Alternatives under NEPA: Toward an Accommodation

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Judicial review of environmental impact statements prepared in accordance with the mandate of the National Environmental Policy Act has become increasingly comprehensive. Courts have recognized their responsibility both to enforce federal agency compliance with the procedural requirements of NEPA and to review, at least to a limited extent, substantive agency decisions. In both of these capacities one of the most important issues confronting the courts is NEPA’s command that agencies discuss alternatives to proposed projects being evaluated. This article examines various means by which courts and agencies deal with the “alternatives” issue, and suggests novel procedural devices to facilitate effective but reasonable enforcement of NEPA.

The National Environmental Policy Act of 1969 (hereinafter NEPA) became law on January 1, 1970. Although it dealt with an issue of great public interest, its progress through Congress caused little fanfare in the press, and attracted little attention from agency officials immersed in pressing day-to-day problems. Officials supervising programs with significant environmental impact saw NEPA as merely another hortatory environmental policy with few teeth, not ca-

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2. Note, for example, the few very brief references to NEPA in the NATIONAL JOURNAL, which generally provides extensive analysis of significant congressional developments, during the period from November 1, 1969, to March 7, 1970. See, e.g., 1 NAT'L J. 315, 370 (1969) and 2 NAT'L J. 208, 327 (1970).
pable of affecting their programs in any significant way. At most, NEPA was a "sheep in wolf's clothing."^4

Subsequent events have shown how wrong that placid assessment was. Although NEPA's impact on the ultimate outcome of major environmental issues is difficult to ascertain,^5 it has certainly confounded, frustrated, and angered scores of federal administrators, generated reams of implementing regulations,^6 created in many agencies new organizational elements whose entire raison d'etre is the production of passable environmental impact statements, and produced loud debates about its impact on the solution of various national problems. It has also provoked a rash of lawsuits and ensuing judicial opinions.

Early NEPA litigation involved essentially preliminary skirmishes. Section 102(2)(C) of NEPA^7 requires the preparation of environmental impact statements for "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Predictably, officials were not entranced by the prospect of spending budget dollars to crank out statements which might help kill a pet agency project. Agencies accordingly sought to characterize as few proposals as possible as major, or as having significant environmental effect. This effort was almost universally unsuccessful,^8 except possibly in the Second Circuit.^9 As other commentators have

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7. 42 U.S.C. § 4332(C) (1970). The products of this section have come to be referred to as environmental impact statements. The section requires the preparation of a "detailed statement" concerning (1) the environmental impact of the proposed action, (2) adverse environmental effects which cannot be avoided, (3) alternatives to the proposed action, (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity", and (5) "any irreversible and irrevocable commitments of resources which would be involved in the proposed action should it be implemented."


observed, the terms “major” and “significantly” have been the victims of judicial ellipses; “major” now means almost any action anyone cares enough to challenge in the courts, and “significantly” means discernibly, not insignificantly, or perhaps “at all.”

Early NEPA suits also frequently addressed questions of retroactivity. The kinds of federal construction projects which have been the principal targets of environmental suits have long gestation periods, often as great as ten years. Application of the environmental statement requirement to such projects posed a thorny problem, especially where large sums had already been expended and the project was approaching completion. Agencies opposed application of the requirement, while environmental organizations sought either total re-evaluation of the project or at least substantial reconsideration of remaining increments of work. Although the results are not neatly reconcilable, most courts have accepted the principle that the uncompleted portions of projects started prior to NEPA’s effective date require reevaluation to see what, if anything, can be done to mitigate environmental impact. However, where the agencies’ pre-NEPA efforts have been largely devoted to planning studies and preconstruction engineering, courts have tended to require an impact statement before construction can proceed.

11. See, e.g., Billings v. Camp, 4 ERC 1744 (D.D.C. 1972); see also the eloquent treatment of the issue in Conservation Society v. Volpe:

Will highway development be held up for one little Hill and one beaver pond? . . . To those of us who are so fortunate to live in Vermont and to have a little wildness surrounding us, it is probably not so difficult as it may be for others to conceive in terms of the preservation of all mankind of the importance of a little limestone hill rising abruptly from a valley floor, covered with basil and marjoram and creeping thyme, with columbine and yellow ragwort in dramatic abundance. . . . An environmental impact statement is required.

343 F. Supp. 761, 767, 4 ERC 1226, 1230 (D. Vt. 1972). For a detailed discussion and analysis of court treatment of the NEPA phrase “major federal action significantly affecting the quality of the human environment,” see F. ANDERSON & R. DANIELS, NEPA IN THE COURTS 73-96 (1973) [hereinafter cited as ANDERSON]. The author suggests that several factors guide judicial decisions on this issue, including (a) the number of alternatives and consequences likely to flow from a proposal, and (b) what agencies have required of themselves in their own guidelines.

12. See generally ANDERSON, supra note 11, at 142-78, and cases discussed therein.
13. Federally-funded highway projects, and Army Corps of Engineers, Bureau of Reclamation, and TVA dams have been the subjects of most of the suits.
becomes less important as time passes; so long as agencies file statements between the planning and construction stages, no new major battles concerning retroactivity should occur.

With these preliminary skirmishes largely resolved, the courts have been turning more and more to issues concerning the adequacy of agency compliance with NEPA's requirements. As they do so, it is becoming apparent that the most important area of future contention will be the sufficiency of efforts to comply with those portions of NEPA relating to consideration of alternatives.

Practical as well as legal considerations make "alternatives" a productive area for dispute. From a practical standpoint, alternatives have a real-world significance which appeals to courts and to prospective challengers. At the core of many NEPA suits are conflicting views about either the most promising alternative programs for satisfying a particular objective, or the desirability of pursuing the objective at all. Debate on the latter issue focuses on a primary objective in many environmental suits, forcing the agency to forego any project at all by adopting the "abandonment" option. The former issue, in turn, leads naturally to consideration of "mitigation alternatives," which also occupy a position of special importance under NEPA. Also important to the tactics of environmental challengers are the fertile opportunities to postulate an alternative which the agency has failed to

Sierra Club v. Volpe, 351 F. Supp. 1002, 4 ERC 1804 (N.D. Cal. 1972); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731, 4 ERC 1329 (D. Conn. 1972); Northside Tenants Rights Coalition v. Volpe, 346 F. Supp. 244, 4 ERC 1376 (E.D. Wis. 1972). However, some courts have refused to give NEPA retroactive application where no construction had begun. See, e.g., Brooks v. Volpe, 319 F. Supp. 90, 2 ERC 1004 (W.D. Wash. 1970), rev'd 460 F.2d 1193, 2 ERC 1858 (4th Cir. 1971); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 1 ERC 1271 (M.D. Pa. 1970), aff'd 454 F.2d 613 (3d Cir. 1971). See also ANDERSON, supra note 11, at 143, where the author identifies two judicial approaches to the cutoff point for NEPA application: (a) looking to the formal legal event which committed the federal government to a project, or (b) looking to the date of the "substantial physical event."


