahoma*.<sup>106</sup> In

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duties under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982) and the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982) from NEPA requirements. See *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973); *Portland Cement Ass'n v. Rucklehaus*, 486 F.2d 375, 384-85 (D.C. Cir. 1973). Thus, Congress has protected EPA's jurisdiction over air and water quality by exempting EPA's duties under the Clean Air Act, 42 U.S.C. §§ 7401-7642, and the Clean Water Act, 33 U.S.C. §§ 1251-1376 from NEPA.

<sup>103</sup> See *Alaska Natural Gas Transportation Act*, 15 U.S.C. § 719(h)(c)(3) (1982); *The Federal-Aid Highway Act of 1973*, Pub. L. No. 93-87, § 154, 87 Stat. 250, 275 (1973). Other projects exempted from NEPA include the *Energy Supply and Environmental Coordination Act of 1974*, 15 U.S.C. § 793(c)(1) (1982); *Disaster Relief Act of 1974*, 42 U.S.C. § 5175 (1982); and *Regional Rail Reorganization Act of 1973*, 45 U.S.C. § 791(c) (1976). See also R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234-35 (1975).

<sup>104</sup> See *Earth Resources Co. of Alaska v. FERC*, 617 F.2d 775 (D.C. Cir. 1980). Congressional withdrawal of funding from a project is still another method of nullifying NEPA compliance. For example, work on the San Antonio freeway had been suspended pending NEPA litigation. Congress passed Section 154(a) of the *Federal-Aid Highway Act of 1973*, Pub. L. No. 93-47, 87 Stat. 250 (1973), which stated, "[t]he contractual relationship between the Federal and State governments shall be ended with respect to all portions of the San Antonio North Expressway . . . and the expressway shall cease to be a Federal Aid Project." Pub. L. No. 93-87, § 154(a), 87 Stat. 250, 275 (1973). Congress withdrew federal funding from the project to cause it to cease to be a major federal action under § 102(2)(c) and to make NEPA's EIS requirement inapplicable to the project. See *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept.* (II), 496 F.2d 1017, 1022 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

These examples indicate that the City of Detroit could also have used the political process to seek an exemption from NEPA's requirements. Congress itself would then have determined whether the economic conditions overrode congressional desires as exhibited in NEPA. Had Congress desired to exempt the CIP from NEPA, it could have done so.

Also, courts have noted that limitations on NEPA review need a clear congressional statement to be effective. For example, courts have not allowed defendants to argue that Congress, by appropriating funds for a project, has intended that the project be exempted from NEPA review. See *e.g.*, *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060, 1066-67 n.10 (1977); *The Committee for Nuclear Responsibility, Inc. v. Seaborg (I)*, 463 F.2d 783, 785 (D.C. Cir. 1971); *National Audubon Society v. Andrus*, 442 F.Supp. 42, 45 (D. D.C. 1977).

<sup>105</sup> See *Calvert Cliffs*, 449 F.2d at 1115 n.12.

<sup>106</sup> 426 U.S. 776 (1976).



*Flint Ridge*, developers were required under the Interstate Land Sales Disclosure Act<sup>107</sup> to file a statement of record, which disclosed information about subdivisions they were developing.<sup>108</sup> Such statements would become effective within thirty days, unless within that time the Secretary of Housing and Urban Development (HUD) determined that the statement was incomplete or inaccurate.<sup>109</sup>

The Flint Ridge Development Company had filed a statement of record relating to development of property along a river in north-eastern Oklahoma.<sup>110</sup> Two nonprofit conservation organizations petitioned HUD to prepare an EIS before allowing the statement of record to become effective.<sup>111</sup> HUD did not prepare an EIS and the organizations filed suit.<sup>112</sup> The court of appeals ruled that HUD's review of the statement was a major federal action requiring preparation of an EIS.<sup>113</sup>

The question for decision was whether HUD should have prepared an EIS for the proposed development. The Supreme Court held that the Land Sales Disclosure Act required that HUD complete its review of the statement of record on the development within thirty days.<sup>114</sup> Since HUD could not possibly prepare a full EIS in such a short time, a statutory conflict existed between the Land Sales Disclosure Act and NEPA.<sup>115</sup> The court noted that "the duty NEPA imposes upon the agencies to consider environmental factors (should) not be shunted aside in the bureaucratic shuffle."<sup>116</sup> Yet the court also recognized that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way."<sup>117</sup> Since the Disclosure Act imposed a strict time schedule on HUD, HUD would not have time to prepare an EIS and therefore the court would not require one.<sup>118</sup>

Problems of time constraints have arisen in another context. Once Congress acts to meet an "emergency," the federal agencies created pursuant to that action may not need to satisfy NEPA. In these

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<sup>107</sup> 15 U.S.C. §§ 1701-1720 (1982).

<sup>108</sup> *Flint Ridge*, 426 U.S. at 777-80.

<sup>109</sup> *Id.* at 781.

<sup>110</sup> *Id.* at 782.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 782-3.

<sup>113</sup> *Id.* at 784.

<sup>114</sup> *Id.* at 790.

<sup>115</sup> *Id.* at 790-1.

<sup>116</sup> *Id.* at 787.

<sup>117</sup> *Id.* at 788.

<sup>118</sup> Even so, the Court emphasized that the Secretary could have other duties under NEPA than those barred by the Disclosure Act. *See id.* at 792.

cases courts have excused compliance with NEPA due to Congress' determination of the exigent circumstances of the emergency. An examination of these cases reveals that Congress can mandate swift action to meet an emergency, and thus create a conflict which prevents compliance with NEPA. The inference is that when Congress intends an emergency exception from NEPA it will affirmatively create one. A court can then affirm the override of NEPA on review.

Several cases have discussed what situations would constitute such an emergency. In *Cohen v. Price Commission*,<sup>119</sup> the Price Commission was a temporary agency created by the President<sup>120</sup> under provisions of the 1971 amendments to the Economic Stabilization Act of 1970 (the "Act").<sup>121</sup> Given the unstable economic conditions prevalent at that time, the Commission had a mandate to act swiftly to control prices.<sup>122</sup> In *Cohen*, the Commission allowed fare increases to the New York transportation system.<sup>123</sup> Those opposing the increase complained that the new fares would lead to increased vehicular traffic in New York City, and, consequently, more air pollution. These factors, therefore, would necessitate preparation of an EIS.<sup>124</sup>

The federal district court reasoned that to achieve the purpose of the Act, officials "must be free to act with promptness and dispatch."<sup>125</sup> The procedures for complying with the provisions of NEPA by creating an EIS would require a great expenditure of time. The Commission would not be able to implement its mandate if it was required to undergo the lengthy EIS process before authorizing increases in the price of goods.<sup>126</sup> Therefore, the court noted it was unlikely that NEPA was applicable to the Price Commission, due to the need for swift action.<sup>127</sup>

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<sup>119</sup> 337 F.Supp. 1236 (S.D. N.Y. 1972).

<sup>120</sup> See Exec. Order No. 11,627 § 8, 3 C.F.R. 621, 625 (1971).

<sup>121</sup> Amendments to the Economic Stabilization Act of 1970, Pub. L. No. 92-210, 85 Stat. 743 (1971).

<sup>122</sup> *Id.* at 85 Stat. 744.

<sup>123</sup> *Cohen*, 337 F.Supp. at 1238.

<sup>124</sup> *Id.* at 1239.

<sup>125</sup> *Id.* at 1240.

<sup>126</sup> *Id.* at 1242. The court noted that "a fair reading of the provisions of NEPA and the Economic Stabilization Act, and their respective basic purposes indicates substantial questions as to whether NEPA is applicable to the Price Commission—a temporary agency and one intended to act upon matters within its authority with dispatch" *id.* at 1241, and noted that compliance with NEPA would frustrate the objectives for which the Economic Stabilization Act was passed.

