June 1973

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http://dx.doi.org/https://doi.org/10.15779/Z38GR73

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IMPLEMENTATION OF THE CLEAN AIR ACT: SHOULD NEPA APPLY TO THE ENVIRONMENTAL PROTECTION AGENCY?

Environmentalists have found the National Environmental Policy Act to be an effective litigation tool in their efforts to prevent environmental degradation, and the decision-making processes of nearly all federal agencies have been affected—in form if not in substance—by NEPA. Ironically, the only agency which has escaped NEPA’s procedural clutches is the institution charged with implementing the nation’s major environmental improvement programs—the Environmental Protection Agency. With increasing frequency but with universal futility, industry has cited the agency’s noncompliance with NEPA in challenging EPA’s Clean Air Act programs. All courts which have considered the issue have agreed with EPA and held the Clean Air Act exempt from NEPA. Thus, EPA has managed to avoid the institutional headaches which NEPA has caused other agencies. But while the Clean Air Act has accordingly been immunized from this potential source of industry challenge, the question must be asked, “At what cost?” In this article, the author examines the policy reasons for and against such an exemption.

The National Environmental Policy Act of 1969 (NEPA) requires that all federal agencies must follow certain steps designed to insure the maximum feasible protection of the environment, before taking major federal action “significantly affecting the quality of the human environment.” The Environmental Protection Agency (EPA),

1. 42 U.S.C. §§ 4321 et. seq.
2. 42 U.S.C. § 4332. Section 102 of NEPA provides in part:
   The Congress authorizes and directs that, to the fullest extent possible:
   (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall . . .
   (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
   (i) the environmental impact of the proposed action,
   (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
   (iii) alternatives to the proposed action,
   (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
   (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
These reports have come to be known as environmental impact statements, or NEPA statements.
which administers the nation's major federal environmental efforts, has maintained from its inception that NEPA was not meant to apply to most of its major regulatory activities, and has offered a series of policy arguments in support of that claim. For quite different reasons EPA's contentions have been challenged by both environmentalists and industry. Environmentalists view NEPA as a necessary and effective tool in preventing environmental degradation, and believe that the statute could provide similar protection if applied to EPA's activities. They also fear that an exemption for EPA could have a demoralizing effect on other agencies' efforts to comply with NEPA. On the other hand, industry has sought to use NEPA as an additional vehicle for delaying the agency's regulatory programs. In fact, suits which have raised NEPA in challenging various aspects of EPA's air programs have been initiated by industry, and this has caused environmentalists to be cautious in pushing for NEPA compliance.

Courts have failed to carefully analyze the complex issues involved in most of the cases raising the NEPA-EPA issue which have been decided to date. This paper will examine the NEPA-EPA relationship as it specifically pertains to two aspects of EPA's activities under the Clean Air Act: review of state implementation plans.

3. The Environmental Protection Agency was established pursuant to Executive Reorganization Plan No. 3 of 1970, 3 CFR 199 (Comp. 1970). Among the major federal anti-pollution efforts which it is charged with administering are: air and water pollution control, pesticides use, solid waste disposal management, and radiation exposure hazards. For a further discussion of EPA's functions, see text accompanying notes 141-45 infra.

4. In the following cases, the NEPA-EPA issue in relation to Clean Air Act new source performance standards or state implementation plans was raised and decided: Appalachian Power Co. v. EPA, 477 F.2d 615, 5 ERC 1222 (4th Cir. 1973) (EPA approval of state implementation plan); Buckeye Power, Inc. v. EPA, 481 F.2d 162, 5 ERC 1611 (6th Cir. 1973) (state implementation plan); Duquesne Light Co. v. EPA, 481 F.2d 1, 5 ERC 1473 (3rd Cir. 1973) (implementation plan); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 5 ERC 1820 (D.C. Cir. 1973) (new source performance standards); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 5 ERC 1593 (D.C. Cir. 1973) (new source of performance standards); Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972), rev'd, 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973); Getty Oil Co. v. Ruckelshaus, 342 F. Supp. 1006, 4 ERC 1141 (D. Del. 1972), aff'd, 467 F.2d 349, 4 ERC 1567 (3rd Cir. 1972), cert. denied, 409 U.S. 1125 (1973) (implementation plan).

5. At present, all cases which have decided the issue have held that NEPA does not apply to EPA review of state implementation plans or setting of new source performance standards. The Tenth Circuit opinion on this issue in Anaconda was dictum since the court held that the lower court was without jurisdiction. 482 F.2d at 1305, 5 ERC at 1676. The district court had held that NEPA was applicable to EPA review of state implementation plans. 352 F. Supp. at 713, 4 ERC at 1828. See also International Harvester Co. v. EPA, 478 F.2d 615, 650 n.130, 4 ERC 2041, 2061 n.130 (D.C. Cir. 1973), indicating that NEPA is inapplicable to EPA's auto emission control program.

6. This paper does not examine other Clean Air Act matters such as estab-
the setting of new source performance standards. A summary and analysis of the pertinent legislative history will be followed by an examination of EPA's policy arguments. The agency's reluctance to comply with NEPA will be placed in historical perspective, and the discussion will then move to a consideration of the major advantages of applying NEPA to EPA, and an analysis of the ramifications of exempting EPA from that statute. This will include a look at EPA's recently published guidelines, which are intended to implement the "spirit" of NEPA without being bound by its letter. References will be made to the 1972 Amendments to the Federal Water Pollution Control Act (FWPCA) where such reference sheds light on a particular issue.

One cautionary note is in order. In its analysis of whether EPA should be bound by NEPA, a study conducted by an internal EPA Task Force includes an extensive review of what has been required of

7. Section 110(c) of the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857c-5(c), directs the Administrator to "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof," if, inter alia, the state failed to submit a plan or if the administrator determines that the state plan does not attain the national primary and secondary ambient air quality standards promulgated by EPA. Section 109(b)(1), § 1857c-4(b)(1) defines a primary ambient air quality standard as that standard for a particular pollutant which, "allowing an adequate margin of safety, are requisite to protect the public health." A secondary standard is defined in Section 109(b)(2), § 1857c-4(b)(2) as that level of air quality respecting a particular pollutant which is necessary "to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutant in the ambient air."

8. Section 111(a)(1) of the Act, 42 U.S.C. § 1857c-6(a)(1), defines a standard of performance as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." EPA must publish a list of categories of new stationary sources, which are defined in Section 111(a)(2) as "any stationary source, the construction or modification of which is commenced after the publication of regulations . . . prescribing a standard of performance under this section which will be applicable to such source." The list of categories of new stationary sources must include all sources which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare." Within 120 days after the promulgation of this list, EPA must propose standards of performance for each category, and final standards must be promulgated within ninety days after that date. 42 U.S.C. § 1857c-6(b)(1)(A).


11. EPA, APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO EPA'S ENVIRONMENTAL REGULATORY ACTIVITIES: TASK FORCE REPORT (1973) [hereinafter cited as EPA TASK FORCE REPORT].
other agencies under NEPA. This paper will not attempt to duplicate that or any of the other general studies which have been done on NEPA, since it is an underlying premise of this paper that most of the issues involved in such an inquiry are not germane to the issue of whether EPA should comply with NEPA; so long as NEPA is the law, the issue is why EPA should not comply. In short, the question of the EPA-NEPA relationship should not be converted into a general debate on NEPA's ultimate workability. As will become clear, some of EPA's arguments introduce precisely this danger. This paper will focus, however, on problems which may be of more unique relevance to EPA and the Clean Air Act.

I

LEGISLATIVE HISTORY

A. NEPA

When the Conference Report on NEPA, S. 1075, reached the floor of the Senate, Senator Jackson introduced for the record a document entitled "Major Changes in S. 1075 as Passed by the Senate." After mentioning several agencies which had environmental protective duties, the document stated that sections 102 and 103 were not meant to alter the manner in which those agencies carried out their responsibilities. While NEPA was intended to insure the consideration of environmental factors in decisionmaking, the bill's "action-forcing" provisions were aimed primarily at "those agencies who now have little


13. The text of section 102 is contained in note 2 supra. Section 103 directs all federal agencies to review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act [and to recommend to the President] such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.


14. The procedural requirements of section 102 were added to S. 1075 to insure
or no legislative authority to take environmental considerations into account.\textsuperscript{15}

Similar legislative history was established concerning section 105, which provides that "(t)he policies and goals set forth in this Act are supplemental to those set forth in existing authorizations of Federal agencies."\textsuperscript{16} Senator Muskie stated the "clear understanding" between Senator Jackson and himself was that the legislative mandates of agencies having environmental protection responsibilities "are not changed in any way" by this NEPA provision.\textsuperscript{17}

On the basis of this legislative history, the Council on Environmental Quality's\textsuperscript{18} original guidelines provided that EPA should be exempt from NEPA's procedural requirements embodied in section 102.\textsuperscript{19} This exemption represented a "startling departure"\textsuperscript{20} from the clear language of NEPA, which directs all federal agencies to comply with the Act. Furthermore, for several reasons this departure was not warranted by the vague legislative history cited above. First, EPA had not yet been established at the time of NEPA's passage,\textsuperscript{21} making any application of this legislative history to EPA inferential. It is doubtful, however, that at the time of NEPA's passage Congress considered NEPA's applicability to the varied programs which eventually came under EPA's purview.\textsuperscript{22}

More importantly, the meaning of this legislative history is at best unclear. For example, one observer has suggested that the real concern reflected in the legislative debates centered around questions of

\begin{itemize}
  \item that the statement of national purpose and policy embodied in the Act were implemented by federal agencies. See \textit{Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs}, 91st Cong., 1st Sess., at 112-115 (1969) (testimony of Prof. Lynton K. Caldwell); \textit{Council on Environmental Quality, 3 CEQ ANN. REP. 222 (1972)} [hereinafter cited as \textit{3 CEQ ANN. REP.}].
  \item 115 CONG. REC. 40418 (1969). Similar statements were made by House sponsors of NEPA. See, \textit{e.g.}, 115 CONG. REC. 13093 (remarks of Congressman Dingell).
  \item 42 U.S.C. § 4335.
  \item 115 CONG. REC. 40423 (1969).
  \item The Council on Environmental Quality (CEQ) was established pursuant to Title II of NEPA, 42 U.S.C. §§ 4341 \textit{et seq.}. Its duties under the Act include, \textit{inter alia}, the gathering and analyzing of information concerning trends in environmental quality, and the evaluation of federal environmental programs. It is also to recommend and develop national policies for improving the environment. \textit{See 1 CEQ ANN. REP. 20-21 (1970); Executive Order 11514, 3 C.F.R. 104 (Comp. 1970).}
  \item \textit{Comment, Kalur v. Resor, Water Quality, and NEPA's Application to EPA, 2 E.I.R. 11125, 10029 (1972)} [hereinafter cited as \textit{Kalur Comment}].
  \item EPA was established six months after NEPA was passed.
  \item In fact, the Congressional debates at this time focused mainly on air and water programs, which were to form only part of EPA's responsibilities. \textit{See Recent Developments, Impact Statements, supra note 12, at 350; Kalur Comment, supra note 20, at 10029.}
\end{itemize}
committee jurisdiction. The Senate Subcommittee on Air and Water Pollution which Senator Muskie chairs, oversees the legislative scheme governing the operation of many agencies which would have been affected by NEPA and which have environmental control authority. This indicates that Senator Muskie was attempting to prevent encroachment on such agencies by the committee that wrote NEPA, Senator Jackson's Interior and Insular Affairs Committee.\textsuperscript{23} Thus, the legislative record may not have been directed to the section 102 process at all, and in any event does not indicate a clear intent to exempt any agencies from NEPA procedures.\textsuperscript{24}

This view is further supported since the document submitted by Senator Jackson\textsuperscript{25} specifically mentioned the National Park Service as an agency with environmental responsibilities. Therefore, if the legislative history supports an exemption for EPA it would also support a NEPA exception for the Park Service; yet courts have held that NEPA applies to the latter.\textsuperscript{26}

B. The FWPCA Amendments of 1972

Although NEPA's nebulous legislative history stands in sharp contrast to its clear statutory directive that all federal agencies must comply with the Act, recent legislative developments have further obfuscated the issue of congressional intent. In 1972, Congress passed a comprehensive set of amendments to the Federal Water Pollution Control Act (FWPCA).\textsuperscript{27} These amendments contain a specific NEPA exemption for EPA in carrying out several functions under the Act; no EPA action taken pursuant to it "shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of NEPA," with the exception of federal assistance for construction of public treatment facilities and the

\textsuperscript{23} Kalur Comment, supra note 20, at 10029.