18. See text accompanying notes 74-81 infra, for further discussion of the no-action alternative,
consider, and thereby at least delay the offensive project while the omitted alternative is incorporated in an environmental statement.\textsuperscript{19}

In addition, many other NEPA issues are most sharply focused in the context of alternatives assessment. For example, environmentalists contend that section 101, despite its merely hortatory tone, imposes enforceable requirements upon agencies.\textsuperscript{20} Arguments that an agency action does not "attain the widest range of beneficial uses of the environment,"\textsuperscript{21} "achieve a balance between population and resource use,"\textsuperscript{22} or "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources,"\textsuperscript{23} are mere abstractions except when discussed in the context of feasible alternatives to the agency's proposed course of action.

Several of section 102's procedural requirements are also most meaningful when viewed in relation to discussions of alternatives.\textsuperscript{24} As the Second Circuit noted in \textit{Monroe County Conservation Association v. Volpe}:

\begin{quote}
The requirement for a thorough study and a detailed description of alternatives . . . is the linchpin of the entire impact statement. Without the detailed statement the conclusions and decision of the agency appear to be detached from and unrelated to environmental concerns.\textsuperscript{25}
\end{quote}

This article will examine in some detail the requirements likely to be imposed upon agencies with respect to consideration of alternatives. The starting point will be the statutory and regulatory framework. There will follow an examination of what alternatives must be addressed, and in how much detail, focusing on the fragmentary judicial guidance thus far available and on some of the practical problems which agencies face. The article will then examine some emerg-

\begin{footnotes}
19. This factor is equally pervasive in industry-initiated NEPA suits; a great many industry challenges to Clean Air Act standards promulgated by the Environmental Protection Agency have been based in part on NEPA. It seems clear that industries hope to use NEPA as an additional means by which to impose formal rule-making procedures on EPA's programs. It also seems clear that courts are rejecting such efforts by holding that NEPA does not apply to EPA. \textit{See} Comment, \textit{Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency?}, 3 \textit{Ecology L.Q.} 597 (1973).


24. For example, litigants may charge that agency discussion of alternatives lacks a "systematic, interdisciplinary approach" (42 U.S.C. § 4332(2)(A) (1970)) or fails to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values" are appropriately considered. \textit{Id.} § 4332(2)(B).

25. 472 F.2d 693, 697-98 (2d Cir. 1972).
\end{footnotes}
ing, generic administrative law rubrics frequently articulated in recent environmental cases, which are likely to be applied with greatest impact to alternatives questions. Finally, with hope and pretension springing eternal, the author offers his own "alternative" to the otherwise likely course of events.

I

STATUTORY AND ADMINISTRATIVE REQUIREMENTS

A. Statutory Language and Legislative History

As noted, section 102(2)(C) of NEPA requires a "detailed statement by the responsible official" concerning certain environmentally significant matters. Five specific elements require discussion in this environmental statement; "environmental impact" is but one of the five.26 "[A]lternatives to the proposed action"27 is another. In addition, section 102(2)(D) requires that agencies "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." These provisions, like other NEPA directives, have what one judge aptly termed an "opaque" quality.28 In such situations, one turns necessarily to legislative history for further illumination. Here, however, that exploration is largely unrewarding, because of the inadequate record bearing on the issue.29

Throughout the legislative record runs a thread of special congressional emphasis on alternatives. Yet there is an almost total lack of specificity sufficient to guide administrators and courts in facing practical problems relating to environmental impact statements. Senator Jackson set the theme in summarizing his introductory remarks to the original Senate version of NEPA:

We need to know what the risks are, and we need to know what options and alternatives are available in the development of our resources and in the administration of our environment. It is far cheaper in human, social and economic terms to anticipate these

29. The House-enacted version of NEPA had no counterpart of what became section 102. See H.R. 12549, 91st Cong., 1st Sess. (1969). During Senate hearings, witnesses suggested that an "action-forcing" mechanism was necessary in order to transform the bill's lofty declarations of purpose and policy into suitable agency responses. See, e.g., Hearings on S. 1075, S. 237, and S. 1752 before the Senate Interior and Insular Affairs Comm., 91st Cong., 1st Sess. 116 (1969) [hereinafter cited as Senate Hearings] (testimony of Prof. Lynton Caldwell). Hence, the only relevant legislative history is that of the Senate debates, the conference committee, and the floor action taken by both houses on the conference report. For an account of NEPA's legislative history see ANDERSON, supra note 11, at 1-14.
problems at an early stage and to find alternatives before they require the massive expenditures we are now obligated to make to control air, water and oil pollution.80

With all its imprecision, the legislative history clearly reflects a lack of faith in existing institutions' ability to examine alternatives,31 a perceived need for marshalling national resources to develop a national policy,82 and a need for new institutional arrangements.32 The Committee Report accompanying Senator Jackson's bill emphasized that federal institutions were "not well structured for the administration of complex environmental issues or to offer meaningful alternatives to past methods of coping with environmental problems."33 With respect to the Council on Environmental Quality, established by NEPA,34 the Report deemed it less important for Council members to have "depth of training or expertise in any specific discipline"35 than for them to be able "to grasp broad national issues" and "to appreciate the significance of choosing among present alternatives in shaping the country's future environment."36 A significant, if brief, comment in the Senate report characterized section 102(2) (D) as requiring [i]tthe agency [to] develop information and provide descriptions of the alternatives in adequate detail for subsequent reviewers and decision-makers, both within the executive branch and the Congress, to consider the alternatives along with the principal recommendation.37

30. 115 Cong. Rec. 3700 (1969) (emphasis supplied). A special report prepared for the Interior and Insular Affairs Committee and introduced by Senator Jackson contains several references to the need for adequate consideration of alternatives. Its preamble, in summarizing the four principal national tasks required for environmental protection, describes one such priority as the need to "find alternatives and procedures which will minimize and prevent future hazards in the use of environment-shaping technologies, old and new." Id. at 3702. The body of the report contains other references to the significance of alternatives assessment. See id. at 3703, 3705.

31. Senator Jackson urged "representatives of all elements of our national life" to work toward "the development of new institutions and alternatives" in environmental management, and to devise creative methods of utilizing technology towards that goal." 115 Cong. Rec. 3702 (1969). The Committee Report accompanying S. 1075 emphasized that federal institutions were "not well structured for the administration of complex environmental issues or to offer meaningful alternatives to past methods of coping with environmental problems." Senate Hearings, supra note 29, at 15.