Congress had freed the Commission from the provisions of the Administrative Procedures Act and had limited the powers of the courts to issue injunctive relief, indicating its desire to afford the Commission the ability to act with dispatch in carrying out its mandate. *Id.* at 1242.

<sup>127</sup> *Id.* at 1241-42.

Similarly, in *Gulf Oil Corporation v. Simon*<sup>128</sup> an oil company sued to enjoin mandatory allocation of crude oil and other petroleum products. The Federal Energy Office created regulations for this allocation which were based on the Emergency Petroleum Allocation Act of 1973.<sup>129</sup> Congress decided that "immediate emergency action was necessary to avoid foreseen catastrophic nationwide consequences of a critical shortage of . . . oil."<sup>130</sup> Congress required announcements of the regulations within fifteen days after the effective date of the statute, and the regulations were to take effect fifteen days thereafter.<sup>131</sup> The court held that the lengthy period of time required for promulgation of an EIS was in direct conflict with the short period Congress had provided for building a nationwide scheme of allocation.<sup>132</sup> The court thus allowed the mandatory schemes to take effect without fulfilling the requirements of NEPA.<sup>133</sup>

Thus, when Congress defines a situation as an emergency, a reviewing court will exempt that situation from the EIS requirement. Indeed, Congress legislated to meet national economic, and oil and gas emergencies, as noted above. The nature of the limited exceptions Congress granted would seem to indicate that, in the absence of such emergency conditions, federal agencies must comply with NEPA. In contrast, the *Crosby* court allowed CEQ, not Congress, to declare that an economic recession justified an exception from the EIS requirement. In *Crosby*, no statute conflicted with NEPA to

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<sup>128</sup> 502 F.2d 1154 (Temp. Emer. Ct. App. 1974).

<sup>129</sup> Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, 87 Stat. 627, § 4(A) (1982).

<sup>130</sup> *Gulf Oil*, 502 F.2d at 1156.

<sup>131</sup> Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(a) (1982).

<sup>132</sup> The court noted that "[i]n these circumstances, Congress must have intended that the President proceed forthwith to allocate oil supplies without the elaborate formal determination of environmental impact for which the National Environmental Policy Act provides." *Id.* at 1157.

<sup>133</sup> *Id.* There have been other cases dealing with emergency gas and oil allocation. In particular, in *American Smelting and Refining Co. v. FPC*, 494 F.2d 925 (D.C. Cir. 1974), the Federal Power Commission had a duty flowing directly from its enabling statute, the Natural Gas Act (52 Stat. 821, 15 U.S.C. § 717) to "take effective curtailment action in the exigencies provided by gas shortages." *Id.* at 948, quoting *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973). The court held that this requirement precluded NEPA compliance, but warned:

A federal agency which seeks to excuse itself from its duties under § 4332(2)(C) [the EIS requirement] cannot do so by simply ignoring that statute. Rather, it must make express findings which demonstrate the "statutory conflict" which prohibits compliance. *Id.*

This agency's emergency power flowed directly from its enabling statute, suggesting that if Congress had intended for CEQ to possess emergency power in limited situations, it could have given CEQ that authority.

create severe time constraints or the like, and the emergency in *Crosby* was local in nature, not national in scope.<sup>134</sup>

The pattern of congressional exemptions from NEPA indicates that, absent specific authority to do so, CEQ did not possess any power to alter the EIS requirement. Thus, the promulgation of the emergency exception may have been ultra vires, and undeserving of any deference. CEQ cannot act to alter what NEPA requires. This Comment now takes up this question.

#### IV. LEGAL DEFICIENCIES IN § 1506.11: ULTRA VIRES, DEFERENCE AND DEFINITIONS

The fact that a procedurally correct EIS is necessary for NEPA compliance and that all exceptions from the EIS procedure are due to congressional action should alert a reviewing court to close scrutiny of § 1506.11. Rigorous scrutiny would reveal three possible failings of § 1506.11. First, § 1506.11 may be ultra vires with respect to both the executive order that authorized the CEQ regulations and NEPA itself. Second, a reviewing court should not grant CEQ's emergency exception substantial deference, but rather should determine whether § 1506.11 is reasonable in light of the history of NEPA and the few exceptions to it. Finally, by not defining the term "emergency" in its regulation, CEQ created the possibility of more expansive interpretations of emergencies requiring exceptions than necessary under NEPA.

##### A. *The Ultra Vires Problem*

By promulgating an emergency exception which may allow non-compliance with the EIS requirement, CEQ may have gone beyond

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<sup>134</sup> The *Crosby* situation stands in stark contrast to the usual pattern of emergency exceptions from the NEPA requirements. To illustrate, in *Dry Color Manufacturers Association, Inc. v. Dept. of Labor*, 486 F.2d 98 (3d Cir. 1973), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq (1982)) had provided for the issuance of emergency temporary standards by the Occupational Safety and Health Administration (OSHA) (§ 650(c)(1)), if OSHA found that grave danger existed to employees from exposure to substances believed to be toxic or physically harmful and that such an emergency standard was necessary to protect the employees.

OSHA created such a standard without first filing an EIS, although a DEIS was released shortly after issuing the standard. The court provided the temporary standard with an exception from NEPA compliance, holding that the need to provide quick protection to employees against serious health risks outweighed the EIS requirement. *Id.* at 108. Unlike *Crosby*, in which a DEIS was released shortly after the emergency exception had been granted, in *Dry Color* there was statutory authorization to move swiftly in an emergency national in scope.

the scope of authority granted it by executive order 11,991, which authorized binding regulations that set up procedures for compliance with NEPA. Such action therefore would have been ultra vires.

To determine whether an agency's actions are ultra vires, a court must examine whether an agency has acted outside the authority its enabling statute confers upon it.<sup>135</sup> Thus, a court can sustain a regulation only if the agency remained within the bounds of delegated authority.<sup>136</sup> With ultra vires review, courts do not accord an agency the same deference that occurs in other areas of administrative law.<sup>137</sup>

When NEPA was originally passed into law, CEQ was to be merely an advisory and research body, and Congress did not delegate to CEQ any rulemaking authority whatsoever.<sup>138</sup> However, in 1977 Executive Order 11,991 gave CEQ such authority.<sup>139</sup> The order expressly directed CEQ to implement NEPA's procedural provisions through regulations which would be binding upon all federal agencies.<sup>140</sup> The regulations had three main aims: to reduce paperwork, to reduce delays, and to produce better decisions.<sup>141</sup> Thus, the executive order seemed to expand the procedural duties of CEQ to ensure compliance with NEPA.

The executive order did not, and indeed could not, grant CEQ any authority to modify NEPA substantively.<sup>142</sup> Beyond explicitly stating that the purpose of the order was to authorize procedural implementation of NEPA,<sup>143</sup> the order also directed full agency compliance

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<sup>135</sup> See Administrative Procedures Act, 5 U.S.C. § 706(2)(c) (1982).

<sup>136</sup> *Planned Parenthood Federation of America, Inc. v. Heckler*, 712 F.2d 650, 655 (D.C. Cir. 1983).

<sup>137</sup> See *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965).

<sup>138</sup> Ordinarily, courts will give more deference to a regulation promulgated under express congressional authorization than a rule merely interpreting its statute. See DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 710-711 (2d ed. 1978).

<sup>139</sup> Exec. Order No. 11,991, 3 C.F.R. 123 (1978), 42 Fed. Reg. 26,767 (1977).

<sup>140</sup> Exec. Order No. 11,991 § 1(h), 3 C.F.R. 123 (1978).

<sup>141</sup> See *Implementation of Procedural Provisions*, 43 Fed. Reg. 55,978, codified at 40 C.F.R. 1500 (1986). All federal agencies would follow an "efficient, uniform procedure," *id.*, for carrying out NEPA's requirements, to make the EIS process more useful, and to lead to a more focused approach to environmental issues. See Exec. Order No. 11,991, § 1(h), 3 C.F.R. 123 (1978).