\textsuperscript{24} Id; Recent Developments, Impact Statements, supra note 12, at 350. In fact, the document submitted by Senator Jackson stated that section 102 was "clearly designed to assure consideration of environmental matters by all agencies in their planning and decision making." 115 CONG. REC. at 40418 (1969) (emphasis supplied). The General Accounting Office has concluded that the thrust of the legislative debates discussed above was to insure that environmental improvement agencies would not use the NEPA phrase "to the fullest extent possible" as an "excuse to exercise their environmental protection mandates with less diligence than before NEPA's enactment." Letter from Comptroller General of the United States to Congressman Dingell, June 6, 1973, at 12.

\textsuperscript{25} See text accompanying notes 13-15 supra.

\textsuperscript{26} See Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 5 ERC 1844 (10th Cir. 1973); Minnesota PIRG v. Butz, — F. Supp. —, 5 ERC 1251, 1276 (D. Minn. 1973); Upper Pecos Ass'n. v. Stans, 452 F.2d 1233, 1236. 3 ERC 1418, 1419 (10th Cir. 1971), vacated as moot, 409 U.S. 1021 (1972).

\textsuperscript{27} Pub. L. No. 92-500 (Oct. 18, 1972).
issuance of discharge permits for new sources. Senator Muskie partially justified the exemption on the grounds that a NEPA application would have frustrated congressional intent. Senator Muskie contended that

[the relation of FWPCA and NEPA should not require clarification. It was clearly intended, at the time Congress enacted NEPA, that environmental regulatory agencies such as those authorized by FWPCA and the Clean Air Act would not be subject to NEPA's provisions.]

However, other senators contested this interpretation of NEPA's legislative history. Senator Jackson stated that the history was ambiguous "with respect to both the scope of the exemption sought to be established for EPA and the policy objectives sought to be achieved by the exemption," but concluded that EPA should not be exempt from NEPA. Congressman Dingell, NEPA's floor manager in the House, expressed no doubts that NEPA was applicable to EPA. Thus, NEPA's major sponsors disagree with Senator Muskie on his interpretation of the legislative record.

In addition, the NEPA exemption contained in section 511 of FWPCA was in neither the House nor Senate versions of the 1972 amendments. In fact, its appearance in the conference report "caught the Administration, environmentalists, industry lobbyists, and the committees that wrote [NEPA] completely by surprise." Referring specifically to the NEPA exemption, Senator Buckley voiced strong objection to the hasty manner in which the Senate was being forced to consider such "complex legislation in so short a time; especially as in one respect we are being asked to ratify a provision which has no basis in either the Senate or House versions." It therefore appears that a vague legislative history was labeled by some legislators as "clear" and then used to support later attempts to legislate in accordance with their interpretation of that earlier legislative record; an unclear legislative intent had been used to push through a clear legislative exemption for

30. Id.
31. Id. at 16886.
33. Barfield, Environmental Report/Water Pollution Act Forces Showdown in 1973 Over Best Way to Protect Environment, 4 Nat'l. J. 1871 (1972). This provision was written into the legislation at the very end of the House-Senate Conference upon the suggestion of a staff assistant to Senator Baker.
EPA in circumstances where few legislators were adequately prepared to consider the exemption's merits.\(^{35}\)

In fact, the debates surrounding the FWPCA amendments neither resolve the meaning of NEPA's legislative history\(^{36}\) nor reflect a congressional consensus concerning the EPA-NEPA issue. Nevertheless, EPA has attempted still another bootstrapping maneuver by asserting that the NEPA exemption written into the water amendments manifests a congressional desire to exclude the Clean Air Act from NEPA's requirements as well.\(^{37}\) EPA has also cited the 1971 CEQ Guidelines\(^{38}\) in support of its position.\(^{39}\) However, CEQ has recognized that the EPA exemption was based upon a dubious reading of NEPA's legislative history, and its Revised Guidelines have deleted the EPA-NEPA exception.\(^{40}\) Although the Revised Guidelines do not direct EPA to comply with NEPA, the deletion of § 5(d) undoubtedly erodes EPA's reliance on legislative history, since the guideline had been explicitly based on that legislative history. EPA has reportedly been aware for some time that its legislative intent argument lacks force,\(^{41}\) and has therefore offered a series of policy arguments in support of its position. These policy arguments must now be examined.

35. Further Congressional controversy arose as a result of suggestions that because the phrase "major federal actions significantly affecting the quality of the human environment" only appears in section 102(2)(C) of NEPA, other provisions were therefore applicable to the FWPCA. Senator Muskie rejected this contention, stating the conferee's intent to exclude all of NEPA from the FWPCA. \textit{Id.} at 16,885-86. Senator Jackson responded with a warning that "[a] back-door attempt at legislation through last minute speeches on the floor of the Senate is not the proper conduct of the Nation's business. Fortunately, as \textit{Calvert Cliffs} and other court decisions have indicated, the courts will not abide the diminution of the authority of environmental laws through the vehicle of floor speeches re-interpreting clear legislative language." \textit{Id.} at 16,888.


37. \textit{See, e.g.,} Brief for EPA as Respondent at 9, Appalachian Power Co. v. EPA (D.C. Cir. Civ. No. 72-1079) (hereinafter cited as EPA Brief, Appalachian Power Co. v. EPA); Brief for EPA as Respondent at 47, Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972) (hereinafter cited as EPA Brief, Anaconda Co. v. Ruckelshaus); Brief for EPA as Appellant at 33-34, Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973) (hereinafter cited as EPA Appeal Brief, Anaconda Co. v. Ruckelshaus). The reader should not confuse the Appalachian Power case cited here, which was consolidated with Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 426, 5 ERC 1820 (D.C. Cir. 1973), with Appalachian Power Co. v. EPA decided by the Fourth Circuit and cited at note 4 supra.

38. \textit{See note 19 and accompanying text supra.}


41. \textit{See Kalur Comment, supra} note 20, at 10029. On the other hand, several
II

ALLEGED INCONSISTENCIES BETWEEN NEPA AND THE CLEAN AIR ACT

The major thrust of EPA’s argument has been three-pronged. First, EPA has argued that NEPA, as interpreted by the courts, is too inflexible to allow the agency to comply with both NEPA’s procedural requirements and the strict timetables set forth in the Clean Air Act. Second, EPA has maintained that the environmental impact of a proposed emission standard is too speculative to achieve the degree of precision demanded by NEPA analysis. Third, the agency has contended that under the Clean Air Act it is statutorily prohibited from considering the kinds of issues which would be central under NEPA. The first argument is at least questionable. The second justification is inaccurate, as will become clear. The third position may be technically correct with respect to implementation plans, but is tenuous with respect to new source performance standards. Most importantly, the

courts have been quite receptive to the legislative intent argument. In Portland Cement Ass’n v. Ruckelshaus, the court reviewed portions of the legislative debates and found that the history raised a “serious question whether NEPA is applicable to environmentally protective regulatory agencies.” 486 F.2d at 381, 5 ERC at 1596. However, the court also concluded that this history was not “decisive” and proceeded to a discussion of the underlying policy issues. 486 F.2d at 383, 5 ERC at 1597. In Anaconda Co. v. Ruckelshaus, the tenth circuit was unequivocal in its conclusion that NEPA was not meant to apply to EPA: “The legislative history which is developed in Portland Cement Ass’n v. Ruckelshaus . . . clearly establishes that such [an impact] statement was not contemplated by Congress.” 482 F.2d at 1306, 5 ERC at 1676. The district court, however, had treated the legislative history quite differently in holding that EPA was bound by NEPA, stating that since NEPA applies on its face to all federal agencies, “the 1972 amendments to the Water Pollution Act create no exception under the Clean Air Act.” The court stated that “[i]f Congress wants to exempt EPA from the requirement for impact statements in Clean Air Act cases, it can and it will amend the statute.” 352 F. Supp. at 713, 4 ERC at 1828.

42. EPA has argued that the trend towards adoption of technology-based standards is a result of the “rudimentary state of our knowledge concerning how ambient conditions . . . are brought into being, and how they can best be regulated.” The need to develop “extremely complex models” is thus obviated by simply requiring a high level of emission limitation. While this is an accurate description of standard-setting for new sources, which require an application of the “best system” of emission reduction, it cannot explain the process by which implementation plans are formulated. Implementation plans are designed to attain the national primary and secondary air quality standards established for individual pollutants. Inevitably, implementation plans include emission limitations for particular sources, and the Clean Air Act requires them to be included. 42 U.S.C. § 1857c-5(a)(2)(B). Thus, in promulgating and reviewing implementation plans, EPA must theoretically consider the effects of emission limitations on ambient air conditions. However, EPA’s regulations do not require State Implementation Plans to include emission limitations. 40 C.F.R. § 51.1(7) (1972), even though they are mandated by the Clean Air Act. See Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo. L.J. 153, 183 (1972) [hereinafter cited as Note, Clean Air Amendments].

43. See text accompanying notes 101-104 infra.
agency's first two arguments concerning time constraints and the need for certainty represent a general attack on NEPA's viability and, as such, are not only applicable to EPA, but also could be used by any agency operating under statutory deadlines or imperfect knowledge to support a claim for a NEPA exemption.\textsuperscript{44} It is sufficient for present purposes to note that the ultimate viability of NEPA is receiving more attention,\textsuperscript{45} and it is not the intent here to duplicate those inquiries. Rather, what follows is a sampling of judicial opinions which are most relevant to the problems posed by EPA.

A. The Need for Prompt Action

EPA emphasizes that the Clean Air Act "requires rapid action under strict deadlines," and that the statute was established "on the premise that the air pollution situation is a crisis that requires immediate control."\textsuperscript{46} Therefore, according to the agency, "any court-imposed techniques for delay directly conflict with the provisions and the congressional intent of the Clean Air Act."\textsuperscript{47} Regarding both EPA review of state implementation plans and the setting of standards for new stationary sources, EPA fears that NEPA application would lead to significant delays.\textsuperscript{48} Courts have been quite sympathetic to this argument, and the Clean Air Act's time constraints have been a primary factor underlying judicial willingness to exempt EPA from NEPA.\textsuperscript{49} It is therefore worthwhile to analyze this issue in some detail.

B. Potential Sources of Delay

1. Preparation of Environmental Impact Statements: NEPA and Emergency Procedures

The Clean Air Act directs the EPA Administrator to publish a list of categories of new stationary sources within ninety days after date of enactment. The Administrator must include in this list all sources which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."\textsuperscript{50} Within 120 days after publication, EPA must propose emission limitations,
which are labeled "standards of performance," for categories contained in the list, and final standards must be promulgated within ninety days thereafter. The statute thus allows EPA only three hundred days from the date of enactment to promulgate new source emission standards. Therefore, the agency claims

"[i]t is unrealistic to presume that a meaningful study of all the broad social, economic, and environmental impacts of the proposed stationary source standards could have been made and a 'detailed statement' of those impacts and of alternative courses of action written, in time for such a statement to accompany the proposed standards through the agency review process for promulgation, all within 300 days."