32. Senator Jackson stated: "Developing this capacity will require that representatives from all elements of our national life—industry, the university, Federal, State and local government—participate in forming this policy." 115 Cong. Rec. 3700 (1969).

33. Id. at 3707.

34. Senate Hearings, supra note 29, at 15; see also Anderson, supra note 11, at 13.


36. Senate Hearings, supra note 29, at 23.

37. Id.

38. Id. at 21.
While this history contains little specific guidance for determining adequacy of presentation of alternatives by agencies, it does demonstrate that the need for careful consideration of alternatives was in the forefront of congressional concern. Furthermore, the phrasing of that concern suggests that Congress was occupied with more cosmic issues involving fundamental policy choices with respect to environmental protection and regulation, rather than with the environmental ramifications of a particular dam, highway, or other federal construction project, or the details of preparing environmental statements.

**B. Executive Branch Implementation**

Presidential implementation of NEPA came by executive order in March 1970. Of principal significance was its authorization to the Council on Environmental Quality (CEQ), to issue "guidelines" to federal agencies on preparation of impact statements, an authority not bestowed on the Council by NEPA itself. The guidelines are by far the most significant executive branch implementation of NEPA — because they refine and clarify the Act, have government-wide impact, and provide a model which further agency implementation regulations have tended to follow closely.  

39. Ironically, many of these more fundamental questions of federal environmental policy are now committed to the Environmental Protection Agency, which several courts of appeals have treated as exempt from NEPA's requirements. This exemption is based on a tenuous determination of congressional intent and is contrary to NEPA's clear statutory language that all federal agencies comply with NEPA to the fullest extent possible. See Comment, Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency?, 3 ECOLOGY L.Q. 597 (1973) and cases discussed therein.


41. The term "guidelines" suggests something less than an enforceable requirement, and probably represents a compromise imposed by the Office of Management and Budget for the purpose of making the CEQ more palatable to existing agencies which were unwilling to submit to the hegemony of a new and potentially meddlesome body. Some courts have characterized the guidelines as nonmandatory. See, e.g., Hi-ram Clarke Civic Club v. Lynn, 476 F.2d 421, 5 ERC 1178, 1180 (5th Cir. 1973); Greene County Planning Board v. FPC 455 F.2d 412, 421, 3 ERC 1595, 1600 (2d Cir. 1972); Daly v. Volpe, 362 F. Supp. 868, 870, 2 ERC 1506, 1508 (W.D. Wash. 1971). Most courts, however, appear to treat them as enforceable regulations. See Morningside-Lenox Park Assoc. v. Volpe, 334 F. Supp. 334, 132 F. Supp. 132, 141-43, 3 ERC 1327, 1334 (N.D. Ga. 1971); National Helium Corp. v. Morton, 326 F. Supp. 151, 155-6, 2 ERC 1372, 1376 (D. Kan. 1971), aff'd, 455 F.2d 650, 3 ERC 1129 (10th Cir. 1971); EDF v. Corps of Engineers, 325 F. Supp. 728, 743, 2 ERC 1260, 1273 (E.D. Ark. 1971). For a critique of the efficacy of CEQ's role in NEPA implementation see ANDERSON, supra note 11, at 10-14.

42. There have been, thus far, three versions of the guidelines: Council on Environmental Quality, Interim Guidelines, 35 Fed. Reg. 7390 (1970) [hereinafter cited as Interim CEQ Guidelines]; more complete guidelines, Council on Environmental Quality, Guidelines for Federal Agencies under the National Environmental Policy
All versions of the Guidelines have accorded to the alternatives requirement the significant role dictated by the Act and its legislative history. For example, the “policy” portions of both the Initial and Final Guidelines require exploration of “alternative actions that will minimize adverse impact” so as to “avoid to the fullest extent practicable undesirable consequences for the environment.” Both the Initial and Final Guidelines require a “rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects.”

The Revised Guidelines also require “rigorous” exploration, but limit the alternatives to be examined to those which are “reasonable.” Furthermore, the Revised Guidelines require consideration not only of alternatives avoiding adverse effects but also of those that “might enhance environmental quality.” The Final Guidelines also provide that the analysis should reveal the agency’s comparative evaluation of the environmental risks of the proposed action and each reasonable alternative.

The Revised Guidelines also require, for the first time, a structured justification for rejecting reasonable alternatives which might mitigate adverse environmental effects. Such rejection must be accompanied by “an indication of what other interests and considerations of Federal policy are thought to offset the adverse environmental effects of the proposed action.” In addition, the environmental statement must “indicate the extent to which the stated countervailing benefits could be realized by following reasonable alternatives for the proposed action . . . that would avoid some or all of the adverse en-


45. Revised CEQ Guidelines, § 1500.8(a)(4), 38 Fed. Reg. at 20554 (1973). This thought was surely implicit in the earlier CEQ versions.

46. Id.

47. Id. This requirement is discussed in some detail at text accompanying notes 124-28 infra.

48. Revised CEQ Guidelines, § 1500.8(a)(8), 38 Fed. Reg. at 20544 (1973). The language of the Revised Guidelines on this issue is obviously drawn from a section of the NEPA bill as reported to the Senate floor. In that earlier version, the requirement now found in section 102(2)(C)(ii) to discuss “adverse environmental effects which cannot be avoided” appeared in the form of a required finding that “any adverse environmental effects which cannot be avoided by following reasonable alternatives are justified by other stated considerations of national policy.” S. 1075, 91st Cong., 1st Sess. § 102(c)(ii) (1969).
vironmental effects." Any cost-benefit analyses prepared by the agency, or summaries thereof, must be attached to the environmental statement. Such analyses "should clearly indicate the extent to which environmental costs have not been reflected in such analyses." The clear thrust of the Revised Guidelines is to require extensive justification when an agency rejects a reasonable alternative having a potentially less serious environmental effect than the original agency proposal.

II

JUDICIAL INTERPRETATION OF THE DUTY TO CONSIDER ALTERNATIVES

A. The Judicial Prologue

Several cases predating NEPA were harbingers of judicial response to the NEPA alternatives requirements. In 1965 the Court of Appeals for the Second Circuit set aside a decision of the Federal Power Commission which had authorized the construction of a pumped-storage hydroelectric plant at Storm King Mountain on the Hudson River. In a major victory for early environmentalists, the court held that section 10(a) of the Federal Power Act required the FPC to consider in its decisionmaking conservation of natural resources, maintenance of natural beauty, and preservation of historic sites. The court found unacceptable the Power Commission's diffident approach to the consideration of alternative power-generation systems and project modifications which might have reduced environmental damage. In remanding to the Commission, the court directed the FPC to reflect in renewed proceedings "a basic concern [for] the preservation of natural beauty and of natural historic shrines," cautioning that "the cost of a project is only one of several factors to be considered."