<sup>142</sup> At the time the Executive Order was promulgated, there was some doubt as to its validity, since NEPA did not grant the President authority to make binding regulations. However, this authority has never been seriously questioned since the *Andrus* case accorded substantial deference to CEQ's new regulations. For a discussion of the President's authority to issue these regulations, see McDermott, *New Regulations of the Council on Environmental Quality*, 8 B.C. ENVTL. AFF. L. REV. 89, 114-118 (1979).

<sup>143</sup> See *supra* note 140.

with CEQ's new regulations unless "inconsistent with statutory requirements."<sup>144</sup> This language refers back to NEPA, and NEPA demands compliance to the fullest extent possible.<sup>145</sup> Courts have interpreted "to the fullest extent possible" to mean an agency must comply with NEPA unless compliance would be inconsistent with statutory authority.<sup>146</sup> Both the legislative and judicial history of NEPA strongly suggest that a federal agency contemplating major action must prepare an EIS unless statutory law does not require such preparation.<sup>147</sup> The executive order would seem to have authorized no new exceptions to compliance with NEPA's procedural provisions.

As drafted, § 1506.11 confines itself to an exception of CEQ's own detailed procedures for compiling an EIS, not the NEPA requirement that an EIS accompany major federal action. The language of § 1506.11 authorizes a federal agency to act in an emergency "without observing the provisions of *these* regulations." (emphasis supplied)<sup>148</sup> By waiving only its own regulations, CEQ would have remained within the procedural authority granted it by Executive Order 11,991, since it would not waive or modify compliance with NEPA, but merely waive compliance with detailed CEQ procedures. In *Crosby*, however, a § 1506.11 exemption allowed action well before the release of the EIS, contrary to the requirements of NEPA.

As a result of the *Crosby* court's failure to review ultra vires questions, Detroit used § 1506.11 as a vehicle for substantively modifying NEPA by taking action before fulfilling the EIS requirement. The court accorded substantial deference to CEQ, noting only that responsibility for NEPA enforcement was delegated to CEQ.<sup>149</sup> Rigorous review would have addressed the ultra vires problem. Executive Order 11,991 authorized only a set of procedures for "compliance"<sup>150</sup> with, not exceptions from, NEPA, and authorized exemptions only when direct conflict with statutory authority was present.<sup>151</sup> Therefore, § 1506.11, as used in *Crosby*, was ultra vires with respect to Executive Order 11,991.

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<sup>144</sup> Exec. Order No. 11,991 § 2(g), 3 C.F.R. 123 (1978).

<sup>145</sup> See 42 U.S.C. § 4332 (1982).

<sup>146</sup> See *Flint Ridge*, 426 U.S. at 787-88; see also 115 CONG. REC. 39,703 (1969). (House Conferees); *id.* at 40,418 (Senate Conferees).

<sup>147</sup> See *supra* notes 69-134 and accompanying text.

<sup>148</sup> 40 C.F.R. § 1506.11 (1986).

<sup>149</sup> *Crosby*, 512 F.Supp. at 1386.

<sup>150</sup> See *supra* note 139.

<sup>151</sup> *Id.*

Section 1506.11 also is inconsistent with NEPA itself. There is no provision in NEPA, its legislative history or subsequent modifications that would give CEQ any rulemaking power. NEPA requires preparation and release of an EIS for any major federal action that significantly affects the quality of the human environment.<sup>152</sup> It does not provide any exception for emergency situations. Thus, while an agency may not have to comply with the detailed and time consuming CEQ regulations in an emergency situation,<sup>153</sup> it would still have to prepare and release an EIS before making any decision. There have been indications that courts might accept an EIS with expedited procedures<sup>154</sup> or an abbreviated comment period.<sup>155</sup> In the absence of statutory conflict, however, federal agencies must comply with the EIS requirement in timely fashion.<sup>156</sup> Nothing in NEPA gives CEQ the authority to modify this requirement.

By neglecting to inquire whether CEQ had authority to excuse full compliance with NEPA's EIS requirement, the court negated full and timely considerations of environmental values and public criticism at an early stage in the EIS process. Thus, Detroit could not possibly utilize the two most important functions of the EIS in a timely fashion.<sup>157</sup>

Because the court did not address the *ultra vires* issue, § 1506.11 can currently create a major change in the EIS requirement. The possibility of undermining NEPA through § 1506.11 now exists. Future litigants will now have to address whether CEQ's ability to interpret NEPA through § 1506.11 should be given the substantial deference that the *Crosby* court afforded it.

### B. Problems of Deference

In *Crosby*, the court noted that it was according substantial deference to CEQ's interpretation of the NEPA statute.<sup>158</sup> An examination of the role of CEQ in the NEPA scheme and why courts grant deference to an agency interpreting its mandate<sup>159</sup> reveals that, in

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<sup>152</sup> 42 U.S.C. § 4332(2)(C) (1982).

<sup>153</sup> See 40 C.F.R. § 1506.11 (1986).

<sup>154</sup> See *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th Cir. 1981).

<sup>155</sup> See *State of Alaska v. Carter*, 462 F.Supp. 1155, 1164 (D. Alaska 1978).

<sup>156</sup> *Calvert Cliffs*, 449 F.2d at 1115 n.12.

<sup>157</sup> The *Crosby* court simply stated that CEQ had the authority to interpret NEPA to "accommodate emergency situations." *Crosby*, 512 F.Supp. at 1386.

<sup>158</sup> *Id.*

<sup>159</sup> For a discussion of how courts treat issues of statutory construction, see Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Comment, A

dealing with emergencies, CEQ's interpretation of NEPA was not reasonable and should not have been given deference.

Congress established the Council on Environmental Quality (CEQ) in Title II of NEPA.<sup>160</sup> CEQ was to act as the President's advisor, review agency compliance with NEPA, and be a conduit for information to the public.<sup>161</sup> Shortly after passage of NEPA, however, President Nixon issued an executive order which refined CEQ's responsibilities.<sup>162</sup> The executive order directed CEQ to publish guidelines for preparation of environmental impact statements.<sup>163</sup> These guidelines were not binding, and CEQ had no power to enforce regulations governing compliance with the Act.<sup>164</sup> CEQ acquired power to issue mandatory regulations only through Executive Order 11,991.

CEQ is the administrator of the NEPA statute. It regulates all agencies of the federal government to ensure procedural compliance with NEPA's environmental mandate.<sup>165</sup> It is thus expert in environmental matters, and in general its regulations speak to procedures for complying with an environmental mandate.<sup>166</sup> Thus, CEQ is "most familiar with its requirements" for an EIS.<sup>167</sup>

In promulgating § 1506.11, CEQ must have interpreted NEPA to provide for an emergency exception to the EIS requirement. A review of the reasonableness of that interpretation would indicate that there was no basis upon which CEQ could base such a broad emergency provision. Therefore, a discussion of the standard of review for agency interpretation of its statutory mandate is in order.

In determining whether an agency's interpretation of its statute is entitled to deference, a court must decide whether Congress has clearly spoken to the issue under consideration.<sup>168</sup> If so, the court

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*Framework for Judicial Review of an Agency's Statutory Interpretation*, 1985 DUKE L.J. 469 (1985).

<sup>160</sup> 42 U.S.C. §§ 4342-4347 (1982).

<sup>161</sup> See 42 U.S.C. § 4344 (1982).

<sup>162</sup> Exec. Order No. 11,514, 3 C.F.R. 902 (1966-1970 Compilation).

<sup>163</sup> Exec. Order No. 11,514 § 3(h) required CEQ to issue "guidelines to federal agencies for the preparation of detailed statements on proposals for legislation and other federal actions affecting the environment." 3 C.F.R. 123 (1978).