This conclusion presumes that EPA would not have leeway under NEPA to devise procedures for accommodating time constraints imposed by the Clean Air Act. The conceptual resolution of this issue turns on the NEPA provision which directs agencies to comply with the Act "to the fullest extent possible." There is legislative history indicating that this phrase was intended to excuse compliance only when another statute expressly precluded, or made impossible, agency compliance with NEPA. The landmark decision in Calvert Cliffs' Coordinating Comm., Inc. v. AEC adopted this interpretation in requiring NEPA compliance to the fullest extent allowed by the agency's statutory authorization and in quoting from the following legislative history:

52. EPA Brief, Appalachian Power Co. v. EPA, supra note 37, at 22. EPA has offered the same argument regarding review of state implementation plans: "Implementation plans under § 110 affect thousands of sources and involve complex and diverse control strategies designed to achieve the ambient air quality standards. Clearly, it would have been an impossible task for the Administrator, within the four months allowed by the Act, to prepare a 'detailed statement' of 'all known possible consequences' for each of the 55 state plans analyzing the factors required to be addressed by NEPA. . . . It is obvious, therefore, that the Administrator could not realistically be expected to comply with both the requirements of NEPA and the Clean Air Act." EPA Brief, Anaconda Co. v. Ruckelshaus, supra note 37, at 50.
54. The phrase "to the fullest extent possible" did not appear in either the House or Senate versions of the NEPA legislation, but was added by the Conference Committee. The House Conferes stated that "[t]he purpose of the new language is to make clear that each agency 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. 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." H.R. REP. No. 765, 91st Cong., 1st Sess. 9-10 (1969). See also 115 Cong. Rec. 40416 (1969) (remarks of Senator Jackson); CEQ, Preparation of Environmental Impact Statements: Guidelines § 1500.4, 38 Fed. Reg. 20550, 20551 (1973) [hereinafter cited as CEQ Revised Guidelines].
no agency shall utilize an excessively narrow construction of its ex-
isting statutory authorization to avoid compliance.

. . . .

Considerations of administrative difficulty, delay, or economic cost
will not suffice to strip [section 102] of its fundamental import-
ance. The tough language in Calvert Cliffs', however, must be read in light
of the AEC's attempt to circumvent NEPA entirely through an ex-
ceedingly restrictive interpretation of NEPA's relevance to the activ-
ity at issue. The court indicated that the agency could not read "to the fullest extent possible" to allow noncompliance with NEPA.
The issue was not good faith compliance, but no compliance at all. Thus, it would seem that even under this rigorous approach to NEPA, EPA would not be prohibited from applying NEPA to its Clean Air Act activities to the fullest extent possible within its statutory dead-
lines.

In addition, there are court decisions which indicate a judicial willingness to apply NEPA flexibly in the face of administrative ex-
igencies. For example, EDF v. Corps of Engineers held that NEPA was applicable retroactively to the Gilham Dam project, which had been two-thirds completed at the time of the lawsuit. The Corps main-
tained that under its own regulations it would take several years to complete a NEPA analysis. The court replied that NEPA did not preclude the adoption of reasonable abbreviated procedures, so long as the final product was "essentially the same."

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55. 449 F.2d 1109, 1115, 2 ERC 1779, 1782 (D.C. Cir. 1971). See also Monroe County Conservation Council v. Volpe, 472 F.2d 693, 699, 4 ERC 1886, 1889 (2d Cir. 1972); EDF v. TVA, 468 F.2d 1164, 1175, 4 ERC 1850, 1855-56 (6th Cir. 1972).

56. The AEC argued in Calvert Cliffs' that a prospective licensee's compliance with applicable water quality standards assured adequate water pollution control, and that the agency therefore need not prepare a NEPA statement in connection with its licensing actions. The court rejected this contention that compliance with water quality standards obviated the need for NEPA balancing, holding that water quality standards constituted the minimum requirement; NEPA procedures would insure that the optimally beneficial course of action was followed. 449 F.2d at 1123, 2 ERC at 1788.

57. For a further exposition of this view, see Hearings on H.R. 14103 Temporary Exemption From Section 102 Statements Before the Subcomm. on Fisheries and Wild-
life Conservation of the House Comm. on Merchant Marines and Fisheries, 92d Cong., 2d Sess., at 217-18 (1972) (exchange between Congressman Dingell and Anthony Z. Roisman) [hereinafter cited as Hearings on H.R. 14103]. This view is corroborated in EDF v. TVA, where the court ignored factors of administrative cost and delay for the purpose of considering a NEPA exemption. 468 F.2d at 1176, 4 ERC at 1856.


59. 325 F. Supp. at 756-57, 2 ERC at 1265. The court further stated: "[T]he evidence indicates that the defendants will require, by their own regulations and poli-
A more recent example of this flexible approach is NRDC v. TVA,\(^\text{60}\) where defendant had filed one comprehensive EIS covering all of its coal procurement contracts, claiming that preparation of a statement on each contract would conflict with competitive bidding requirements. The court held that this was a reasonable method of resolving statutory conflict.\(^\text{61}\) Although the problem confronting the agency was not one of time, the case indicates that statutory conflict with NEPA does not exempt an agency from compliance, but affords leeway in determining how to comply with both statutes. This view is supported by United States v. SCRAP,\(^\text{62}\) where the Interstate Commerce Commission sought to avoid NEPA compliance in its rate-making procedures on the theory that rates must be determined quickly, in contrast to "the sort of reflective deliberation which NEPA requires."\(^\text{63}\) The court replied that such conflicts did not warrant a NEPA exemption, but rather could be resolved under the NEPA provision which requires compliance "to the fullest extent possible."\(^\text{64}\)

Despite these indications of flexibility, EPA maintains that the judicial trend under NEPA suggests that it might not be at liberty to devise innovative methods for coping with its legitimate administrative needs. A decision relied on in support of this contention is Izaak Walton League v. Schlesinger,\(^\text{65}\) which involved the adequacy of the AEC's interim licensing procedures established in response to Calvert Cliffs'. The revised regulation in dispute was designed to implement and expedite reviews of the environmental impact of those generating facilities which were constructed and nearly at the point of applying for operating licenses when Calvert Cliffs' was decided. The
relevant section directed the AEC to "proceed expeditiously" with such applications, pending receipt of a supplemental environmental report. The applicant was to be granted an operating license upon a determination that its activities would not significantly contribute to environmental degradation, and upon satisfaction of safety requirements. The court held that this class of facilities was subject to NEPA and that environmental impact statements were therefore required, rejecting the notion that the AEC "has the discretion to comply with less than all the mandates of NEPA." However, Izaak Walton League need not be read to stand for the nonviability of emergency procedures per se, since the court was concerned with fairly clear violations of NEPA's provisions and purposes. Implicit in its decision is the suggestion that the AEC would have been provided leeway in complying with NEPA; as in Calvert Cliffs, the court was dismayed with the lack of any effort at compliance. Another factor in the decision was the effective exclusion of the public from AEC's decisionmaking process relating to this class of facilities. In fact, this aspect seems to have been at the core of plaintiff's grievance. Joseph B. Karangis, counsel for plaintiffs, stated this objection quite clearly before a House Subcommittee. Thus, public participation in bureaucracy decisionmaking was the central issue in Izaak Walton League. It was the violation of NEPA's core value of public participation, and not deviation by the AEC from NEPA's other procedural commands, to which the court addressed itself.

68. For example, the court stated that it could not "even reach a discussion of the adequacy of the NEPA statement . . . since AEC refuses to issue a NEPA statement. . . . In Calvert Cliffs, the court intimated that NEPA would not require the same approach with respect to ongoing projects. . . . But this does not mean that AEC can ignore the public impact statement requirements of the Act." Id. at 294 n.26.
69. The court noted with concern that the manner in which thermal effluents would be discharged into the Mississippi River was not disclosed until after plaintiff's opportunity to intervene had expired. Id. at 292.
70. "They [AEC] were not even going to have a hearing. There was no hearing. They would just engage in good analysis which determined whether there was an environmental impact and then issue the license. . . . This is really what we were fighting. . . . We said, we do not care about the abbreviated procedures. We realize you have demands on our time. Give us your analyses: let us have your impact. We were told 'No'." Hearings on H.R. 13752: Interim Nuclear Licensing Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92 Cong., 2d Sess. at 70 (1972) [hereinafter cited as Hearings on H.R. 13732]. Anthony Roisman has offered the same analysis of Izaak Walton League: To begin with, of course, [Izaak] only said you can't get away with an emergency program which cuts the public out of a program. That was the flaw that resulted in [that decision] and that flaw we know will not be the case with EPA." Hearings on H.R. 14103, supra note 57, at 201.
71. The court stated that it would be "unacceptable" to "substitute the possi-
2. Litigation Delays

Aside from the issue of whether NEPA would allow EPA adequate leeway to devise innovative compliance procedures to accommodate both NEPA and the Clean Air Act, the agency fears that an application of NEPA to its Clean Air Act activities would provide industry with a significant new opportunity to challenge its program in the courts, thus causing further delays in air pollution control. Although this danger is real, it must be placed in proper perspective. First, if industry or environmentalists are not pleased with a particular standard, EPA will undoubtedly find itself in court irrespective of NEPA. Second, recent cases have indicated a judicial readiness to allow industries the right to challenge EPA's Clean Air Act standards in time-consuming adjudicatory proceedings. Third, NEPA's stringent disclosure requirements must be measured against a background of increasing judicial insistence on adequate disclosure and explanation of agency action, which has taken place independently of NEPA. Fourth, NEPA's significance as an additional "handle" for industry is tempered by the limited scope of judicial review which courts have gener-

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bility of one form of threat to the environment for another form." The court was also influenced by the fact that the AEC's NEPA statement was nearly completed, so there would not be "substantial delay." 337 F. Supp. at 298. For regulations offered as a solution to the Izaak Walton case, and which its drafters maintained would have met NEPA's requirements, see Hearings on H.R. 13752, supra note 70, at 183-87 (letter from Anthony Z. Roisman and Myron M. Cherry to Senator Baker and Congressman Dingell, March 27, 1972).

72. See Hearings on H.R. 14103, supra note 57, at 150-51 (testimony of Robert Rauch, assistant legislative director, Friends of the Earth) for similar comments concerning NEPA and the water pollution control program. Rauch argued that NEPA compliance might actually serve to reduce litigation under the Refuse Act Permit Program because NEPA statements would promote "increased understanding of EPA's reasons for issuing specific permits—reasons which may otherwise never be adequately clarified except under pressure in courts."

73. In Appalachian Power Co. v. EPA, the issue of the appropriate type of hearing to be granted plaintiff was remanded pending a determination of the adequacy of the hearings provided by the state in conjunction with the preparation of its implementation plan. — F.2d at —, 5 ERC at 1227-28. The opinion indicates that if the state has afforded adequate opportunity for industry to be heard at that time, then EPA need not provide a full evidentiary hearing. In International Harvester Co. v. Ruckelshaus, the court ordered EPA to conduct a modified adjudicatory hearing with the right to cross-examination in connection with the agency's automobile emission control program, even though such a hearing was not required by the Clean Air Act. 478 F.2d at 649, 4 ERC at 2061. Several courts have, however, refused to grant adjudicatory hearings in connection with Clean Air Act implementation plans. See, e.g., Anaconda Co. v. Ruckelshaus, 482 F.2d at 1306, 5 ERC at 1676; Buckeye Power Inc. v. EPA, 481 F.2d at 173, 5 ERC at 1618. See also, Duquesne Light Co. v. EPA, 481 F.2d at 7, 5 ERC at 1478 (holding that EPA approval of implementation plans is rule-making within the Administrative Procedure Act and therefore requires a "limited legislative-type hearing" in appropriate circumstances.)