Subsequently the Supreme Court implicitly endorsed these views when the Secretary of the Interior challenged FPC-approved construction of a private dam on the Snake River. The Commission had

49. Id.
50. Id.
51. The Revised Guidelines also contain material designed chiefly to reflect court decisions. See § 1500.8(a)(4), the first sentence of which reflects the ruling in NRDC v. Morton, 458 F.2d 827, 3 ERC 1558 (1972); and § 1500.6(d)(2), reflecting the decision in Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973) (Wright, J.) [hereinafter cited as SIPI v. AEC]. 38 Fed. Reg. 20550, 20554 (1973).
54. 354 F.2d at 614, 1 ERC at 1088.
55. Id. at 624, 1 ERC at 1096.
proceeded without seeking any evidence on the desirability of federal development, and had not allowed the Secretary of the Interior to present such evidence.\textsuperscript{57} It had considered neither the alternative of having no dam, nor that of deferring construction. Writing for the Court, Mr. Justice Douglas sent the matter back to the Commission with these instructions:

The grant of authority to the Commission to alienate federal water resources does not, of course, turn simply on whether the project will be beneficial to the licensee. Nor is the test solely whether the region will be able to use the additional power. The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including future power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.\textsuperscript{58}

Against this background, judicial exploration of the NEPA alternatives requirement began.

\textbf{B. Application of NEPA}

Since NEPA contains two separate commands pertaining to alternatives, a threshold question concerns the relationship between section 102(2)(C)(iii),\textsuperscript{59} which requires that "alternatives to the proposed action" be one of the five subjects explored in the "detailed" (i.e., environmental impact) statement, and section 102(2)(D),\textsuperscript{60} which imposes the additional requirement that agencies "study, develop and describe" alternatives to proposals involving "unresolved conflicts concerning alternate uses of available resources." Although a number of courts have noted the separate obligation of the latter section, none has examined carefully its potentially broader requirements.\textsuperscript{61}

\textsuperscript{57} Mr. Justice Harlan justifiably criticized the Secretary's tardy and somewhat confusing actions regarding the FPC proceeding. 387 U.S. at 452 n.4, 1 ERC at 1078 n.4.

\textsuperscript{58} Id. at 450, 1 ERC at 1077.


\textsuperscript{60} Id. § 4332(2)(D).

\textsuperscript{61} Although EDF v. Corps of Engineers, 470 F.2d 289, 296, 4 ERC 1721, 1725 (8th Cir. 1972), held that subsection (2)(D) required a "more extensive treatment of alternatives," the same court was of the view that any additional information developed pursuant to subsection (2)(D) should be presented as part of the subsection (2)(C) description. Other judicial references to the (2)(D) requirement are not revealing. See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114, 2 ERC 1779, 1782 (D.C. Cir. 1971); Conservation Council v. Froehlke, 340 F. Supp. 222, 227, 3 ERC 1687, 1690 (M.D.N.C. 1972) (suggesting that the existence of subsection (2)(D) may justify not including certain information on alternatives in the description
Without subsection (2)(D), it is possible, but unlikely, that courts would find that one may satisfy subsection (2)(C)(iii) merely by describing alternatives. The subsection (2)(D) requirements to “study” and “develop” alternatives implies a more exacting and active duty. On the other hand, both Scenic Hudson and Udall v. FPC found an obligation both to develop and describe alternatives based on statutory provisions which omit any specific references to consideration of alternatives. Against the background of Scenic Hudson and Udall v. FPC, and with heightened judicial concern for the environment evident in scores of opinions, it is doubtful that agencies can successfully read subsection 102(2)(C)(iii) as requiring anything less than the somewhat clearer subsection 102(2)(D). Reflecting the view that the courts will merge the duties imposed by the two provisions, the discussion which follows maintains no distinction between them.

1. General Requirements for Alternatives Analysis

Obviously, the specific requirements imposed by NEPA will vary with the proposal under consideration. There are, however, a number of general observations concerning NEPA’s requirements which apply to nearly every proposal.

a. Alternatives as mitigating environmental damage

Those responsible for formulating alternatives to a proposed action should recognize that the purpose of exploring alternatives is to mitigate negative environmental features of the principal proposal. In declaring the objectives of NEPA, Congress stressed efforts to “prevent or eliminate damage to the environment.” The congressional policy speaks of the “critical importance of restoring and maintaining environmental quality.” Realistically, few “major” federal actions which “significantly affect” the environment will have a beneficial ef-
fect. Government pushes roads through virgin territory, felling trees and driving out the creatures of nature in the process. It builds dams and canals, producing major changes from the natural state. It authorizes major efforts to discover, develop, and transport energy resources. In all such activities some damage is inevitable, but there is a range of choice in the execution of the program. There may be both wholly different ways to achieve the desired ends (such as different transportation modes for energy resources) or variations on a basic theme which can minimize environmental damage (such as routing a road around a particular significant natural feature or screening an ugly man-made one).

The Revised CEQ Guidelines recognize as an essential element of federal environmental policy the requirement to proceed in such a manner that “adverse effects are avoided, and environmental quality is restored or enhanced,” noting particularly the need to explore alternatives that will “minimize adverse impact.” The cases reflect the concept of mitigation, most often implicitly. The most explicit discussion is that of Sierra Club v. Froehlke, where the court speaks of NEPA’s indirect but affirmative command that federal agencies “mitigate some and possibly all of the environmental impacts arising from a proposed project.”