<sup>164</sup> See *e.g.*, *Greene County Planning Board v. FPC*, 455 F.2d 412, 421 (2d Cir. 1972); *Hiram Clarke Civic Club, Inc. v. Lynn*, 476 F.2d 421, 424 (5th Cir. 1973).

<sup>165</sup> See Exec. Order No. 11,991 § 1(b), 3 C.F.R. 123 (1978).

<sup>166</sup> *Id.*

<sup>167</sup> *Warm Springs Task Force v. Gribble*, 417 U.S. 1301, 1310 (1974).

<sup>168</sup> See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781 (1984).



must give effect to the congressional action.<sup>169</sup> Thus, a court will examine the language, purpose and history of an act to determine the legislative intent.<sup>170</sup> No court should defer to an agency interpretation of a statute if that agency is interpreting the statute in a way that frustrates the purpose or is inconsistent with the statute itself.<sup>171</sup>

Generally, only when a statute is silent on the issue in question, or if the legislative intent is ambiguous, should a court look to the agency interpretation.<sup>172</sup> A court must determine whether an interpretation of a statute carries out the policies behind it and makes those policies attainable.<sup>173</sup> At that stage review is to be deferential, asking only if the interpretation is reasonable.<sup>174</sup> A court may not substitute its own construction for a reasonable interpretation made by an agency.<sup>175</sup> Thus, a court, in reviewing CEQ's interpretation of NEPA, should examine whether NEPA provides for emergencies, or if the CEQ interpretation is contrary to congressional intent.

The question, then, is whether Congress intended to permit an exception to NEPA in emergencies. Although NEPA is silent on emergency exceptions, the language of the statute, its legislative and judicial history all seem to indicate that the only exceptions from compliance with NEPA should come from congressional action.<sup>176</sup> NEPA requires that an EIS accompany any major federal action,<sup>177</sup> and also mandates agency compliance with the EIS process "to the fullest extent possible."<sup>178</sup> Legislative history indicates that one should interpret this phrase as "unless inconsistent with a statutory

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<sup>169</sup> *Id.*; *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 105 S.Ct. 1102, 1108 (1984).

<sup>170</sup> *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

<sup>171</sup> *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

<sup>172</sup> *Chevron*, 104 S.Ct. at 2782.

<sup>173</sup> *National Petroleum Refiners Ass'n v. Federal Trade Commission*, 482 F.2d 672, 689 (D.C. Cir. 1973).

<sup>174</sup> *See Chevron*, 104 S.Ct. at 2782; *Chemical Manufacturers*, 105 S.Ct. at 1108.

<sup>175</sup> *See Chevron*, 104 S.Ct. at 2782; *Chemical Manufacturers*, 105 S.Ct. at 1108; *Kunakana v. Clark*, 742 F.2d 1145, 1150 (9th Cir. 1984); *Eagle Picher Industries, Inc. v. United States Environmental Protection Agency*, 759 F.2d 922, 927 n.5 (D.C. Cir. 1985). While the reviewing court must give deference to an agency interpretation, courts are the final arbiters of statutory construction. *See e.g., Federal Election Comm'n*, 454 U.S. at 32; *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968).

<sup>176</sup> *See supra* notes 69-134 and accompanying text.

<sup>177</sup> 42 U.S.C. § 4332 (2)(C) (1982).

<sup>178</sup> *Id.*

mandate."<sup>179</sup> Prior to *Crosby*, courts allowed exceptions to the EIS requirement only when Congress legislated to meet what it defined to be an emergency.<sup>180</sup> Thus, Congress seems to have reserved to itself the power to modify NEPA. Congress could not have intended for CEQ to alter this scheme, since it did not delegate any rulemaking authority to CEQ. To allow CEQ to do so by interpretation, then, is contrary to the intent of Congress.<sup>181</sup> The *Crosby* court, by ruling that CEQ could interpret NEPA to "accommodate emergency situations"<sup>182</sup> allowed a \$30 million loan authorization for work on the CIP site without preparation and release of an EIS as required by NEPA.<sup>183</sup>

A similar failure to adequately review CEQ's determination of an emergency situation occurred in *National Audubon Society v. Hester*.<sup>184</sup> In *Audubon*, the Fish and Wildlife Service (FWS), in attempting to preserve the California condor, decided to bring all remaining wild condors into captivity.<sup>185</sup> This represented a change from FWS' prior policy.<sup>186</sup> FWS requested and received from CEQ an emergency exemption because of the bird's condition in the wild. CEQ accepted this reasoning and did not require immediate documentation of the environmental effects of FWS' decision.<sup>187</sup> The appeals court upheld the agency's action, holding that the agency was not altering its policy so much as adapting its rules to changing circumstances.<sup>188</sup> The court satisfied itself that the agency adequately justified its change in policy.<sup>189</sup>

The appeals court gave scant attention to CEQ's grant of the emergency exemption. In a footnote, it overturned the district court's independent review of the emergency exception, noting only

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<sup>179</sup> See *supra* note 12.

<sup>180</sup> See *supra* notes 106-34 and accompanying text.

<sup>181</sup> Courts generally do accord CEQ's interpretation of NEPA substantial deference. See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). However, in this instance, when examining an interpretation allowing noncompliance with NEPA, which is in conflict with a judicial history of forcing strict compliance with the EIS process, a court should not accord CEQ substantial deference. For a discussion of the appropriate amount of judicial deference due to CEQ, see Comment, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843 (1980).

<sup>182</sup> *Crosby*, 512 F.Supp. at 1386.

<sup>183</sup> *Id.* at 1386, 1387.

<sup>184</sup> 801 F.2d 405 (D.C. Cir. 1986).

<sup>185</sup> *Id.* at 406.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 408.

<sup>189</sup> *Id.*

that "CEQ's interpretation of NEPA is entitled to substantial deference."<sup>190</sup> As in *Crosby*, the appeals court failed to go beyond this declaration and examine in any manner the emergency exception itself. The district court, while not examining whether CEQ had the authority to promulgate an emergency exception, had at least scrutinized carefully the request for an exemption.<sup>191</sup> The district court noted that there was a lack of documentation supporting the emergency request.<sup>192</sup> FWS viewed its action as an emergency "due to the precipitous decline in the number of Condors in the past year."<sup>193</sup> Six condors had been lost in that year.<sup>194</sup> The district court noted that the condors were lost over eight months prior to the FWS emergency request.<sup>195</sup> During that time FWS could conceivably have prepared a more than adequate EIS. Therefore, the district court decided that the emergency exemption was suspect due to the lack of an adequate record supporting a need for such an exemption.<sup>196</sup>

The district court decided to narrowly construe any emergency exemption because NEPA demands compliance to the fullest extent possible.<sup>197</sup> In overturning this decision the appeals court did no more than give CEQ's emergency determination substantial deference without addressing the concerns of the district court. Such deference disserves NEPA when CEQ is allowing noncompliance based on a scanty record, which provides little justification for an emergency exception. This willingness to give total deference to CEQ's actions ensures that an agency charged with enforcing procedural compliance with NEPA will continue to alter the EIS requirement substantively, without congressional authorization. Pulling back the veil of deference would reveal the flaws in § 1506.11.

Assuming *arguendo* that CEQ could interpret NEPA to accommodate emergencies, no court should accord substantial deference to

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<sup>190</sup> *Id.*, n.3, quoting *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). Yet in *Andrus*, the Supreme Court was not granting deference to a CEQ determination that an exception from NEPA was necessary, but to CEQ regulations dealing with agency appropriations requests not requiring an EIS. *Id.* at 358-9. In contrast, an emergency exemption excuses compliance with NEPA itself when CEQ would otherwise have determined that an EIS is necessary. CEQ deserves deference when deciding that an EIS is necessary; once it determines that there is a need for an EIS, it is substantially modifying NEPA by allowing noncompliance. Therefore, there should be little deference to an administrative decision to grant an emergency exception.