74. See text accompanying notes 94-100 infra.
ally exercised over NEPA statements; rarely has a court overturned agency action on the merits because of failure to comply with NEPA's procedural requirements. Therefore, even if a court were to find EPA's compliance with NEPA procedures to be unsatisfactory, the ultimate question would be what happens to EPA's standard during remand. This last issue will be addressed first.

a. NEPA and temporary injunctions

EPA's emphasis on the congressional sense of urgency in passing the Clean Air Act becomes relevant in considering whether inadequate NEPA compliance would necessitate granting an industrial plaintiff temporary equitable relief from a particular standard. A model for judicial treatment is *Kennecott Copper Corp. v. EPA,* where plaintiff challenged EPA's national secondary ambient air quality standard for sulfur oxides. The court remanded the case, requiring EPA to explain further the basis for its decision.

At the same time, the court recognized the congressional concern for expeditious implementation of the federal air pollution control program, and therefore directed that the standards should remain effective pending further judicial proceedings. While *Kennecott Copper* was brought under the Administrative Procedure Act and not under NEPA, the same factors could operate in a NEPA suit to prevent a challenged standard from being stayed during the judicial review period.

Some courts have held that deficiencies in agency compliance with NEPA will not necessarily justify enjoining the agency action. Instead, they have generally engaged in equity balancing. For example, in *EDF v. Froehlke,* which involved construction of the Truman Reservoir and Dam project, plaintiffs sought to enjoin construction until the Army Corps of Engineers had finished its impact statement. The


76. 462 F.2d 846, 3 ERC 1682 (D.C. Cir. 1972).

77. Id. at 851, 3 ERC at 1685.

78. Id.

79. Courts have specifically rejected environmentalists' claims that NEPA compliance will become meaningless unless a federal activity is enjoined. See, e.g., Sierra Club v. Mason, 351 F. Supp. 419, 427, 4 ERC 1687, 1691 (D. Conn. 1972); EDF v. Froehlke, 348 F. Supp. 338, 366, 4 ERC 1541, 1553 (W.D. Mo. 1972), aff'd 477 F.2d 1033, 5 ERC 1313 (8th Cir. 1973). In Mason, the court said that there may be circumstances when adverse consequences of delay are greater than the benefits to be derived from NEPA statements. This would most likely be the case in most suits brought by industrial polluters under NEPA. See also ANDERSON, NEPA IN THE COURTS, supra note 12, at 239-45.

80. 348 F. Supp. 338, 4 ERC 1541, aff'd 477 F.2d 1033, 5 ERC 1313 (8th Cir. 1973).
court recognized that the Corps was obligated to prepare an EIS and had not yet done so, but found that the agency had been taking "substantial and concrete steps" to comply with NEPA.\(^1\) This factor was held to outweigh the likelihood of environmental damage from continued construction, and the court therefore denied plaintiff's request for an injunction.\(^2\) If such factors are balanced in an industry suit brought under NEPA against EPA, it is difficult to foresee a court granting temporary equitable relief to an industry, assuming EPA's compliance was in good faith. In dam or nuclear power plant construction, environmental damage can be expected from continued building, whereas in EPA standard-setting activities, the greater environmental damage would most likely result from preventing the federal activity.\(^3\)

Indeed, where an industry challenge is based on economic cost factors, the granting of temporary relief would run directly counter to the spirit of NEPA. As one environmental lawyer has observed, "the logic of NEPA" would suggest that an injunction which allows industry to keep polluting "is not going to be issued."\(^4\)

The problem is how to insure that the "logic of NEPA" will prevail. In *Getty Oil Co. v. Ruckelshaus*,\(^5\) plaintiff challenged a regulation issued pursuant to Delaware's implementation plan and EPA's compliance order issued pursuant to that regulation. The district court recited four traditional criteria for determining whether plaintiff would be entitled to preliminary injunctive relief: irreparable harm to petitioners unless such relief was granted, absence of substantial harm to opposing party, absence of harm to the public interest, and likelihood that petitioner would prevail on the merits. After weighing these factors, the court denied Getty the temporary relief it had requested, on the grounds that it had not shown a likelihood of success on the merits.\(^6\) However, several facets of the court's discussion do not mesh with the "logic of NEPA" or of the Clean Air Act.\(^7\) First,

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81. *Id.* at 342, 4 ERC at 1543. The court observed that in this respect the Corps' behavior contrasted sharply with the AEC's procedures in *Calvert Cliffs*.

82. *Id.* at 366, 4 ERC at 1552.

83. Of course, this might not be the case if the control strategy employed for the benefit of one "media," such as air, results in substantial pollution of another media, such as water. For purposes of temporary equitable relief, however, an industrial plaintiff would have to show substantial likelihood of success on the merits of such a claim. See text accompanying notes 134-67 infra.


86. 342 F. Supp. at 1016-17, 4 ERC at 1146-47.

87. Although the opinion is not consistent with NEPA's spirit, it should be noted that dicta in both the district court and circuit court opinions indicated that NEPA was not applicable to EPA's Clean Air Act activities. *Id.* at 1022, 4 ERC at 1156,
Judge Stapleton shifted the burden of proof to EPA to demonstrate that noncompliance by Getty would harm the public health. The strong congressional concern manifested in the Clean Air Act demands that a regulation issued pursuant to that Act should be accepted *prima facie* as necessary for the public health. Second, in considering whether Getty would suffer irreparable injury if temporary relief were denied, the court considered monetary loss. Several NEPA cases have refused to equate prospective money damages with irreparable injury for the purpose of granting injunctive relief, and the Getty balancing of industry dollar loss against environmental damage involves substantial drawbacks from an environmentalist's viewpoint; such cost-benefit analyses inherently tend to emphasize readily quantifiable factors such as money while ignoring "softer" environmental considerations.

On the other hand, the import of *Kennecott Copper* is that in view of the congressional sense of urgency concerning the environment, traditional equity balancing may be inappropriate in NEPA or Clean Air Act cases. This has been articulated in a recent NEPA case, *Stop H-3 Ass'n v. Volpe*, where the court had issued a preliminary injunction against continued expenditures of funds for the design, planning, and preliminary engineering of a highway until an EIS was approved. After issuing a subsequent stay suspending the injunction, the court then decided to reinstate the injunction, noting that traditional equity balancing is not proper in NEPA suits. The court stated that the balancing must be weighted in favor of plaintiffs, and "[t]he strong public policy articulated in the provisions of NEPA would make any other decision improper." The court's reference to "plaintiffs" undoubtedly assumes environmental plaintiffs, and the strong environmental protective policy embodied in NEPA would demand equally that when industrial polluters are seeking temporary injunctive relief

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467 F.2d at 359, 4 ERC at 1572 (3rd Cir. 1972). That dictum was elevated to an explicit holding by the third circuit in Duquesne Light Co. v. EPA, 481 F.2d at 9, 5 ERC at 1479 (3rd Cir. 1973).

88. 342 F. Supp. at 1016-17, 4 ERC at 1147.
90. "Prior decision-making in government has often been destructive, precisely because cost-benefit information and techniques were used to the exclusion of 'softer' environmental information and techniques." *Calvert Cliffs' Coordinating Committee v. AEC and the Requirement of 'Balancing' Under NEPA*, 2 ELR 10003, 10004. See also Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAG. L. REV. 1092, 1102-04 (1972); ANDERSON, NEPA IN THE COURTS, supra note 12, at 256-57.
91. 462 F.2d 846, 3 ERC 1682 (D.C. Cir. 1972). See text accompanying notes 76-78 supra.
93. *Id*. at 18, 4 ERC at 1907.
on the basis of economic cost the balance must be shifted in favor of EPA.

b. Expanding judicial review under the APA: The need for adequate explanation of agency action

In decisions involving NEPA, courts have emphasized several functions which section 102 serves. From the start, NEPA has been viewed as a means of insuring that the basis of agency decisions are fully disclosed to the public, Congress and the President. In EDF, Inc. v. Corps of Engineers, the court declared that NEPA was "an environmental full disclosure law . . . intended to make [agency] decision-making more responsive and responsible." Given recent judicial decisions requiring extensive agency disclosure, it is quite possible that NEPA would require EPA to disclose little more than it would otherwise have to. For example, in Kennecott Copper, plaintiff challenged EPA's secondary ambient air quality standard for sulfur oxide without relying on NEPA. Kennecott's complaint rested on the grounds that the standards were not accompanied by a "concise general statement of their basis and purpose" as required by section 4(c) of the APA and as necessary "to insure adequate judicial review." The court held that it could not reach a decision on the merits based on the existing record. After noting that the Court of Appeals for the District of Columbia has a "special responsibility" to resolve disputes arising under the Clean Air Act, Judge Leventhal said:

Inherent in the responsibility . . . is a requirement that we be given sufficient indication of the basis on which the Administrator reached the 60 figure so that we may consider whether it embodies an abuse of discretion or error of law.

The provision for statutory judicial review contemplates some disclosure of the basis of the agency action.

Judge Leventhal concluded that the record should be remanded so that EPA could supply information sufficient to "enlighten" the court as to how it reached its decision. Independent of NEPA, EPA was re-

94. 325 F. Supp. at 759, 2 ERC at 1267.
97. 462 F.2d at 847, 3 ERC at 1682.
98. Id. at 849, 3 ERC at 1684.
99. Id. at 851, 3 ERC at 1685.
required to provide a fuller disclosure and explanation than was required by the APA.100

C. NEPA and the Need for Precision

EPA has argued that the Clean Air Act demands prompt action "regardless of the imperfect state of our knowledge," and has contrasted this preoccupation with NEPA's concern that "action significantly affecting the environment should not be taken unless the consequences are known."101 However, decisions under NEPA have not required that the consequences of proposed agency action be predicted with absolute precision. Certainty is not the keynote of NEPA; a thorough analysis of available data is. In the leading case of NRDC v. Morton,102 the court carefully pointed out that speculative and remote alternatives whose consequences could not be reasonably ascertained need not be considered.103 If EPA's research resources are limited, courts will recognize that fact in measuring the agency's compliance with NEPA. Thus, NEPA would not hinder Clean Air Act standard-setting on the grounds that the agency does not possess complete information concerning the effects of its emission standards.104

100. Particularly as applied to environmental regulations, produced under the tension of need for reasonable expedition and need for resolution of a host of nagging problems, we are loath to stretch the requirement of a 'general statement' into a mandate for reference to all the specific issues raised in comments.

There are contexts, however, contexts of fact, statutory framework and nature of action, in which the minimum requirements of the Administrative Procedure Act may not be sufficient. Id. at 850, 3 ERC at 1685.

101. EPA Brief, Appalachian Power Co. v. EPA, supra note 37, at 15.

102. 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).

103. "[T]he requirement in NEPA of discussion as to reasonable alternatives does not require 'crystal ball' inquiry. Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance 'to the fullest extent possible.' But if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite..... In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness." 458 F.2d at 837, 3 ERC at 1564. See also, Sierra Club v. Froehlke, 359 F. Supp. at 1344, 5 ERC at 1068; Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1280, 4 ERC 1933, 1936 (9th Cir. 1973); City of New York v. U.S., 344 F. Supp. 929, 939, 4 ERC 1647, 1653 (S.D.N.Y. 1972).

104. In EDF v. Corps of Engineers, the Corps asserted that it had not yet developed methods to quantify the difference between the Cossatot River's value in a free-flowing state and its value after completion of the dam. The court indicated that such a deficiency would not be fatal, even though NEPA directs agencies to "develop methods and procedures ... which will insure that presently unquantified environmental amenities and values be given appropriate consideration." 42 U.S.C. § 4332 (2)(B). The court merely required that the final impact statement recognize the existence of the Corp's problem. 325 F. Supp. at 758, 2 ERC at 1266. See Cramton and Berg, supra note 12, where the authors argue for a judicial approach which rec-
D. NEPA Balancing and Economic Cost

In Calvert Cliffs', Judge Wright stated that NEPA "mandates a rather finely tuned and 'systematic' balancing analysis" in which the environmental costs of a federal action are weighed against economic and technical benefits. A consideration of NEPA's ramifications for EPA's Clean Air Act activities requires an analysis of the role which costs play in EPA's decisionmaking and how NEPA might alter the weight of such economic factors.