It would be unusual to find a program alternative which would wholly mitigate all the adverse environmental effects of a proposed action. A major project is likely to impinge upon many elements of the environment, and while mitigation may be feasible with respect to some effects, it may not be possible with respect to others. For example, it may be possible, by care in the timing and manner of constructing highway bridges, to reduce impact on streams and related fishery resources. But it is unlikely that measures are available which will significantly mitigate the visual aesthetic impact which results from simply having a highway. Thus, agencies must frame alternatives which will have some beneficial mitigating effects, even though adverse elements cannot be wholly eliminated. This concept, reflected in the Revised CEQ Guidelines, was explicitly recognized in Sierra Club v. Froehlke, where the court noted that “it is not appropriate to disregard alternatives merely because they do not offer, individually, a

68. Id. at 1339, 5 ERC at 1065. See also Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1112, 2 ERC 1774, 1780 (1971).
complete solution to the problem.\textsuperscript{70} The court suggested an approach to formulating alternatives with mitigation as its focus:

[E]ach of the primarily environmentally adverse effects must be considered, and alternative approaches to the project should be considered with an eye to mitigating each or all of these. The purpose of "breaking" down a project into its beneficial and detrimental "components" is to determine whether some significant portion of the environmental harm may be alleviated.\textsuperscript{71}

There is generally little evidence in published environmental statements to indicate that agencies have employed such a carefully structured analytical process.\textsuperscript{72} One difficulty which partially explains the omission is that focusing on each of the detrimental effects of a major project and framing alternatives with such effects in mind could produce a plethora of alternatives, a problem discussed more fully below.\textsuperscript{73}

\textbf{b. Abandonment}

One alternative is always available to a proposal to undertake a specific action, program, or project—the alternative of not going ahead with what has been proposed, frequently referred to as "abandonment." Consideration of this "no-project" alternative was not explicitly required either by the 1970 or 1971 CEQ Guidelines, but the 1973 Revised Guidelines specifically prescribe its examination.\textsuperscript{74}

Abandonment has a special place among the alternatives required to be considered. To say that an agency must consider abandonment is essentially to restate the ultimate judgment which is required of the agency when the environmental statement procedures have been completed; some official must then decide whether the environmental and other disadvantages of a proposed action so outweigh any benefits to be obtained as to indicate that the proposal ought not be pursued. In making that judgment, and in explicating it,\textsuperscript{75} the responsible official should have effectively described and assessed the abandonment alternative. Abandonment is also significant because in many (perhaps most) environmental suits, it is the central objective of those opposing

\textsuperscript{70} 359 F. Supp. 1289, 1344, 5 ERC 1033, 1075 (S.D. Tex. 1973).
\textsuperscript{71} Id. at 1345, 5 ERC at 1075-76.
\textsuperscript{73} See text accompanying notes 150-58 infra.
\textsuperscript{75} See discussion of the requirement of a "statement of reasons," at text accompanying notes 203-14 infra.
the agency; only infrequently are NEPA suits motivated merely by a desire to bring about some alterations in a proposal. Treating abandonment as an alternative tends to focus attention upon the central concern and to produce the "finely tuned and 'systematic' balancing analysis" which Judge Wright has said is required by NEPA.76

Predictably, candid discussions of abandonment are not a familiar feature of environmental statements. It is difficult for a program-oriented agency imaginatively to develop the case against a project it has already marked for approval. As a result, even regarding projects the cost-effectiveness of which is debatable wholly apart from possible environmental damage, discussions of abandonment are perfunctory and uninformative.77 Unless the courts begin to require a complete and meaningful discussion of abandonment—the kind of discussion which would, for example, characterize an assault by analysts in the Office of management and Budget upon a public works project thought not to be justified—discussions of abandonment will continue to be perfunctory and will contribute little to thoughtful consideration of the real merits of the project.

c. Deferral

Related to the alternative of abandonment is an option sometimes referred to as the alternative of "deferral." Arguments for deferral commonly take one of two forms. First, it may be contended that insufficient information is available upon which to base an educated decision, and hence that no action should be taken pending further studies.78 Second, opponents may argue that while a project eventually may be necessary, the need is distant and no action need be taken until some future time.79

The first form of deferral does not, properly speaking, constitute an alternative, although the Revised CEQ Guidelines characterize it as an alternative.

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76. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115, 2 ERC 1779, 1781 (D.C. Cir. 1971).
77. Discussion of the abandonment alternative for the Tennessee-Tombigbee Waterway, a major navigation project which will cost at least $400 million, occupies only a single paragraph. See EDF v. Corps of Engineers, 348 F. Supp. 916, 952, 4 ERC 1408, 1434 (N.D. Miss. 1972). The court nevertheless found the environmental statement satisfactory. Similar brevity characterized the discussion of abandonment in the environmental statement for a $28 million segment of the $1.5 billion Trinity River navigation project, considered in Sierra Club v. Froehlke, 359 F. Supp. 1289, 5 ERC 1033, 1077 (S.D. Tex. 1973). The court found the environmental statement inadequate, but did not single out the discussion of abandonment for specific criticism.
79. Some of the objections to the High Mountain Sheep Project were of this nature. See Udall v. FPC, 387 U.S. 428, 444-45, 1 ERC 1069, 1074-75 (1970).
as such.\textsuperscript{80} It is interlocutory in nature, and deals with the necessary processes of preparing a satisfactory environmental statement. The objection to proceeding is more properly phrased in terms of a failure to satisfy adequately NEPA's requirement of a description of "the environmental impact" and the "adverse environmental impacts which cannot be avoided."\textsuperscript{81}

On the other hand, deferral based on the merits of proceeding on the proposed schedule can properly be characterized as an alternative. Admittedly, it may merely affect timing; if the proposal ultimately is implemented, it may produce all the feared environmental impacts. Deferral, however, results in a definitive disposition of the pending proposal and postpones any undesirable impacts. If the period of deferral is considerable, subsequent review may ultimately produce a much different proposal.

d. Alternatives suggested by other agencies

An administrator operating under NEPA can ignore only at considerable peril those substantive suggestions concerning alternatives which he receives from other federal agencies having special competence in the field in which they are providing comments. The flag of caution was raised most explicitly in Sierra Club v. Froehlke, where the court said of the rejection by the Corps of Engineers of computations made by other federal agencies:

With all due respect to the experts acquired by the Corps of Engineers . . . their duties cannot include their substitution for the expertise of other federal agencies charged with primary duties relating to the environment . . . . When a conflict arises between the Corps and an agency which is making an evaluation in its particular field of expertise, and when the Corps' evaluation is based on factors of which the reviewing agency may take cognizance, then NEPA obligates the Corps in most instances to defer to that evaluation. Only upon the presentation of clear and convincing evidence that the reviewing agency was incorrect in its assessment should the Corps adopt another evaluation . . . .\textsuperscript{82}

\textsuperscript{81} Sections 102(2)(c)(i) and (ii), 42 U.S.C. §§ 4332(2)(c)(i) and (ii) (1970).
\textsuperscript{82} 359 F. Supp. 1289, 1349, 5 ERC 1033, 1072 (emphasis supplied). A similar thought was expressed less forcefully in the court's discussion of alternatives in NRDC v. Grant, — F. Supp. —, 5 ERC 1001 (E.D.N.C. 1973), where the court noted that several "critical reasonable alternatives" had not been discussed, including one advanced by the Bureau of Sports Fisheries and Wildlife of the Department of the Interior. The court also suggested that special attention should be given to alternatives advanced by a state agency. \textit{Ibid.} at —, 5 ERC at 1006. In a recent decision, the First Circuit expressed concern over an environmental statement in which "thoughtful comments of
Alternatives Under NEPA