<sup>191</sup> *National Audubon Society v. Hester*, 627 F.Supp. 1419, 1423 (D. D.C. 1986).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

CEQ's decisions on whether an emergency has occurred, unless the circumstances bringing about the emergency are environmental in nature. In an environmental emergency, CEQ would possess sufficient expertise to warrant deference from a reviewing court.<sup>198</sup> CEQ can make no such claim to expertise in determining other types of emergency situations, such as an economic recession, or an oil shortage, for instance. Congress, which has acted in the past to meet these situations, possesses far more expertise than CEQ. When a federal agency requests emergency designation so as not to comply with NEPA it is inappropriate for a reviewing court to defer to an agency that Congress did not intend to deal with various emergencies.

### *C. Emergencies under NEPA*

Instead of merely acceding to CEQ's judgment of what constitutes an emergency justifying noncompliance with NEPA, a reviewing court should make its own decision as to what qualifies as an emergency based on NEPA and its history. In a federal case, *Colon v. Carter*,<sup>199</sup> the district court did such an examination of emergencies under NEPA, but outside the context of § 1506.11. In *Colon*, President Carter had declared a state of emergency under the Disaster Relief Act.<sup>200</sup> This declaration was made in order to facilitate transfer of Cuban and Haitian refugees from an overcrowded and unsanitary facility in Florida to Puerto Rico. The government claimed that this declaration triggered provisions in the Federal Disaster Assistance Act which expressly nullified the EIS provisions of NEPA.<sup>201</sup>

The district court held that although a presidential declaration of emergency was entitled to "great deference,"<sup>202</sup> review of that dec-

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<sup>198</sup> One court, in a recent NEPA case, noted that "deference . . . is appropriate when the disputed issue is one expressly delegated to an agency that deals exclusively with the area and so has refined an expertise in its nuances." *Park County Resource Council, Inc. v. United States Dep't of Agric.*, No. 85-2000, slip op. (10th Cir., April 17, 1987).

<sup>199</sup> 507 F.Supp. 1026 (D. P.R. 1980).

<sup>200</sup> Disaster Relief Act of 1974, 42 U.S.C. § 5121 et seq. (1982).

<sup>201</sup> The Federal Disaster Assistance Act, 42 U.S.C. § 5175 (1982) reads:

No action taken or assistance provided pursuant to section 5145, 5146, or 5173 of this title, or any assistance provided pursuant to section 5172 or 5189 of this title that has the effect of restoring facilities substantially as they existed prior to the disaster, shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 . . . Nothing in this section shall alter or affect the applicability of the National Environmental Policy Act of 1969 . . . to other Federal actions taken under this chapter or under any other provision of law.

<sup>202</sup> *Colon*, 507 F.Supp. at 1031.

laration was appropriate.<sup>203</sup> The court noted that it must interpret the President's emergency declaration strictly, due to "the strong policy determinations expressed by Congress in NEPA."<sup>204</sup> The court went on to review the presidential declaration accordingly, and held that the Federal Disaster Relief Act applied only to natural disasters,<sup>205</sup> and that the refugee situation in Florida could hardly qualify as a natural disaster.<sup>206</sup> Thus, even though *Colon* dealt with a presidential declaration of emergency under a separate statute, the court still examined the legal bases behind that declaration, and refused to hold up the shield of substantial deference. In contrast, the *Crosby* court did not perform any such inquiry. Regardless of the amount of deference the court gave to CEQ, the court should have done such an inquiry.

Inquiry would have revealed that, as noted above, NEPA does not provide for any emergency exception, and, until *Crosby*, the only emergency exceptions allowed were congressionally mandated. CEQ, by promulgating an emergency exception with the term "emergency" undefined, left to its own determination what situations would qualify as emergencies. In *Crosby*, an economic recession was found to be a sufficient emergency to alter the EIS requirement.<sup>207</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1032.

<sup>205</sup> *Id.* The term "emergency" in the Disaster Relief Act is defined as:

"Emergency" means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snow-storm, drought, fire, explosion, or other catastrophe in any part of the United States which requires Federal emergency assistance to supplement State and local efforts to save lives and protect property, public health and safety or to avert or lessen the threat of a disaster.

42 U.S.C. § 5122 (1982).

<sup>206</sup> *Colon*, 507 F.Supp. at 1032. Two days after this decision, Congress passed and President Carter signed the Refugee Education Assistance Act of 1980, Pub. L. No. 96-422, 94 Stat. 1799 (1980). Section 501(c)(3) of that Act stated that federal action granting assistance under § 501(c)(1) "for the processing, care, maintenance, security, transportation and initial reception and placement in the United States of Cuban and Haitian entrants" would not be considered a major federal action significantly affecting the quality of the human environment, thus exempting those actions from NEPA's EIS requirements. *Id.* at § 501(c)(3). The legislative history of the Act indicates that REAA was enacted to provide the president with tools for dealing with this special situation that did not fit under a traditional emergency definition. 126 CONG. REC. H. 10111 (daily ed. Sept. 30, 1980).

On motion for reconsideration, the district court then lifted its injunction pursuant to terms of the new legislation. *Colon*, 507 F.Supp. at 1033. See also *Colon v. Carter*, 633 F.2d 964 (1st Cir. 1981). This pattern of legislation is instructive for the CEQ emergency situation. In *Crosby*, had there been no procedure for an emergency exception, Congress could have exempted Detroit's CIP project from the EIS requirement.

<sup>207</sup> *Crosby*, 512 F.Supp. at 1386.

Yet, under NEPA case law, considerations of economics are not supposed to derail the NEPA process. In fact, several courts rejected NEPA claims that were based on economic concerns. These courts noted that economic impact alone will not justify preparation of an EIS.<sup>208</sup> An exception exists if the EIS is connected to claims involving an effect on the natural or physical environment.<sup>209</sup> Since economic concerns do not justify preparing an EIS, economic concerns should not be utilized to avoid preparing an EIS. NEPA is concerned with the environment, not economics.<sup>210</sup> Congress, by legislation, could always weigh economics more heavily than the environment, but there was no such legislation at the time of the *Crosby* decision.

Thus, in examining an economic emergency request under NEPA, a court should keep in mind that considerations of cost and delay are not to stop the NEPA process, and that employment is not a concern of the Act. In light of the strong national policy considerations in NEPA, the local economic problems in Detroit were not such that should negate the statute.<sup>211</sup> The economic conditions in Detroit had been poor all year. The emergency was not sudden or catastrophic,

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<sup>208</sup> See e.g., *Breckenridge v. Rumsfeld*, 537 F.2d 864, 866-67 (6th Cir. 1976); *National Ass'n of Government Employees v. Rumsfeld*, 418 F.Supp. 1302 (E.D. Pa. 1976). In addition, CEQ Regulations, 40 C.F.R. § 1508.14 (1986) note that:

This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

<sup>209</sup> *National Ass'n of Government Employees*, 418 F.Supp. at 1306.

<sup>210</sup> The *Breckenridge* court noted that NEPA is not "a national employment act." *Breckenridge*, 537 F.2d at 867. One might argue that while economic concerns should not come into play when preparing an EIS it is a different matter when an economic exemption is sought. But this would still inject economics into an act not intended to deal with economics. When one combines the *Colon* rationale with the reasoning that economic considerations alone do not justify an EIS, it seems that an economic emergency, unless clearly defined by Congress, is not such that should trigger an exemption from NEPA's strict requirements.