1. New Source Performance Standards

The Clean Air Act provides that in setting new source performance standards, the Administrator must consider the cost of achieving the proposed pollution reduction. Accordingly, plaintiff industries have argued that EPA must evaluate pollution reduction levels against incremental increases in industry expenditure. They urge that the Clean Air Act "prescribes basically the same type of cost-benefit analysis called for by NEPA and Calvert Cliffs'." EPA has argued in response that section 111 does not permit the sort of cost-benefit analysis required by NEPA. Rather, cost is to be considered "only to the extent of determining whether any particular system of emission reduction is economically feasible." The agency fears that if it were
required to justify its new source performance standards in terms of a rigorous NEPA cost-benefit analysis, less stringent performance standards might result. While this is undoubtedly the main motivating force behind industry efforts to compel NEPA compliance, a relaxation of emission standards need not result from NEPA application. The purpose of NEPA balancing and alternatives assessments is to mitigate adverse environmental effects of proposed agency action; NEPA procedures are designed to protect the environment, and not industrial polluters. In *Pizitz v. Volpe*, businessmen invoked NEPA to enjoin construction of a highway overpass, claiming that the thoroughfare would detract from their businesses. The court rejected plaintiff's invocation of NEPA as "spurious," concluding that NEPA was "not designed to prevent loss of profits, but was intended only to promote governmental awareness of environmental problems."

*Pizitz* crystallizes the fundamental dilemma posed by an application of NEPA to EPA. As interpreted by *Calvert Cliffs*, NEPA requires that environmental costs be balanced against economic and technical benefits of government action. In most industry suits against EPA, plaintiffs will be asking EPA to measure environmental benefits against economic cost. Since EPA is required to consider cost in promulgating new source performance standards, perhaps NEPA would insure that the agency articulates and carefully weighs the economic trade-offs inherent in its standard-setting. However, since industry has attempted to use cost considerations as a means of relaxing pollution controls wherever that loophole has presented itself, the potential for industry abuse of NEPA is substantial. This potential can be mitigated if courts bear in mind the pro-environmental interests which

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impact of controls on any individual plant in a single community.


110. *See EPA TASK FORCE REPORT,* supra note 11, at 57.

111. This assumption is made on the basis of past industry efforts to utilize cost factors as a means of challenging pollution control programs. *See sources cited in note 116 infra.


114. — F. Supp. at —, 4 ERC at 1196.

115. 449 F.2d at 1115, 2 ERC at 1781.

NEPA was meant to protect. Given those interests, EPA would be justified in assigning a very low weight to monetary loss in its NEPA analysis, while at the same time being forced to disclose the role which such factors play in its decisionmaking.

2. State Implementation Plans (SIPs)

Unlike standards of performance, EPA's setting of national ambient air quality standards does not require a consideration of cost factors, and Congress specifically prohibited EPA from considering such factors. However, while the statute does not direct EPA to account for cost in reviewing state implementation plans designed to achieve ambient air standards, the agency's own guidelines encourage states to acknowledge cost factors when preparing their SIPs. In the same way that industry has challenged new source performance standards, they have sought to use NEPA and cost factors to challenge implementation plans, and application of NEPA to section 110 involves many of the same problems discussed in connection with new source performance standards.

III

PLACING EPA'S ARGUMENTS IN PERSPECTIVE: A LESSON IN BUREAUCRATIC INERTIA

EPA's reluctance to attempt compliance with NEPA can be best appreciated by examining its reaction to Kalur v. Resor. Kalur held

117. It has been suggested that industry lacks standing under NEPA to challenge an EPA regulation if the challenge is based on financial injury, because such monetary loss is not within the "zone of interest" protected by NEPA. 3 CEQ ANN. REP., supra note 14, at 255. See also ANDERSON, NEPA IN THE COURTS, supra note 12, at 39-44. The zone of interest test was first announced in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970).

118. Affording EPA leeway in assigning a relatively low weighting does not render the NEPA statement valueless. First, EPA would still be required to consider potential adverse environmental consequences of its regulatory activities. See notes 134-167, infra, and accompanying text. Second, NEPA would compel the agency to adequately assess and disclose the economic impacts of its decisions.

119. Section 109 defines a national primary ambient air quality standard as one which is "requisite to protect the public health." 42 U.S.C. § 1857c-4(b)(1). National secondary ambient air quality standards are those which are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. § 1857c-4(b)(2).

120. See Note, Clean Air Amendments, supra note 42, at 179.

121. EPA Final Guidelines, 40 C.F.R. §§ 51.1(a), 51.2(b) (1972). EPA states that it does not consider cost in setting national ambient standards, but it does "develop cost estimates" of the effects of a proposed ambient standard. EPA TASK FORCE REPORT, supra note 11, at 11, 17.

122. See cases cited in note 116 supra.

that the Army Corps of Engineers had to comply with NEPA in administering the Refuse Act Permit Program. The Corps maintained that as long as a permit applicant was in compliance with water quality standards, a discharge permit should be issued. The court disagreed, holding that compliance with applicable water standards was not an adequate substitute for NEPA's case-by-case balancing exercise as delineated in *Calvert Cliffs*. As a result, the Permit Program was brought to a standstill; of 20,000 permit applications then awaiting processing, EPA estimated that approximately 3,000 would constitute major federal actions requiring NEPA statements. The agencies responded to *Kalur* by seeking a five year exemption from NEPA for the Permit Program, and by appealing the decision.

During the course of congressional hearings on the proposed exemption, various procedures were suggested to mitigate *Kalur*’s impact. For example, an “umbrella statement” approach was advocated, whereby one impact statement would be prepared for geographic areas containing several permit applicants. In response, EPA and the Corps suggested that such an approach was precluded by the *Kalur* and *Calvert Cliffs*’ requirement of a case-by-case, individualized analysis. However, one commentator has persuasively argued that “[n]o mandate forcing thousands of NEPA statements” can be inferred from *Kalur*. In addition, any proscription of umbrella statements would have been contrary to NEPA’s philosophy that agency decisionmaking reflect a broad perspective rather than focus on small increments; a permit-by-permit approach would have made it difficult to consider alternatives meaningfully, since the opportunity to make trade-offs

124. The Permit Program, established pursuant to Executive Order 11,574, 3 C.F.R. 188 (Comp. 1970), was designed to incorporate the Refuse Act of 1889, 33 U.S.C. §§ 407, 411 (1964), into the Federal Water Pollution Control Act, 33 U.S.C. §§ 1115-75 (1970). The program was to be administered by the Corps of Engineers, EPA, and appropriate state agencies. The Corps’ regulations provided in part that in determining whether to issue a discharge permit, environmental impact statements would not be required “where the only impact of proposed discharges or deposit will be on water quality and related water quality consideration because these matters are specifically addressed under subsections 21(b) and (c) of FWPCA.” Section 21(b) of FWPCA, 33 U.S.C. § 1171(b), provided for mandatory certification of compliance with applicable water quality standards as a precondition to licensing.

125. See text accompanying notes 105 supra, for a description of the NEPA analysis required by *Calvert Cliffs*. The *Kalur* court concluded that “NEPA did not permit the sort of total abdication of responsibility in *Calvert Cliffs*—it does not permit it here with the Corps of Engineers.” 335 F. Supp. at 15, 3 ERC at 1467.

126. *Hearings on H.R. 14103*, supra note 57, at 21 (testimony of John R. Quarles, Jr.).

127. See *H.R. 14103*, 92d Cong., 2d Sess. (1972); see also *Hearings on H.R. 14103*, supra note 57.


129. See *Kalur* Comment, supra note 20, at 10028.
among different dischargers would have been lessened. Furthermore, the CEQ, whose advice formed the basis for the Corps' regulations challenged in Kalur, has endorsed the umbrella approach by suggesting that decisions which are "related geographically or as logical parts in a chain of contemplated actions may be more appropriately evaluated in a single program statement."*181

Nevertheless, EPA chose to ignore such suggested alternatives, and that decision represents one manifestation of a phenomenon which is central to understanding EPA's resistance to NEPA. In the six months between Kalur and the hearings on legislative relief from that decision, no effort was made to devise any solutions to the permit problem, and no permits were issued during that period. EPA and the Corps thus avoided the "risk" of losing a court test over umbrella statements, but that risk was not only doubtful, but also of minimal importance since the Permit Program was at a standstill anyway. EPA maintained that its refusal to devise alternative solutions stemmed from the belief that it should not, as a matter of policy, be bound by NEPA. But this was a circular argument which said, in effect: "We should not comply with NEPA because, due to administrative exigencies, we cannot; and since we believe we cannot comply, we should not attempt to do so."

This circular reasoning has resurfaced in EPA's recently published study of NEPA's applicability to the agency's activities. The agency notes that "there is substantial uncertainty concerning what would be involved in complying with NEPA," and lists "major unanswerable questions" which form the basis of that concern.182 The report also observes that, while courts have generally followed a rule of reason in applying NEPA, "reasonableness is a rule of only limited operational and predictive utility," and "what courts deem reasonable

130. Id.
131. CEQ Memo to Federal Agencies on Procedures for Improving Environmental Impact Statements, in 3 Env. RPTR.-Curt. Dev. 82, 87 (May 19, 1972). See also 3 CEQ ANN. REP., supra note 14, at 233; CEQ Revised Guidelines, supra note 54 § 1500.6(d)(1), 38 Fed. Reg. 20552. It should be noted here that EPA has recently recognized the viability of the program-statement approach. See EPA TASK FORCE REPORT, supra note 11, at 40-41.
132. EPA TASK FORCE REPORT, supra, note 11, at 48. The questions raised by the report are: the range of environmental effects which must be discussed; the degree to which EPA would be required to research environmental effects not presently understood; the extent to which EPA would have to discuss environmental effects not commanded by, or inconsistent with, other specific statutory mandates; the extent to which consideration of such effects could allowably influence a program decision; whether broad scale cost-benefit analysis is either permissible or required; whether alternatives inconsistent with statutory directives need be considered; whether a final statement must be issued prior to proposing regulations; and which agency actions constitute major federal actions significantly affecting the environment.
sometimes may seem unreasonable from an administrative standpoint." While the study poses significant questions, the uncertainties are largely a direct product of the agency's refusal to attempt compliance with NEPA. Furthermore, many of the uncertainties raised by EPA after Kalur and in its recent Task Force Report represent a challenge to NEPA's general viability, and are not specifically germane to EPA.

IV

CONSIDERATION OF NON-AIR ENVIRONMENTAL IMPACTS

Perhaps the self-imposed limitations described above are indicative of a more general resistance by federal agencies to NEPA. As a rule, bureaucracies do not appreciate legislative obstacles being thrown in their path, and NEPA has apparently encountered substantial resentment. But that discomfort is largely due to most agencies' unfamiliarity with environmental matters, and their suspicion that environmental values are in conflict with the projects they administer. On the other hand, EPA is a veritable storehouse of environmental expertise. Its resistance to NEPA is therefore differently grounded; EPA has contended that since environmental protection is its business, a statute which directs it to account for environmental matters in a certain prescribed manner can only be a superfluous obstruction. Because of the assertion's superficial appeal, it deserves careful scrutiny.