Requiring some sort of deference to the reasonably well-documented views of other federal agencies is an entirely sensible doctrine. While courts typically defer to the judgment of agencies possessing specialized expertise, the reasons for deference are no longer valid when another agency, with views presumptively entitled to equal or greater deference, takes a position contrary to that of the nominally responsible agency. If the comments of reporting agencies are made responsibly, NEPA's objectives are furthered by requiring them to be taken seriously.

e. Agency as passive umpire

It is also clear that agencies cannot avoid their NEPA obligations simply by reacting to suggestions made by the public or interested agencies concerning material which ought to be included in the environmental statement. Agencies harboring the thought that affirmative obligations under NEPA could be transferred so handily to others should have been forewarned by the pre-NEPA admonition of Judge Hays when Scenic Hudson first came before the second circuit:

In this case, as in many others, the [Federal Power] Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

Post-NEPA cases confirm and strengthen this concept of affirmative duty. Chastising the AEC's passivity in the Calvert Cliffs' case, Judge Wright framed agency responsibility as "not simply to sit back like an umpire," but to "take the initiative of considering environmental values."

There are sound reasons for imposing the burdens of analysis upon the agency. Reviewing the enormously complex Trinity River Project,
the court in *Sierra Club v. Froehlke* found technical information "so extensive that if the burden were placed wholly upon citizen plaintiffs, the full disclosure requirements of NEPA would never be implemented satisfactorily . . . ." According, the burden of proof must be laid upon the "same agency which has the labor and the resources to make the proper environmental assessment . . . ." Accordingly, the burden of proof must be laid upon the "same agency which has the labor and the resources to make the proper environmental assessment . . . ."

The principle of nondelegable agency responsibility under NEPA is not without difficulty. Its rigid application could frustrate policies necessary both to the orderly administration of agencies and to judicial review, and could conflict with the requirement that those interested in agency proceedings exhaust administrative remedies and raise before the agency any matters as to which they wish to preserve an objection. These doctrines reflect a variety of judicial policies: (1) agencies should have a chance to pass on matters within their jurisdiction before judicial intervention is sought; (2) there must be some point at which objections not raised are thereafter foreclosed; (3) judicial review is facilitated by having agency views on all relevant issues; (4) parties should not be allowed to play tactical games by reserving known objections and thereafter basing a lawsuit upon them; (5) timely presentation of matters before the agency may make judicial review unnecessary.

Through the vehicle of the "draft" environmental statement, NEPA provides both the public and other governmental agencies ample opportunity for comment. The "draft" is intended to be more than a trial balloon; it "must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by section 102(2)(C)." Public comment on the draft is encouraged, and the public has another opportunity to comment on the final statement. In some cases, public hearings are held on the draft statement.

What if someone who has not commented on an environmental statement nonetheless files an action alleging that a required alternative has not been examined? Which principle will prevail: the concept that an agency cannot use the absence of public suggestions as an excuse

88. Id.
89. See *Davis*, supra note 83, at §§ 20.01-10.
90. See Revised CEQ Guidelines, § 1500.7(a), 38 Fed. Reg. 20550, 20552 (1973), requiring that each environmental statement be "prepared and circulated in draft form." But see *Anderson*, supra note 11, at 238-9, arguing that the comment period provided by CEQ "allows for very little, if any, informed analysis and debate."
92. Id. at § 1500.9(d), 38 Fed. Reg. at 20555 (1973).
93. Id. at § 1500.10(b), 38 Fed. Reg. at 20555 (1973).
94. Id. at § 1500.7(d), 38 Fed. Reg. at 20553 (1973).
for an inadequate statement, or the policy against allowing judicial challenges by those who have not made use of an adequate opportunity to complain during an administrative proceeding? Few NEPA cases appear to have addressed such a situation. In Natural Resources Defense Council v. TVA, the court had to consider TVA's argument that plaintiffs had failed to exhaust their administrative remedies by their failure to comment on TVA's draft environmental statement, and hence should be barred from challenging the eventual agency decision. The court, in a Solomonic ruling, concluded that the exhaustion-of-remedies doctrine had no application to the facts of the case, but in effect gave considerable weight to the absence of comment in determining whether the final impact statement had adequately considered plaintiff's position.

In Nader v. Ray, plaintiffs found another district court impatient with their challenge to AEC actions governed by policies which were being reexamined in an ongoing rulemaking proceeding which had included publication of a draft environmental statement. The plaintiffs had sought neither admission to participate in the rulemaking, nor to be afforded a limited appearance for the purpose of making a statement. They had not responded to publication in the Federal Register of an invitation for comments on the draft environmental statement, and they had also failed to include themselves in an umbrella group representing more than 50 organizations and individuals in the rulemaking proceeding. One plaintiff had made public statements demonstrating awareness of the ongoing rulemaking. Finally, the environmental phase of the rulemaking had not even been concluded at the time of suit. The court concluded as a matter of law that plaintiffs had failed to exhaust their various administrative remedies.

95. In an analogous situation, a court expressed dissatisfaction that plaintiffs had not revealed that an "alternative" which they were advancing in one suit was in fact a project which they had sued to enjoin in another action. See EDF v. Armstrong, 356 F. Supp. 131, 139 n.7, 5 ERC 1153, 1158 n.7 (N.D. Cal. 1973). The court noted, however, that it did "not question EDF's good faith in opposing both projects, only its apparently inadvertent failure" to disclose this fact to the court.


97. "When neither the governmental agencies nor private organizations responding to the draft statement raise a particular point, which is now advanced by the plaintiffs for the first time, the fact that previous comments were silent on the matter may be taken into consideration in passing upon the adequacy of the subject's treatment or omission from the final impact statement." Id. at 130-31, 5 ERC at 1670.


99. Id. at 953-54, 5 ERC at 1681-82. Moreover, the plaintiffs were represented in the district court by three attorneys who had participated in the rulemaking and were employing a technical expert who had been the primary technical advisor to the umbrella group. Id. at 951 n.4, 5 ERC at 1679 n.4. For other NEPA cases applying the doctrine of exhaustion of administrative agency procedures see Nat'l Forest Preservation Group v. Butz, 343 F. Supp. 696, 4 ERC 1535 (D. Mont. 1972); City of New York
There is probably no hard and fast rule which will satisfactorily resolve all cases involving failure to comment. At one extreme, it seems clear that the courts should generally refuse to consider claims where there has been a deliberate, tactical election not to participate in an agency proceeding. At the other extreme, NEPA's purposes should not be frustrated by an agency's failure to consider an obvious, important alternative to the proposal being considered. There are public rights to be vindicated, and a harsh exhaustion rule appropriate for cutting off purely private claims may offend judicial sensitivities if the agency seems likely to be pursuing a wrongheaded proposal. The disposition of exhaustion defenses will, therefore, involve the balancing of equities in the context of these competing policy considerations.