<sup>211</sup> Even in the *Crosby* case, it was not the economic emergency itself that caused Detroit to seek a commitment of resources before issuing an EIS, but the fact that GM wanted a parcel of land given to it by a specified date. One method of alleviating the emergency could have been to convince GM to move the deadline back. In fact, GM was not to receive title to part of the CIP tract until September 1, 1981. Plaintiffs' Reply in Support of Their Motion for a Preliminary Injunction, In Opposition to Defendant's Motions for Summary Judgment, and In Support of Plaintiffs' Motion for Summary Judgment on Claims II and II at 3, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981). The two month difference between May 1 and September 1 is almost equal to the three month difference between filing the emergency request in late September and release of the EIS in December of 1980. Had GM used a July 1 deadline, there would seem to be little justification for the premature commitment of resources.

but rather a ramification of an economic downturn. If dire economic conditions could constitute an emergency, NEPA could be fraught with exceptions during every recession, contrary to the strict EIS requirement.

A reviewing court should realize the strong congressional interest in NEPA, and in emergency exceptions from NEPA, and closely examine any deviation from congressional requirements. If a court is to allow CEQ to make emergency determinations, at the least it should review the decision closely. The emergency definition in the Disaster Relief Act, noted in *Colon*, which focuses on catastrophies requiring federal assistance, and perhaps may serve as a guide to a congressional definition of emergency.<sup>212</sup> All other emergencies that are not natural in nature should require congressional consideration before granting an exemption from NEPA.

#### V. IMPLICATIONS FOR THE FUTURE: § 1506.11 MAY DEPRIVE COURTS OF THE ABILITY TO REVIEW AGENCY ACTION IN EMERGENCIES

The role of any court which must review an administrative action is heavily dependent upon having an adequate record for review. In NEPA, the EIS is the method for compiling that record. The EIS is proof that an agency has considered environmental values,<sup>213</sup> and the EIS as a document can be examined as the record of the agency's decision-making process.

Section 1506.11 can compromise what little judicial review of agency decision making now exists. In an emergency situation, an agency could release a final EIS months after CEQ granted an emergency exception.<sup>214</sup> Thus, contrary to NEPA's purpose, the EIS might become a justification for an agency decision, rather than a contemporaneous record that ensures consideration of environmental alternatives.<sup>215</sup> During that time, the agency may have invested so much money and so many resources in a project that upon review a court may be unwilling to halt the project now well advanced.<sup>216</sup>

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<sup>212</sup> See *supra* note 205.

<sup>213</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

<sup>214</sup> CEQ Regulation 40 C.F.R. § 1500.3 (1986) states that "it is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final [EIS] . . . or takes action that will result in irreparable injury."

<sup>215</sup> See *Cady v. Morton*, 527 F.2d 786, 793-4 (9th Cir. 1975).

<sup>216</sup> A court must decide "whether injunctive relief pending compliance would still serve the public interest and the purposes of the Act." *Steubing v. Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975).

The substantial completion doctrine, which developed soon after enactment of NEPA,<sup>217</sup> manifests the reluctance of courts to halt such projects. This doctrine grew from cases deciding whether NEPA should apply retroactively to projects begun before NEPA became effective.<sup>218</sup> Courts faced projects in various stages of completion, ranging from those in which mere approval of a project had been given, to others in which there already had been a substantial commitment of resources.<sup>219</sup> Recognizing that some projects might have advanced so far that to require an EIS would result in an empty administrative gesture, courts waived the EIS requirement if the "costs of altering or abandoning the project" outweighed "whatever benefits might accrue therefrom."<sup>220</sup> Once an agency irreversibly and irretrievably committed its resources toward a project, any EIS requirement thereafter applied would be a "meaningless formality,"<sup>221</sup> because most of the environmental harm an EIS could have prevented would have already occurred.<sup>222</sup>

A set of more recent cases applied the same rationale in a different context. Under the equitable doctrine of laches, a court may dismiss a NEPA suit if the plaintiff in the action has inexcusably delayed in filing suit, and if bringing suit at such a late date unduly prejudices the defendant's interest.<sup>223</sup> Courts have adopted substantial completion as a measurement of undue prejudice in NEPA suits.<sup>224</sup>

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<sup>217</sup> For a discussion of the development of the substantial completion doctrine, see F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT, Ch. V, 142-179 (1973).

<sup>218</sup> NEPA took effect on January 1, 1970.

<sup>219</sup> Most of these cases dealt with highway projects. For example, in *Morningside-Lenox Park Association v. Volpe*, 334 F.Supp. 132 (N.D. Ga. 1971), a highway project had been started prior to passage of NEPA, yet the final authorization of funds did not take place until well after the passage of NEPA. Most of the right of way had been purchased, but no work had begun. The court noted that § 102 was required for a federal project in which there was still substantial action to be taken, noting that "while much work had already been taken, the court is not dealing with a *fait accompli*." *Id.* at 144 (emphasis in original).

<sup>220</sup> *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1331 (4th Cir. 1972); *cert. denied*, 409 U.S. 1000 (1972). 93.9% of all dwellings in the area had been acquired, 98.5% of all businesses had also been acquired, and 75.6% of all families had already been moved out of the area. *See id.* at 1328.

<sup>221</sup> *Arlington*, 458 F.2d at 1333; *City of Romulus v. County of Wayne*, 392 F.Supp. 578, 595 (E.D. Mich. 1975).

<sup>222</sup> *Id.* at 1333. *See also* *Shiffer v. Schlesinger*, 548 F.2d 96, 104 (3d Cir. 1977).

<sup>223</sup> Courts reviewing environmental cases do not look favorably on a laches defense. *See Cady v. Morton*, 527 F.2d 786, 792, 793 (9th Cir. 1975).

<sup>224</sup> *See Save Our Wetlands*, 549 F.2d at 1028. The court stated that in assessing the degree of prejudice it had to "balance the equities, considering both the expenditures that have been made by the defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed." *Id.* The court noted that due to the substantial sums expended and



Under this line of cases, substantial completion, and undue prejudice, occurs when an agency has spent a substantial amount of money and has made substantial progress in construction before a party brings suit; and if the expenditures in time and money outweigh any environmental benefit in enjoining the project.<sup>225</sup> As in the earlier retroactivity cases, implementation of this subjective standard has proven to be inconsistent.<sup>226</sup>

The use of substantial completion and laches could be devastating for plaintiffs attempting to contest a final EIS, or any environmental consideration, after CEQ has granted a § 1506.11 exception. Should a plaintiff attempt to test the validity of a final EIS and halt a project, he or she may find that the defendant already has invested substantial resources in the project and created substantial environmental harm. The defendant could then argue that it had achieved substantial completion of the project. Thus, undue prejudice would come not from any delay in filing suit but from substantial completion due to a § 1506.11 exception ratifying such swift action. A court deciding whether it can examine a final EIS, prepared long after a project's initiation, must balance the amount of time and money invested into the project and the environmental harm that resulted against the social benefit obtained by delaying the project until the agency can "rewrite" its EIS. The costs of such a temporary abandonment may substantially outweigh any benefits of a remedial order forcing the agency to revise its EIS, and by extension, the entire project. At this late point there may be little a court can do to prevent further environmental harm.

The *Crosby* fact pattern provides a vivid example of the type of situation in which substantial completion and laches might be held to apply. CEQ granted Detroit a § 1506.11 exception in late September, 1980<sup>227</sup> and a final EIS became official in early February, 1981.<sup>228</sup>

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the amount of construction, preparation of an EIS would produce little environmental benefit. *Id.* at 1078-9.

<sup>225</sup> *Id.* at 1027, 1028; see also *Watershed Associates*, 586 F.Supp. at 985.

<sup>226</sup> Compare *Save Our Wetlands*, 549 F.2d at 1021 (4% completion and \$3.8 million of money expended equalled substantial completion) with *Steubing*, 511 F.2d 489, 522 (2d Cir. 1975) (\$4.7 million of money expended and actual construction in progress did not equal substantial completion); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (30 to 50% of construction completed held not sufficient to bar suit).