A. The Problem Exemplified

In Anaconda Co. v. Ruckelshaus, plaintiff industry sought to demonstrate that the particular control strategy and emission standard for sulfur dioxides proposed by EPA would result in non-air environmental damage. It alleged that the market for sulfuric acid was virtually non-existent, and that to neutralize the acid would create an "enormous solid waste disposal problem." Industries challenging EPA's new source performance standards have raised similar issues. Essex Chemical Cor-

133. Id. at 35.
134. A study conducted by the General Accounting Office in 1972 concluded that agency compliance with NEPA has been inadequate. Common deficiencies found in the six case studies included inadequate consideration of reviewing agencies' comments, inadequate discussion of environmental impact, and inadequate discussion of alternatives. 3 ENV. RPRTR.-CURR. DEV. 909 (1972). The CEQ has also observed that in many instances of agency action, "the question is not whether the goals of NEPA are being implemented effectively but whether they are being implemented at all." 3 CEQ ANN. REP., supra note 14, at 247.
135. See text accompanying notes 197-200 infra, for the particular form which EPA's argument has taken.
poration maintained that in promulgating standards for sulfuric acid, the agency failed to consider "the adverse impact on water quality of purge streams from tail gas scrubbers, which would be mandatory on new or modified recycle or single absorption plants." EPA admitted in response that the setting of standards might involve major economic, social, and environmental impacts. Nevertheless, it maintained that the Clean Air Act sought to achieve specified environmental goals which were intended to take priority over the agency's consideration of "peripheral or indirect environmental consequences." The agency states that NEPA stands in contrast to that philosophy:

In NEPA Congress was telling the agencies how they must go about their duties generally in a way that would protect the environment; in the Clean Air Act, Congress decided for the air quality aspect of the environment certain specific measures should be taken.

This does not mean that the two statutes should not be reconciled; to insist that the specific goals of the Clean Air Act be attained regardless of non-air environmental consequences is to ascribe an underserved degree of irrationality to the federal environmental improvement effort. It also runs counter to the legislative intent embodied in NEPA to "attain the widest range of beneficial uses of the environment without degradation, risk of health or safety, or other undesirable and unintended consequences." Most importantly, it ignores EPA's primary function of coordinating federal environmental programs.

B. EPA as Coordinator of Anti-Pollution Programs

In his message accompanying the establishment of the Environmental Protection Agency, President Nixon observed that since environmental problems should be "perceived as a single interrelated system," the then-existing piecemeal federal efforts were inappropriate.

138. EPA Brief, Appalachian Power Co. v. EPA, supra note 37, at 21.
139. Id.
140. 42 U.S.C. § 4331(b)(3) (1970). On the other hand, EPA's position is consistent with the legislative history of the Clean Air Act. Congress was clearly preoccupied with the air pollution crisis, and the legislative history reveals a sense of urgency over that problem to the virtual exclusion of all other forms of pollution. Perhaps the Congressional mood was best reflected in the following comment made by Congressman Rogers: "Air pollution is one of the most pressing forms of pollution because unlike others, the air around us is unavoidable. We do not have to swim or look at dying lakes. But everyone must breathe." 116 Cong. Rec. 19210 (1970). However, the legislative record also reveals that the legislators were relatively unaware of the interrelation of various forms of pollution. See text accompanying notes 153-55 infra.
141. ENVIRONMENTAL PROTECTION AGENCY AND NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, THE PRESIDENT'S MESSAGE TO THE CONGRESS UPON TRANSMITTING
On the other hand, a consolidation of anti-pollution activities into one agency "would help assure that we do not create new environmental problems in the process of controlling existing ones."\textsuperscript{142} It was hoped that by combining under one roof programs previously housed in several separate agencies,\textsuperscript{143} the government would be able "to mount an effectively coordinated campaign against environmental degradation in all its forms."\textsuperscript{144}

Given EPA's function as environmental coordinator, there is little theoretical inconsistency between NEPA and EPA's duties under the Clean Air Act or any other environmental protective statute. If a particular air standard involves a solid waste disposal problem, then the establishment of that standard involves environmental trade-offs. NEPA would help to assure that EPA fulfills its anticipated purpose of assessing and articulating the nature of those trade-offs in conjunction with its regulatory activities.\textsuperscript{145}

C. Can EPA Consider Counterproductive Environmental Impacts Under the Clean Air Act?

The EPA Task Force Report recognized that EPA was in part created to promote a coordinated, multi-faceted approach to the solution of environmental problems.\textsuperscript{146} However, it noted that the Clean Air Act prescribes certain factors to be taken into account in conjunction with specific air programs, and therefore the question arises whether EPA is permitted under the Act to consider other environmental factors in its decisionmaking. This issue will be examined in relation to two Clean Air Act programs: The setting of new source performance standards and EPA review of SIP's.

I. EPA Review of State Implementation Plans

The Clean Air Act requires states to prepare implementation plans for meeting national ambient air quality standards established by EPA.\textsuperscript{147} EPA must either approve or disapprove a state's plan within four months after it is submitted,\textsuperscript{148} and the sole substantive

\textsuperscript{142} \textit{Id.} at 911.
\textsuperscript{143} The five major programs which were moved to EPA were water pollution, air pollution, solid waste disposal, radiation exposure and hazards, and pesticides control. \textit{Id.}
\textsuperscript{144} \textit{Id.} at 912.
\textsuperscript{145} For a discussion of the extent to which EPA considers such factors in its decisionmaking, see notes 155 and 194 infra.
\textsuperscript{146} EPA TASK FORCE REPORT, supra note 11, at 46.
criterion for approval or disapproval of an SIP is whether it will provide for the attainment and maintenance of air quality standards within three years from its effective date.\textsuperscript{149} The statute does not direct EPA to consider non-air environmental effects, and EPA's guidelines do not direct the states to consider such factors in preparing SIP's. The EPA Task Force Report therefore concluded that even if national standards could be met only by creating substantial pollution problems in other media, this would not provide a basis for States not meeting the national standards, or for EPA to reject State plans, so long as the plans did provide for meeting the air quality standards.\textsuperscript{150}

One could argue in response that EPA's conclusion places its decisionmaking cart before the horse; an implementation plan represents an attempt to effectuate national ambient air quality standards. Air quality standards, in turn, are based upon air quality criteria for particular pollutants. The Clear Air Act directs that these criteria "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutants in the ambient air, in varying quantities."\textsuperscript{151} This reference to all identifiable effects of varying pollutant quantities is quite consistent with the broad-based approach required by NEPA, and therefore implies the need for an analysis of all effects of incremental air pollution controls. Thus, one might conclude that non-air environmental impacts can be taken into account at the initial step of this process—the setting of air quality criteria.

Several considerations undercut the cogency of the preceding analysis. First, it is doubtful that a meaningful impact statement could be prepared when formulating air quality criteria; the focus of air quality criteria and ambient air standards is clearly on the hazards of various substances in the air, and it is unlikely that EPA can intelligently assess the effects of controlling such substances until presented with implementation plans designed to achieve air quality.\textsuperscript{152} On the other hand, if environmental impacts are assessed at or near the implementation stage when it is more feasible to do so, then the national ambient air standards will be rendered tentative, subject to change if it

\textsuperscript{149} 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). The Act requires the SIP to include adequate provisions for enforcement and monitoring, interstate cooperation, and emission limitations designed to achieve and maintain the ambient air standards.

\textsuperscript{150} EPA TASK FORCE REPORT, supra note 11, at 18.


\textsuperscript{152} This would seem to be the case since the effects of controlling air pollutants will depend upon a number of factors, such as specific geographical considerations and the type of technology to be applied, that may not be ascertainable at the air-quality criteria setting stage.
is later found that all feasible methods of implementing those standards create substantial non-air pollution problems. Certainly, in such a case an air quality standard should be changed; at the very least, implementation plans should be formulated so as to minimize non-air environmental pollution. However, the Clean Air Act does not provide for such a scheme; EPA’s conclusion that it cannot consider extra-air environmental impacts in the SIP process appears to be correct under the Clean Air Act as it now stands, however irrational the result may be.

2. NEPA and New Source Performance Standards

a. The Clean Air Act

The Clean Air Act defines a performance standard for a new stationary source as that emission limitation which is “achievable through an application of the best system of emission reduction,” considering the cost of achieving the reduction. The statute ostensibly directs that the most stringent controls economically feasible be applied. However, in determining what constitutes the “best system” of emission control, it would be reasonable to include a consideration of what effects a particular system has on non-air environmental impacts. This approach is supported by recent water pollution legislation.

b. The FWPCA Amendments of 1972

The 1972 amendments to the Federal Water Pollution Control Act reflect a fundamental shift in the federal approach to water pollution abatement. Under prior law the FWPCA cornerstone consisted of water quality standards, which fixed maximum allowable limits on pollution in interstate waters. If a particular discharge increased

154. This was clearly the intent of Congress at the time of the Act’s passage. Senator Randolph stated: “The overriding purpose of performance standards for new stationary sources is to prevent the occurrence of new air pollution problems. These standards will insure that when an industry moves into any area with low pollution levels, that this new facility does not appreciably degrade the existing air quality.” 116 CONG. REC. 33075 (1970) (emphasis supplied). Senator Cooper’s remarks were similar: “Through such standards of performance maximum available technology will be installed in all new facilities. With this mechanism, the committee believes that new facilities will be constructed to achieve maximum air pollution control.” 116 CONG. REC. 33116 (1970) (emphasis supplied).
155. It is unclear from EPA’s Task Force Report to what extent such factors are considered. The report states that while standards are “based almost exclusively on technology and cost,” a determination of the best emission control system includes an assessment of extra-air environmental impacts. The report also observes that EPA has established a Steering Committee to consider inter-media impacts and relationships in standard-setting. EPA TASK FORCE REPORT, supra note 11, at 11-13. The Steering Committee is more fully described in note 194 infra.
water pollution above that limit, the polluter was then subject to legal
action.157 Ultimately, it became universally recognized that water quality standards were not the most efficient methods for achieving cleaner
waters.158 Accordingly, the 1972 legislation has shifted focus to the
application of effluent limitations based on current pollution control
technology. With this change in emphasis from receiving waters to
individual sources, water quality standards will correspondingly become
"a measure of program effectiveness and performance, not a means of
elimination and enforcement."159

For the purpose of carrying out this change in approach, section
304 directs the Administrator to identify the level of effluent reduc-
tion which can be achieved through the "best practicable control tech-
nology." The statute also specifies factors to be taken into account
in determining control strategies and in defining "best practicable con-
trol technology." Included among these factors is "non-water quality
environmental impact."160 The Act contemplates the establishment
of a range of discharge levels for each industrial category, and all
sources will be required to meet at least the base level requirements
of that range.161 In determining the effluent limitation to be applied
to an individual source, the same factors outlined in section 304 are
to be taken into account. The bill provides for a similar procedure
concerning discharges from new point sources.162

Thus, in establishing effluent levels for both existing and new
point sources, the Administrator is required by statute to consider sev-
eral factors, including non-water quality environmental impacts. Ar-
guably, since Congress gave explicit recognition to non-water quality
matters in the FWPCA, the lack of explicit mention of non-air quality
factors in the Clean Air Act indicates a conscious legislative decision
to exclude non-air impacts from a determination of "best system" of
emission reduction. It is much more likely that the FWPCA mani-
fests a growing congressional awareness that various values falling un-
der the rubric of "environment" may often compete for priority in any
federal action, including those which are thought to be environmentally
protective. Most likely, the legislators did not consider this dimension
when passing the Clean Air Act. Certainly the policy and reasoning

158. See, e.g., Hearings on the Refuse Act Permit Program Before the Subcomm.
on the Environment of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971);
Hearings on Water Pollution Control Legislation Before the Subcomm. on Air and
Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess., pt. 9;
159. S. REP. NO. 92-414, supra note 157, at 8.
161. S. REP. NO. 92-414, supra note 157, at 50.
162. Section 306(b)(1)(B).
embodied in section 304 of FWPCA amendments are equally sound when applied to matters relating to the Clean Air Act.