2. Presentation of Data and Analysis Concerning Alternatives

Having selected the alternatives to be discussed in the environmental statement, the responsible agency must determine what degree of detail should accompany the evaluation of each, and how the collected information should be presented. Administrators tend to seek the most cursory treatment which will survive challenge, since they typically view the environmental statement as a superfluous paper exercise, to be completed nominally before decision but in fact after basic decisions have been reached. On the other hand, environmental organizations demand the fullest rigor in the collection and analysis of information pertaining to alternatives, conforming to the philosophy that man ought to know and ponder more before acting on environmentally significant matters.

At the risk of oversimplification, one can identify three common agency approaches to the discussion of alternatives. The "notice" approach does little more than announce that there is an alternative and describe its essential features. It adduces little significant data or other supporting information which might justify rejection of the alternative. The "staple job," as it is sometimes called in bureaucratic parlance, may contain more discussion than the notice version, but is principally characterized by masses of studies, data, and comments of the public and other agencies "stapled" to a slender narrative. While the narrative occasionally may refer to the accompanying papers, the reader must wade through much poorly organized material often set forth in technical jargon to sift out that which is relevant and


100. For an example of an environmental statement which meets the description of a staple job see Sierra Club v. Lynn, 364 F. Supp. 834, 841-42, 5 ERC 1737, 1741 (W.D. Tex. 1973).
important. The “decision-paper” approach is tailored for an intelligent and demanding decisionmaker, providing essentially all information required for decision in a narrative of moderate length and intelligible content, without demanding extensive forays into supporting documents.

Assessment of the decided cases to determine the variety of impact statement most commonly used is complicated because most early NEPA cases involved projects which were, if not under construction, at least well advanced in planning. Courts naturally were reluctant to require agencies to pursue what would most likely have been meaningless rituals of detailing alternatives not seriously being considered. Indeed, at least one court advanced the notion that ongoing projects are subject to a less demanding standard of NEPA compliance. Accordingly, some of the earlier cases can be relied upon as precedent only at considerable risk.

In NRDC v. Morton, the court of appeals characterized environmental aspects of alternatives as “too important to relegate either to implication or to subsequent justification by counsel,” proceeding to hold that the environmental statement “must set forth the material contemplated by Congress in form suitable for the enlightenment of others concerned.” Yet the discussion “need not be exhaustive.” The requirement is for “information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned.”

Courts have differed as to how much detail is enough. One court spoke in terms of requiring a discussion of the “significant aspects of the probable environmental impact of the proposed [agency] action,” rejecting as too stringent the formulation of another court requiring environmental statement to disclose “all known possible environmental consequences.”

101. “Under NEPA, an EIS required for an ongoing project may not need to be as broad in scope under all the circumstances pertaining to that project at the time of NEPA’s application as would be the case if the project had not been initiated prior to January 1, 1970. Just as a balancing of factors test governs a determination of whether or not NEPA applies at all to an ongoing project... so a balancing of factors test is also applied in determining the degree of application of NEPA to an ongoing project.” Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1388, 5 ERC 1625, 1642 (D. Md. 1973). See also EDF v. Corps of Engineers, 325 F. Supp. 749, 756-57, 2 ERC 1260, 1265 (E.D. Ark 1971).

102. 458 F.2d 827, 836, 3 ERC 1558, 1563 (D.C. Cir. 1972).


104. Id., quoting from EDF v. Corps of Engineers, 325 F. Supp. 749, 759, 2 ERC 1260, 1267 (E.D. Ark. 1971). However, the court in the latter case apparently softened its attitude toward subsequent agency efforts; in dissolving the injunction after preparation of a more complete EIS, the court stated that the agency need not “dot all the Ts and cross all the Ts” in its impact statement. EDF v. Corps of Engineers, 342 F. Supp. 1211, 1216, 4 ERC 1097, 1100 (E.D. Ark. 1972).
factory a formulation found in Corps of Engineers regulations implementing NEPA: "all possible significant effects on the environment."\textsuperscript{105}

The CEQ Guidelines have consistently required a "rigorous" exploration and objective evaluation of alternatives with litigation potential.\textsuperscript{106} Perhaps the most demanding judicial formulation to date is found in \textit{EDF v. Corps of Engineers}, where the court focused on the NEPA section 102(2)(C) requirement that the environmental statement be "detailed," noting that \textit{Webster's} defines that word as meaning "marked by abundant detail or thoroughness in treating small items or parts."\textsuperscript{107} Impact statements have been held inadequate for failure to include such detail.\textsuperscript{108}

Of course, it is instructive to note not only what courts say but what they ultimately do. The same court which emphasized \textit{Webster's} definition of "detailed" approved as adequate a page-and-one-half discussion of alternatives containing only a half-page discussion of abandonment, although the $350 million project had been the object of protracted intragovernmental debate for years.\textsuperscript{109} For a $12.6 million dam, a five-page discussion of alternatives was held "somewhat brief" but adequate, even though the original version of the dam, which had been authorized by Congress and subsequently abandoned as studies progressed, was given short shrift.\textsuperscript{110} Some courts have also given their blessing to "staple jobs" which compelled interested parties to look to the "back pages" to discover what was involved.\textsuperscript{111} In one case the discussion of alternatives was only seven pages in length, and the court commented that "[t]he primary reason that the impact statement meets the requirement of full disclosure is because the defendants included in the statement the depositions of plaintiffs' expert witnesses."\textsuperscript{112}


\textsuperscript{107} EDF v. Corps of Engineers, 348 F. Supp. 916, 932, 4 ERC 1408, 1418 (N.D. Miss. 1972). Note the apparently less stringent standard formulated by this court in the same case, and discussed at text accompanying note 103 \textit{supra}.

\textsuperscript{108} See EDF v. Froehlke, 473 F.2d 346, 4 ERC 1829 (8th Cir. 1972).


\textsuperscript{110} See EDF v. Armstrong, 352 F. Supp. 50, 57, 4 ERC 1760, 1763-64 (N.D. Cal. 1972).