<sup>227</sup> Letter from Gus A. Speth, Chairman, CEQ to Coleman A. Young, Mayor of Detroit, (Sept. 24, 1980)(granting § 1506.11 exception).

<sup>228</sup> Plaintiffs' Reply in Support of Their Motion for a Preliminary Injunction, in Opposition to Defendants' Motions for Summary Judgment, and in Support of Plaintiffs' Motion for Summary Judgment on Claims II and III at 5, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981).

The plaintiffs filed suit soon thereafter. The parties filed briefs in federal court in late March, 1981, nearly six months after the emergency declaration.

The defendants vigorously argued that laches should apply.<sup>229</sup> By the time plaintiffs were able to file suit challenging the adequacy of the final EIS, much irreversible action had occurred. HUD had approved a \$60,500,000 loan guarantee in October, 1980, after CEQ granted it a § 1506.11 exception.<sup>230</sup> Since that time the city had committed approximately \$31,500,000 to the acquisition of property,<sup>231</sup> demolition work was in progress, and Detroit had purchased or contracted to purchase 1267 of 1674 parcels of land involved in the project.<sup>232</sup> Actual construction had not yet begun. Although the *Crosby* court did not pass on the defendants' contention, it is conceivable that the court could have considered the commitment of such a substantial amount of resources, coupled with relocation of homeowners and site preparation, including demolishing the Dodge Main facility and other structures in the area, an irretrievable and irreversible commitment of resources such that a rewrite of the EIS would have a prohibitive cost.<sup>233</sup>

Thus, the § 1506.11 exception could easily short circuit the rigorous review of environmental factors in the EIS by allowing an agency to take action before preparing and releasing the EIS. By doing so, an agency would disenfranchise actors deemed important to the NEPA process—the public<sup>234</sup> and other federal agencies.<sup>235</sup> A court may find itself denied an opportunity for adequate review of the EIS, because once substantial completion exists there may be little a court can do to prevent further environmental harm. A possible solution to this problem would be to leave emergency declarations to Congress, or to legislatively add a layer of procedure to the emergency provision that would at least involve relevant actors at an early stage of the process.

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<sup>229</sup> Defendants' Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 6-16, *Crosby v. Young*, 512 F.Supp. 1363 (E.D. Mich. 1981).

<sup>230</sup> *Crosby*, 512 F.Supp. at 1376.

<sup>231</sup> Defendants' Brief, *supra* note 215 at 2.

<sup>232</sup> *Id.*

<sup>233</sup> The *Crosby* court did note that "plaintiffs seek a solution which will preserve the buildings in Poletown . . . . This goal is difficult of attainment since most of the property in this area has been acquired by Detroit through condemnation proceedings." *Crosby*, 512 F.Supp. at 1389.

<sup>234</sup> See 42 U.S.C. § 4332(2)(C) (1982).

<sup>235</sup> See *id.*

## VI. A POSSIBLE SOLUTION: AN EXPEDITED EIS EMERGENCY PROCESS

The CEQ § 1506.11 exception is of dubious legality, and, as interpreted, can compromise thorough judicial review of the EIS process. One solution to this problem would simply be to do away with § 1506.11 and let Congress deal with any emergencies that might justify noncompliance with the EIS process, as has been done in the past.<sup>236</sup>

However, there are certainly situations in which it would be preferable to have a simple procedure in place for modifying the EIS process. Such situations occurred in the past. For example, in 1983 CEQ waived requirements of an environmental assessment on paperwork<sup>237</sup> for NEPA when the National Oceanic and Atmospheric Administration promulgated its own emergency regulations to prevent violence between stone crab and shrimp fishermen competing off the coast of Florida.<sup>238</sup> In 1984, CEQ waived completion of the NEPA process to facilitate rapid removal of hazardous asbestos from a historic railroad station undergoing renovation.<sup>239</sup> In both situations time was of the essence; in one situation human life was at stake and in the other severe environmental harm was likely. An emergency exception that would allow swift action seems appropriate in such cases.<sup>240</sup>

The *Crosby* case, however, demonstrates the need for procedural safeguards that would not allow CEQ to abandon its environmental protection mission in treating emergency situations. In *Crosby*, General Motors, a private sector actor, in effect created the emergency by setting a deadline that pressured Detroit to act quickly and

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<sup>236</sup> For a discussion of the role of Congress in fashioning past emergency exemptions from NEPA, see text accompanying notes 102-134.

<sup>237</sup> An environmental assessment is an early stage in the CEQ regulatory scheme that leads, in some cases, to preparation of the EIS. See 40 C.F.R. § 1508.9 (1986).

<sup>238</sup> Letter from Thomas E. Bigford, United States Department of Commerce, to Dinah Bear, General Counsel, CEQ (March 17, 1983)(requesting § 1506.11 exception); letter from Dinah Bear, General Counsel, CEQ to Thomas E. Bigford, United States Department of Commerce (March 24, 1983)(granting § 1506.11 exception).

<sup>239</sup> Letter from David F. Riker, Executive Director, Albany Urban Renewal Agency to Dinah Bear, General Counsel, CEQ (undated)(requesting § 1506.11 exception); letter from Dinah Bear, General Counsel, CEQ to David F. Riker, Executive Director, Albany Urban Renewal Agency (October 17, 1984)(granting § 1506.11 exception).

<sup>240</sup> NEPA failed to provide for these types of situations that require immediate action to preserve life or prevent severe environmental harm. This is a fairly common situation. Rules that agencies administer can frequently extend by their literal terms to circumstances the framers of the law did not foresee. See Comment, *Regulatory Values and the Exceptions Process*, 93 YALE L. REV. 938, 939 (1984).

bypass the full NEPA process.<sup>241</sup> Thus the actions of General Motors provided justification for Detroit to avoid a federal requirement. Without this deadline, there was no need for action before compiling an EIS. Yet there was no independent CEQ inquiry into the city's time constraints, that is, whether General Motors in fact could move to another state in less time than needed for preparation of an EIS.<sup>242</sup> Significantly, the *Crosby* case is the only instance in which CEQ granted an emergency exception on economic grounds. All other grants of emergency exceptions have been based on environmental concerns.<sup>243</sup> In environmental emergencies, CEQ would be the appropriate agency to make such a determination.

To prevent another such occurrence, there should be a curb on CEQ's discretion, judicial or statutory. If CEQ is to decide when an emergency can excuse NEPA compliance, there should be a procedure in place that would ensure an independent review of the circumstances surrounding the emergency request, and the fashioning of a solution least harmful to NEPA. Commentators have noted in the context of other statutory schemes that an exercise of discretion, without standards, procedures or statutory authorization can lead to an abuse of discretion, thus risking administrative favoritism and abuse.<sup>244</sup> The lack of standards can render review especially difficult in emergency situations.<sup>245</sup>

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<sup>241</sup> See *supra* text accompanying note 47.

<sup>242</sup> Wherever GM decided to build its plant, an EIS would be required, if there would be any federal assistance. It may be that the EIS would be less time consuming in a rural area. But, given that GM would have to begin the entire process of negotiation and EIS preparation anew elsewhere, it seems incongruous that GM could not merely have waited three months for Detroit to release an EIS.

The *Crosby* situation falls into what has been described as an "economic hardship exception." See Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*: 1982 DUKE L.J. 277, 294. Aman discusses an agency's ability to grant exceptions when the economic vitality of a project is in great jeopardy. He notes that, even so, any exception must not destroy the underlying policy goals of a statute. CEQ granted an economic hardship exception. Yet, considerations of expense are not supposed to derail the EIS process. See *Shiffler*, 548 F.2d at 103, 104.

<sup>243</sup> The *Crosby* case is the only instance of an economic exception in CEQ's § 1506.11 file. Also, CEQ refuses many requests for emergency exceptions over the phone that it feels are inappropriate for an exception, and that therefore are never reflected in files. Telephone interview with Dinah Bear, General Counsel, CEQ (April 16, 1987).