However, while Congress has seen fit to require a NEPA-like analysis for the setting of performance standards under FWPCA, it has also exempted FWPCA from NEPA's procedural requirements, with the exception of federal assistance for the construction of public treatment facilities and the issuance of discharge permits for new sources. Supporters of the NEPA exemption cite sections 304 and 306 of the Act as affording adequate safeguards against unsound environmental decisions. Although those sections may mitigate the effects of the NEPA exemption, there is no convincing reason to exempt EPA from NEPA's procedures if the agency is required by statute to perform a NEPA-like analysis; NEPA would provide the best method of implementing the FWPCA language. Moreover, it is precisely because

163. Section 511(c)(1) states:
Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 201 of this Act, and the issuance of a permit under section 402 of this Act for the discharge of any pollutant by a new source as defined in section 306 of this Act, no action of the Administrator taken pursuant to this Act 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.

Under Title IV of the Act, EPA will assume responsibility for the Permit Program, which will in turn be merged with a National Pollutant Discharge Elimination System under section 402.

164. See text accompanying notes 159-62 supra.

The ground rules for this kind of finely-tuned, systematic balancing analysis are explicitly set out repeatedly in the FWPCA.

This act specifically identifies factors to be considered by the Administrator in making this kind of balancing analysis, and the conference concluded that the substantive purposes and procedures of the Act fully satisfy and go far beyond what is required by NEPA and would be frustrated if other factors were to be injected into the decision of the Administrator by NEPA.

166. It should be noted that section 511 specifically excepts new sources from the NEPA exemption. Senator Muskie has explained this exception on the grounds that in new source cases the owner "has a degree of flexibility in planning, design, construction, and location that is not available to the owner or operator of an existing source." 118 CONG. REC. 16878 (daily ed. Oct. 4, 1972). While these considerations lend increased justification for applying NEPA to new sources, one hardly should conclude that NEPA is not appropriate for existing sources as well. Senator Muskie's argument is relevant to the question of convenience, and not appropriateness. In addition, even new sources may escape NEPA scrutiny; under section 402(b), EPA may approve state permit programs. Upon such approval, the agency will delegate authority over the permit program to the state. Once this delegation has occurred a permit issuance is not technically a federal action, and therefore not within the scope of NEPA. Given Senator Muskie's persuasive policy reasons for applying NEPA to new sources, it is to be hoped that EPA will condition its delegation to insure that states comply with NEPA.
the Clean Air Act language does not require a NEPA-like analysis of environmental trade-offs that NEPA should be applied to air-control activities; there is no better way to insure an adequate multi-faceted approach to environmental problems under the Clean Air Act.\textsuperscript{167} 

V

ALTERNATIVES TO NEPA

A. The Clean Air Act

Section 312(a) of the Clean Air Act states that annual studies must be furnished to Congress concerning the cost and economic impact of air programs.\textsuperscript{168} Section 313 provides for annual reports concerning the progress made and problems encountered in implementing the Act.\textsuperscript{169} EPA has argued that NEPA's goals are adequately achieved under these sections, and several courts have agreed.\textsuperscript{170} This view is incorrect. First, since the annual reports need not comply with the specific analysis demanded by NEPA, they will not necessarily afford Congress the opportunity to assess systematically either the actions taken or the thought process of the decisionmakers. Second, EPA's annual reports will inevitably consist of post facto justifications for its actions. On the other hand, NEPA's major focus is to insure interested parties, and not only Congress, a chance to contribute input prior to agency decisions.\textsuperscript{171} In addition, as one court has stated, "Congress receives no required information about the possible adverse environmental impacts of proposed standards" from these reports.\textsuperscript{172} 

B. Accounting for Adverse Environmental Effects in Rulemaking Proceedings

The court in Portland Cement Ass'n v. Ruckelshaus granted EPA

\textsuperscript{167} The judgment that NEPA is the best existing method is based on the discussion accompanying notes 168-206 infra.
\textsuperscript{170} Getty Oil Co. v. Ruckelshaus contains dictum to this effect. 467 F.2d at 359, 4 ERC at 1572. This dictum was cited with approval in Appalachian Power Co. v. EPA, 477 F.2d at 508, 5 ERC at 1231. On the other hand, Portland Cement Ass'n v. Ruckelshaus quite properly rejected this argument for reasons set forth below. 486 F.2d at 384 n.40, 5 ERC at 1598, n.40.
\textsuperscript{171} Russel Train, former CEQ Chairman and present EPA Administrator has observed that court decisions under NEPA "have strengthened the prospect that government will take citizen concern and participation into account before important decisions are reached and, if necessary, justify the reasonableness of the handling of environmental issues." Hearings on Calvert Cliffs Court Decision Before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., pt. 1, at 17 (1971).
\textsuperscript{172} Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 384 n.40, 5 ERC at 1598 n.40.
a NEPA exemption in its promulgation of new source performance standards under the Clean Air Act.\textsuperscript{173} This exemption rested on the court's finding that section 111 of the Act "requires the functional equivalent" of a NEPA statement since a determination of "best system of emission reduction" must include an analysis of possible adverse environmental impacts and economic costs to industry, and this analysis must accompany a proposed standard through the agency review process as part of the record for purposes of judicial review.\textsuperscript{174} The Portland Cement requirements correspond closely to guidelines published by EPA in June, 1973, under which the agency will disclose the anticipated environmental effects of and basis for "proposed major standard setting actions."\textsuperscript{175} These guidelines are intended to be "responsive to the growing demand by the judiciary and the public that Government agencies provide full and public explanation of their actions."\textsuperscript{176} They also are a direct result of EPA's internal study on NEPA,\textsuperscript{177} and represent a compromise between those on the EPA Task Force who favored full compliance with NEPA and those who favored the status quo.\textsuperscript{178}

1. **Summary of the Guidelines**

The explanations of environmental impacts will include information possessed by EPA concerning the proposed action's major environmental impacts, an explanation of the agency's "viable options," and the reasons for choosing a particular course of action "in sufficient detail to apprise a reader, not an expert in the subject matter involved,

\textsuperscript{173} 486 F.2d at 385-87, 5 ERC at 1599-1600. The court emphasized that it was granting a limited NEPA exemption applicable only to EPA's activities under section 111 of the Clean Air Act, dealing with new source performance standards.

\textsuperscript{174} Id. at 384-86, 5 ERC at 1598-1600. See text accompanying notes 153-67 supra, for an elaboration of this concept of standards of performance.

\textsuperscript{175} EPA Guidelines, supra note 9, at 15653. The regulations apply to major guidelines, regulations, or standards promulgated by EPA which either set national environmental standards, or require national emission, effluent, or performance standards or limitations. They will become effective on January 1, 1974.

\textsuperscript{176} Id.

\textsuperscript{177} EPA Task Force Report, supra note 11.

\textsuperscript{178} The Task Force Report does not take an ultimate position on NEPA, but is an ostensibly objective analysis of NEPA's requirements and how they would affect EPA's programs. However, the Report explores alternatives to NEPA which might be followed by the agency, and the alternatives discussed in connection with each program closely resemble the procedures set forth in the new EPA guidelines. In addition, the Task Force Report was made public two weeks after the promulgation of the guidelines, further indicating that the Report was intended to be in part a justification for those guidelines. The author has been told that as originally drafted, the Task Force Report recommended that EPA attempt to comply with NEPA, but that that suggestion was rejected.
of the issues." In addition, the statement will discuss relevant non-environmental factors which the agency considers in its decision-making process. The statement will generally be made available to interested parties at the time of publication of notice of proposed rulemaking, and will be published in the Federal Register if the statement is not too lengthy. In the event that a statutory deadline or "compelling need" for pollution control requires immediate action, an environmental statement will be made available within ninety days after the regulation's publication, unless EPA determines that a longer or shorter period is necessary. Thus, EPA has provided itself with an emergency escape hatch.

2. Analysis of the Guidelines

The contents of EPA's explanatory statement dovetail with NEPA's environmental "full disclosure" aspects, and the "viable options" requirement meshes with NEPA's mandate that only reasonable alternatives be discussed. Furthermore, the requirement that a non-expert reader be able to digest the substance of EPA's statements is similar to CEQ's Revised Guidelines, which directs NEPA statements to be conveyed "succinctly in a form easily understood, both by members of the public and by public decisionmakers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement." By providing that the explanatory statements shall be published or made available at the time of notice of proposed rulemaking, EPA is in effect complying with the NEPA requirement that an impact statement "accompany the proposal through the existing agency review processes," which insures meaningful public comment before final agency action. Thus, the EPA guidelines recognize NEPA's emphasis on prior disclosure.

The emergency escape clause, by which EPA may delay publication of its statement until after regulatory action, indicates EPA's

179. EPA Guidelines, supra note 9, §§ 2(a), (c), at 15653.
180. Id., §§ 2, 4, at 15653.
181. Id., § 5, at 15654.
183. See NRDC v. Morton, 458 F.2d 827, 837, 3 ERC 1558, 1564 (D.C. Cir. 1972); CEQ Revised Guidelines, supra note 54, § 1500.8(a)(4), at 20554.
184. CEQ Revised Guidelines, supra note 54, § 1500.8(b), at 20554.
186. Preservation of this core value was foremost in the court's mind in Portland Cement, where Judge Leventhal emphasized that "EPA's proposed rule, and reasons therefore, are an alert to the public and the Congress who will have the opportunity to comment as to possible adverse environmental effects of the proposed rule, during the pendency of the rule making proceedings." 486 F.2d at 386, 5 ERC at 1600.
187. See text accompanying note 181 supra.
concern over anticipated administrative exigencies such as the strict timetables contained in the Clean Air Act. Similarly, the spectre of "a NEPA delay conflicting with the constraints of the Clean Air Act" formed the basis of the court's concern in *Portland Cement*. Yet, at first glance, these compromises with NEPA do not significantly differ from what that statute would probably require, since the CEQ Guidelines provide that in emergency situations a federal agency may consult with CEQ to devise "alternative arrangements." However, the CEQ Guidelines contain two safeguards not present in EPA's. First, under CEQ procedures EPA would be required to consult with an independent body, the CEQ, before acting. This would help to guarantee in advance of agency action that EPA's claim for relief was warranted. Second, the existence of an emergency would not necessarily lead to a total exemption under CEQ's procedures; CEQ might recommend, as did the court in *Portland Cement*, an alternative approach which falls short of eliminating prior disclosure.

The EPA Guidelines also undoubtedly represent an effort to avoid the rigorous judicial scrutiny of impact statement adequacy which has become common under NEPA litigation. Thus, factors such as cost need not be rigorously balanced in NEPA-like fashion under EPA's alternative procedures. However, it is unclear how much EPA will really gain, in view of the stepped-up standard of judicial review in non-NEPA cases as exemplified in *Kencott Copper*. Although EPA will not be required to rigorously follow NEPA's mechanics, it will be under a good faith duty to disclose adverse environmental consequences of which it is aware, and the "underlying balancing analysis"

188. 486 F.2d at 386, 5 ERC at 1599.
189. CEQ Revised Guidelines, *infra* note 54, § 1500.11(e), at 20556. The *Portland Cement* court argued that, in order to avoid the "straitjacket" which NEPA would impose on the Clean Air Act's timetable, EPA need not issue the detailed statement required by NEPA, but could merely make available for comment all documents which supported its proposed rule. The time allowed for comment would depend upon the "strict time requirements" of the Clean Air Act. 486 F.2d at 386 n.43, 5 ERC at 1599 n.43. While this procedure provides a sensible resolution, it is by no means clear that NEPA would require anything less reasonable in such a situation.

190. See note 189 supra.
191. See sources cited at note 12 *infra*. EPA's guidelines are intended to be internal policy guidelines rather than enforceable regulations, and hence the agency maintains that the guidelines cannot provide the basis for legal challenges to its standard-setting actions. However, the *Portland Cement* requirements are clearly judicially enforceable. See text accompanying notes 173 and 174 *infra*. Therefore, to the extent that *Portland Cement* and the EPA guidelines dovetail, the issue of the latter's enforceability is of minimal importance.

192. See text accompanying notes 94-100 *infra*. The court in *Portland Cement* made clear that its scrutiny of EPA activities under the Clean Air Act would conform to the rigor delineated in *Kencott Copper*. 486 F.2d at 386, 5 ERC at 1600.
of its proposed rule. The disadvantage of this approach, however reasonable it may appear to be, is that it is not readily apparent how prepared EPA is to adopt a NEPA-type approach to its activities. For example, the EPA Task Force Report observes a general trend towards consideration of all pollution effects, but recognizes that such factors sometimes receive "quite limited" consideration. Moreover, there are specific indications that EPA has not incorporated NEPA's philosophy. Thus, the central issue is how to insure that EPA's good environmental intentions are institutionalized.

In *Calvert Cliffs*, Judge Wright emphasized that besides serving as a catalyst to spur more open and responsive decisionmaking, NEPA "mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties . . . if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—

193. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d at 386, 5 ERC at 1600.
194. EPA TASK FORCE REPORT, supra note 11, at 11, 27. The Report notes that EPA has formed a Standards and Regulations Steering Committee. This body is composed of representatives of all major program activities, and is intended to "ensure that pollution abatement decisions directed at one media do not create major environmental problems in another." Id. at 11. The Steering Committee reviews a proposed standard prior to its promulgation, and analyzes "[t]he full rationale supporting proposed standards, including discussion of alternative proposals and of the main criteria on which choice of one alternative is based." Id. at 22. However, given the fact that the Report also emphasizes the limited extent to which environmental impacts may be considered under the Clean Air Act (see notes 150 and 155 supra), it is not clear how much analysis is actually performed by the agency concerning environmental impacts.

195. For example, in *Anaconda Co. v. Ruckelshaus*, the district court stated that "we doubt that the record in this case is one on which [EPA] will want to rely in seeking [a NEPA] exemption. If ever there were a case to prove that EPA too should consider all environmental and other relevant factors, this is that case." 325 F. Supp. at 713, 4 ERC at 1828. Although the tenth circuit reversed the lower court and held NEPA inapplicable to EPA, the concurring opinion observed that the figure of the allowable sulfur oxide emission of 7,040 pounds set by the E.P.A. in its proposed regulation was not the work product of the agency staff and was simply an arbitrary figure, not intended by the agency as one defendable . . . as reasonable in fact, and was used only as the bait for discussion at the public hearing to be later scheduled . . . However such a procedure is inherently unfair . . . and most certainly will deter any acceptance of expertise in the E.P.A. by the courts. All proposals by the E.P.A. should reflect that agency's considered judgment.

482 F.2d at 1307, 5 ERC at 1677 (Lewis, J., concurring). See also text accompanying notes 136-39 supra. Petitioners in *Portland Cement* also raised possible adverse environmental effects, but the court noted that there was no indication that such matters had been brought to the attention of EPA. The court therefore directed EPA to consider such matters on remand. 486 F.2d at 387, 5 ERC at 1600. See also Comment, *Jet Polluters and the Government: What They've Done to the Friendly Skies*, 3 ECOLOGY L.Q. 639, where the author argues that EPA's regulation of jet aircraft emissions reflects an inadequate consideration of alternative control strategies, and has actually created more environmental problems than it has solved.
it is the responsibility of the courts to reverse."198 In other words, NEPA operates as a check on the decisionmaking processes to insure that specific factors are meaningfully accounted for by decisionmakers. The need for such a check is as relevant to EPA as it is to the Army Corps of Engineers or the AEC, because EPA has tended in the past to justify its claim for a NEPA exemption on the ground that its actions are environmentally pure. This notion was first expounded in Kalur v. Resor.197 The Corps attempted to distinguish Calvert Cliffs on the ground that, unlike the AEC's licensing procedures, the Refuse Act Permit Program was an environmental protective activity, and that NEPA could "not rationally apply" to such efforts, since "[t]he regulatory agencies in charge of such programs need perform no balancing since they have no other substantive purposes or concerns to balance against the primary concern of environmental quality which motivates these programs."198 Under this view, NEPA should logically exclude the Permit Program because that program was "designed solely to reduce existing harm to the environment."199

This theme has been repeated more recently by EPA in the Anaconda case where it argued that state implementation plans, "which are designed solely to enhance environmental quality," should not be deemed to affect the environment significantly within NEPA's meaning because environmental protective agencies have no raison d'être except to consider environmental factors in their activities.200 This position

196. 449 F.2d at 1115, 2 ERC at 1783. See also Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787, 3 ERC 1126, 1128 (D.C. Cir. 1971), where the court noted its "responsibility to determine whether the agencies involved have fully and in good faith followed the procedure contemplated by Congress: that is, setting forth the environmental factors involved in order that those entrusted with ultimate determination whether to authorize, abandon or modify the project, shall be clearly advised of the environmental factors which they must take into account." Cf., Ely v. Velde, 451 F.2d 1130, 1138, 1139, 3 ERC 1280, 1286 (4th Cir. 1971). See generally Note, Evolving Judicial Standards, supra note 12, at 1603, where the author concludes that "judicial enforcement of NEPA standards also requires a determination of whether federal agencies have reconstructed their decisionmaking apparatus and procedures in a way that ensures review of environmental considerations disclosed in impact statements."


199. Brief for Army Corps of Engineers as Appellants, Froehlke v. Kalur (D.C. Cir. Civ. No. 72-1413, filed Aug., 1972). (Robert F. Froehlke replaced Stanley R. Resor as Secretary of the Army during the interim between the district court's decision and the filing of the appeal.) The district court had explicitly rejected this contention, ruling instead that no exception under NEPA is "carved out for those agencies that may be viewed as environmental improvement agencies." 335 F. Supp. at 15, 3 ERC at 1467.

200. EPA Brief, Anaconda Co. v. Ruckelshaus, supra note 37, at 52. The circuit
amounts to an assertion that EPA's hands are clean, and that it is the environmentalists' best friend. Yet it does not follow that environmentalists should place unquestioning faith in EPA's decisionmaking process, since the agency itself appears to be quite uncertain about what that process should entail. For EPA has asserted all of the following at one time or another in pushing its claim for a NEPA exemption: (1) that there are no environmental trade-offs in its standard-setting activities, (2) that although there are such trade-offs, EPA is not permitted to consider them under specific statutes such as the Clean Air Act, and (3) that it does consider such factors, so NEPA would only be superfluous.

Furthermore, the realities of government undercut EPA's arguments for an NEPA exemption. Those realities have been stated most cogently by the National Wildlife Federation, which observed that however admirably EPA has thus far performed, one must remember that "almost all regulatory agencies have eventually come under the control of those that they are charged with regulating." As Senator Jackson put it, the ultimate issue is, "[w]ho shall police the police?" NEPA's emphasis on public disclosure and opportunity for public comment prior to agency decisionmaking, together with the opportunity it affords courts for systematic review of agency decisions, are the best measures available to prevent EPA from becoming the captive agency forecast by the National Wildlife Federation.

One final aspect of the bureaucratic realities deserves consideration. Many of EPA's objections to NEPA can be interpreted as a general assault on the statute's workability. An admission by the nation's major environmental protector that it cannot operate within this en-

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201. See notes 197-200 supra and accompanying text.

202. See notes 137-55 supra, and accompanying text.

203. "The environmental impact statement procedure was not designed to force pollution control agencies to consider environmental factors which they are already required to consider under their own enabling statute." EPA Brief, Anaconda Co. v. Ruckelshaus, supra note 37, at 52 (emphasis supplied).


206. "Decisions, reversals, and new decisions by EPA in the fields of auto emissions, phosphates, and pesticides reinforce the critical need for this type of decisionmaking by all Federal agencies." Id. (remarks of Senator Jackson).
vontmental legislation would undoubtedly be relied upon by other agencies as "proof" that the statute is unworkable.207 Any agency faced with statutory deadlines and convinced of the sanctity of its own mission could point to EPA's guidelines and ask, "Why not us?"208

CONCLUSION

The National Environmental Policy Act has been a major tool available to environmental groups to challenge and often delay federal actions significantly affecting environmental quality. More recently, industry has attempted to use NEPA to challenge EPA's actions, and the threat thus posed to prompt implementation of the Clean Air Act would not be insignificant. However, while industry has its own motivations for seeking a NEPA application to EPA, there is no a priori reason why courts cannot distinguish between legitimate environmental claims and allegations of financial injury, thus insuring fulfillment of both statutes' environmental goals. Furthermore, the Anaconda case, as well as EPA's regulation of jet aircraft emissions, suggest that deficient regulations, and not NEPA's procedural requirements, will provide the major source for court challenge to EPA's activities. Effective NEPA implementation would result in better standards which would more easily survive court tests.

EPA's refusal to comply with NEPA has been justified on a number of contradictory grounds, and in attempting to follow the agency's rationalizations it has been difficult to determine which particular argument is operative or inoperative at any given time. For example, the agency's assertion that it is not permitted under the Clean Air Act to take such a gestalt environmental approach to standard setting contradicts its argument, offered in various contexts, that NEPA would be a needless obstruction since the agency's business is environmental protection. While the agency's recently published guidelines seem to represent a modification of the latter position, the EPA Task Force Report on NEPA serves as a telling reminder that the agency has not yet defined for itself the scope and depth of the environmental analyses it should be performing; all of the internal inconsistencies of EPA's

207. Robert J. Rauch, assistant legislative director for Friends of the Earth, has made this point quite cogently in Hearings on H.R. 14103, supra note 57, at 149.

208. In Portland Cement, the court sought to minimize the precedential value of its NEPA exemption by emphasizing that the holding established a "narrow exemption from NEPA, for EPA determinations under section 111 of the Clean Air Act. NEPA must be accorded full vitality to non-environmental agencies, as established by our outstanding precedents." 486 F.2d at 387, 5 ERC at 1600. EPA has recognized the possible precedential effects of legislative exemptions, but not of judicial exemptions, in EPA TASK FORCE REPORT, supra note 11, at 80.
past arguments have resurfaced in that Report. Therefore, the new guidelines do not serve as an adequate replacement for NEPA, since the former contemplates disclosure, while the latter would also force analysis.

EPA's one consistent argument has been that NEPA is too inflexible, or at best too vague. On the basis of these questionable objections, the agency has refused to attempt compliance with the statute, and such continued refusal has virtually forced courts to bootstrap noncompliance into a judicially-sanctioned exemption, for fear of requiring a NEPA application at this late stage of Clean Air Act activities. Given the recent string of decisions exempting the Clean Air Act from NEPA, there is perhaps little chance that EPA will incorporate NEPA into its nearly completed first round of Clean Air Act standard-setting activities. However, the issue is far from moot, since under the Clean Air Act the Administrator may revise both new source performance standards and national ambient air standards.209 It seems quite likely that some revisions will be made, in view of the growing public alarm over the socioeconomic ramifications of EPA's standards. Armed with a fuller understanding of the trade-offs involved, EPA should find it easier to assess, consider, and articulate environmental trade-offs in NEPA fashion the second time around.

Undoubtedly, an incorporation of NEPA into the Clean Air Act would be inconsistent with the language of the latter statute and Congress' sense of urgency over the air pollution crisis which it reflects. However, it would be consistent with NEPA's goals and EPA's role as environmental coordinator. If there is a clear statutory conflict between NEPA and the Clean Air Act, then EPA should take advantage of section 103 of NEPA, which directs all federal agencies to "review their present statutory authority, administrative regulations, and current policies and procedures" to determine whether they prevent full compliance with NEPA's purposes and provisions, and to "propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity" with NEPA.210 Such action would be commensurate with EPA's role as environmental coordinator. On the other hand, failure to do so would reaffirm EPA's belief that NEPA is ultimately not viable, and would inevitably encourage other agencies to evade the statute's requirements.

It would be ironic, to say the least, if the Environmental Protection Agency contributed to a successful movement to bury NEPA.211

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