<sup>244</sup> One commentator noted that agencies, when entertaining requests for exceptions from required procedures, act as courts of equity. Thus, administrative equity deals with the burden on a particular individual of a regulatory scheme. Aman, *supra* note 242 at 278-80. See also, Comment, *The Exceptions Process: The Administrative Counterpart to a Court of Equity and the Dangers It Presents to the Rulemaking Process*, 30 EMORY L.J. 1135 (1981).

<sup>245</sup> See Schuck, *When the Exceptions Process Becomes the Rule*, 1984 DUKE L.J. 163, 179 (1984).

The process should begin with Congress. Should Congress determine that an exceptions process for the EIS would be useful, it could create one that would operate within narrow bounds and still preserve the goals of NEPA.<sup>246</sup> A properly designed exceptions process would improve the accountability of CEQ's decision making to such key actors in the NEPA process as the public, other federal agencies and the courts. By providing CEQ with clear standards, Congress could precisely define the situations within which CEQ could properly exercise its discretion as those which Congress itself perceives to be an emergency.<sup>247</sup>

The immediacy of action needed in an emergency would call for a clear definition of the term, so that CEQ could circumscribe its discretion accordingly, and not simply defer to the judgment of the applying agency or consume undue time in making determinations. For example, California, which based its own environmental protection statute on NEPA,<sup>248</sup> defined its emergency exception as a sudden, unexpected occurrence, with great potential for damage to life or property.<sup>249</sup> That statute gives some examples of what would qualify as an emergency: fires, floods, riots and earthquakes.<sup>250</sup>

In the event that such a statutorily defined emergency occurred, Congress could then provide a set of procedures for CEQ to follow, much like an expedited EIS process, if time allowed. Congress could force CEQ to consult the public, by requiring CEQ to hold at least one public meeting on the emergency decision. If the emergency falls within any other federal agency's area of expertise, CEQ should

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<sup>246</sup> Aman has encouraged explicit statutory authorization for any exceptions process. Aman, *supra* note 242, at 330.

<sup>247</sup> Accountability is an important safeguard in any exceptions process. There must be effective oversight of agency discretion in granting exceptions. "The informal record, written criteria, and written decisions of an exceptions process allow members of Congress and their staffs to assess the exercise of discretion in special cases." Comment, *supra* note 240 at 947. Without such procedures, the exercise of discretion may offer little justification for a decision. Involving all relevant NEPA actors in the exceptions process would effectively insure proper oversight of the exercise of CEQ's discretion.

<sup>248</sup> The California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-21176 (1977).

<sup>249</sup> The California Environmental Quality Act defines emergency as follows:

"Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.

Cal. Pub. Res. Code § 21060.3.

<sup>250</sup> *Id.* For a discussion of the effectiveness of the California emergency exemption scheme, see Comment, *The Applications of Emergency Exceptions under CEQA: Loopholes in Need of Amendment?*, 15 PAC. L.J. 1089 (1984).

be required to consult with that agency. Congress could also establish strict time constraints for raising judicial challenge to the emergency determination. These provisions for public review and an informal record would guarantee safeguards against any abuse of discretion.<sup>251</sup>

By forcing CEQ to do such an independent review of the emergency request, Congress would provide a check against agencies which might try to use the emergency exception to bail out of the NEPA process. Thus, even in an emergency, CEQ could at least balance environmental concerns against the emergency situation in an expedited fashion. In addition, a record of the emergency and the environmental considerations that were made before granting an exemption would exist at this early stage. A timely challenge could rely upon this record and timely review could occur before any major commitment of resources. Due to the infrequent nature of these emergency determinations, Congress would not overburden CEQ by putting an expedited procedure in place for dealing with such emergencies.

Such an exceptions procedure would still leave room for CEQ to exercise its own expertise in environmental matters with an accordingly deferential standard of review. A new exceptions process might compare favorably with such processes used in the past. For example, the Department of Energy has a congressionally mandated exceptions process in place for the Emergency Price Allocation Act of 1973 (EPAA).<sup>252</sup> The Act was passed due to oil shortages brought about by the OPEC embargo. Congress passed the Act to assure an equitable distribution of oil at fair prices.<sup>253</sup> Congress then authorized the Secretary of Energy to grant relief from "any rule, regulation or order issued under [the EPAA] as may be necessary to prevent special hardship, inequity or unfair distribution of burdens."<sup>254</sup> The Agency accordingly set up regulations and guidelines to facilitate the exceptions process.<sup>255</sup> Thus, the Department of Energy, expert in the pricing and allocation of oil, can determine whether an individual company is so adversely affected by the allocation scheme as to bear a disproportionate burden of the emergency measures.<sup>256</sup>

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<sup>251</sup> See, e.g., Comment, *supra* note 240 at 949-50.

<sup>252</sup> Emergency Price Allocation Act of 1973, 15 U.S.C. § 751 et seq (1982).

<sup>253</sup> 15 U.S.C. § 753(b)(1) (1982).

<sup>254</sup> The Department of Energy Act, 42 U.S.C. § 7194 (1982).

<sup>255</sup> 10 C.F.R. § 205.176 (1986).

<sup>256</sup> See *Bonnafons v. United States Dep't of Energy*, 492 F.Supp. 1276, 1280 (D. D.C. 1980).

By creating such a procedure, Congress provided a record which a court could review, similar to that which an expedited EIS might provide. With such a record the court could resume its proper, deferential role. Courts have shown great deference to the Department of Energy's Office of Hearing Administrator's exceptions decisions because Congress mandated an exceptions process "by its very nature designed to resolve unforeseen or unforeseeable factual situations in a complex, technical and highly volatile field."<sup>257</sup> A Department of Energy order granting exceptions relief will be enjoined "only on a clear showing that it exceeds the agency's authority, or that it is based on findings not supported by substantial evidence."<sup>258</sup>

Thus, a properly designed CEQ emergency exceptions procedure would indicate to a court that CEQ was acting within its proper sphere of discretion. In such a case, a reviewing court could point to procedures and a record as a basis for granting substantial deference to CEQ's actions. A defined emergency exceptions procedure would keep emergency decisions within boundaries set by Congress, and would provide a record for a prompt judicial review, while preserving discretion for CEQ to meet various types of emergency decisions.

## VII. CONCLUSION

As presently construed, the CEQ emergency exception seems to be a major aberration in the goal of assuring that environmental considerations are not shunted aside. The provision goes beyond the mandate of authority granted to CEQ by NEPA and the executive orders that followed passage of the Act. It also cuts against legislative intent and court interpretation mandating strict compliance with the procedures of NEPA, as well as court practice construing narrowly any exemptions from NEPA's requirements. The presence of such a provision, without adequate procedures to ensure consideration of environmental factors and without building an adequate record for public and court review, represents a threat to the goals of NEPA.

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<sup>257</sup> See *Marathon Oil Co. v. Department of Energy*, 482 F.Supp. 651, 657 (D. D.C. 1979); See also *Bonnafons*, 492 F.Supp. at 1280.

<sup>258</sup> *Marathon Oil*, 482 F.Supp. at 657. However, such exceptions processes can develop their own difficulties, which can lead to further rulemaking. For a discussion of the Ashland Oil exceptions procedures passed on in the *Marathon* case, see Schuck, *supra* note 244.

Should such a provision be deemed a necessity, it is possible that Congress, not CEQ, could promulgate such an exception. Congress could define more certainly what conditions would constitute such an emergency, and set up procedures, much like an expedited EIS process, that would involve the public, and other federal agencies in the process. These procedures would build an adequate record for meaningful judicial review and curtail abuse of discretion, all within an abbreviated time span. Such a procedure would provide an adequate, rapid procedure for dealing with an emergency without losing sight of the environmental goals embodied in NEPA and strictly adhered to by the courts.