\textsuperscript{112} Conservation Council v. Froehlke, 340 F. Supp. 222, 226, 3 ERC 1687, 1689
Apart from questions concerning the degree of detail required within an impact statement, courts are now giving some attention to what might be called "editorial" aspects of the statement. Where intra-agency decisions must be made by persons lacking detailed familiarity with the proposal or technical competence in some of the underlying disciplines involved, the statement should be informative to them. It is for this reason that the statement is required to "accompany the proposal through the existing agency review processes." Furthermore, a principal thrust of NEPA is the furnishing of information, not just for agency decisionmakers, but for Congress, the Council on Environmental Quality, the President, and ultimately the public. An environmental statement can hardly satisfy these educational and informational objectives if it buries important information, no matter how detailed, where only an expert could find or evaluate it. Similarly, if a reviewing official, member of the public, member of Congress, or other interested person is required to master one or more fields of technical jargon to comprehend important aspects of the proposal, the value of the environmental statement is seriously diminished. Finally, courts themselves need some comprehensible document to examine if judicial review of NEPA actions is to be performed in anything more than a perfunctory manner.

Several opinions have reflected this concern, refusing to accept environmental statements where the scope of discussion of alternatives leaves much to implication or speculation. In Brooks v. Volpe, the court—apparently not enchanted with earlier highway construction in Seattle—found that a 43-page environmental statement suffered from "a serious lack of detail" and relied on "conclusions and assumptions without reference to supporting objective data." Significantly, the court concluded that the deficiencies were such that "[f]ederal reviewers could not have made an independent decision based on the information referred to, because the sources are not disclosed." Perhaps

(M.D.N.C. 1972): One court has even gone so far as to look outside the environmental statement for evidence that adequate consideration was given to alternatives, conceding that the statement itself was "sketchy" but accepting it based on evidence that responsible officials in the decisionmaking process did consider alternatives, including abandonment. See Life of the Land v. Volpe, 363 F. Supp. 1171, 1175, 5 ERC 1413, 1415 (D. Hawaii 1972).

115. See the discussion of the increasing judicial demands for a "statement of reasons" which explains the processes by which an administrator reaches a particular decision at text accompanying notes 203-14 infra.
117. Id. at 277, 4 ERC at 1496.
worse, the statement was found to suffer from "reliance on generalities and heavyhanded self-justifications."\(^{118}\)

The need for care in the organization and presentation of information received its most explicit recognition in *Sierra Club v. Froehlke.*\(^{119}\) Faced with a project of enormous magnitude and complexity, the court noted the "absolute necessity that an impact statement be prepared . . . which can be meaningfully reviewed." Disapproving the willingness of other courts to search through the entire statement and weigh the often conflicting views of other agencies, Judge Bue stated:

[I]t is apparent that much greater care must be taken in the system, organization and presentation of material for the benefit of a Court and a layman. . . . [I]t would be unreasonable to expect even the most diligent administrator, congressman or court to read hundreds or thousands of pages of text, exhibits, enclosures and appendices to gain an overall grasp of the environmental impact.\(^{120}\)

Unfortunately, the court in *Sierra Club v. Froehlke* overstepped its proper judicial role in demanding the production of "definitive policy guidelines"\(^{121}\) on a number of difficult subjects, and especially so as to calculations involved in the benefit-cost computations,\(^{122}\) which other courts have considered to be a subject of legislative concern.\(^{123}\) Nevertheless, the plea for the presentation of information in an understandable form is reasonable, and is consistent with NEPA's objectives. It is a plea which is likely to be echoed in future cases involving complex issues.

The language and history of the Revised CEQ Guidelines significantly influence the manner in which alternatives information is presented. The CEQ's proposed revisions of the 1971 Guidelines\(^ {124}\) had included a new requirement that alternatives analyses be "sufficiently detailed to permit comparative evaluation of the environmental benefits, costs and risks of the proposed action and each reasonable alternative . . . ."\(^{125}\) Environmental organizations objected strenu-
ously to the italicized word. In their view, "to permit" such evaluation would allow the agency simply to assemble a mass of material, imposing upon the reader rather than the agency the obligation to ascertain and evaluate the comparative tradeoffs involved. The CEQ responded by requiring in the final version of the Revised Guidelines that the environmental statement reveal, rather than permit, a comparative evaluation. The Revised Guidelines also specifically instruct agencies to make "every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decisionmakers." 

Taken together, these two provisions will require the compilation and analysis of sufficient information to permit an informed judgment concerning the available choices by the responsible official and by an intelligent but nonexpert outside party. In short, the resulting statement should closely resemble what was earlier characterized as "the decision document"—a discussion of moderate length which provides references to relevant data without appending reams of tables, and which sets forth in intelligible form the basis for significant conclusions.

III

INSTITUTIONAL LIMITATIONS TO CONSIDERATION OF ALTERNATIVES

The requirements addressed thus far pose no particularly difficult challenges to agency efforts to frame suitable alternatives in an environmental statement. Their resolution poses no difficult multi-agency complications and raises no pervasive issues concerning the manageability of NEPA's requirements. There are other issues, however, which raise serious questions concerning the suitability of existing federal agencies and departments to resolve environmental issues within NEPA's rather loose framework: (1) What is the obligation of the agency to consider the interfaces between its proposal and related proposals or policies committed by law to other federal entities? (2) What of technologically feasible alternatives which could not be implemented without modifying existing laws? (3) Finally, regardless of obligations to move beyond the authority of the proponent agency or existing law, how can the number of alternatives considered be kept within the personnel and dollar resources of finite agency budgets?

128. Id. § 1500.8(b), 38 Fed. Reg. at 20554 (1973).
A. The Extent of Agency Responsibility

The first two issues were the subject of the most significant opinion yet to consider NEPA's alternatives requirement. In NRDC v. Morton, the court had before it a challenge to a proposed lease-sale for oil and gas development on the Outer Continental Shelf. The Interior Department's environmental statement had addressed only the alternatives of abandoning the sale, or eliminating certain tracts with higher environmental risks. Over a vigorous dissent, the court of appeals found the Department's approach inadequate, and in so doing postulated NEPA obligations of sweeping significance. First, the court rejected the view that agencies may limit their consideration of alternatives to those within their own authority to implement. Recognizing that only "reasonably available" alternatives need be discussed, the court defined "availability" in terms of time and technological feasibility rather than the statutory jurisdiction of the proponent agency. Second, the court was unwilling even to define availability in terms of the jurisdiction of all federal agencies collectively, holding that the need for fresh or modified statutory authority to implement a proposed alternative "does not automatically establish it as beyond the domain of what is required for discussion."

The context of the court's decision is important. Although the current energy crisis was not yet upon us, it was clear that alternative energy sources could have vastly different environmental implications, and that large new energy resources were necessary to sustain spiraling energy demand. A vast and confusing array of suggested energy programs were being aired publicly; the President had sent Congress a message discussing the relationships between energy sources and air quality, and public debate was challenging both the Federal Power Commission's gas-pricing policies and the oil import quota system. Faced with an environmental impact statement which sought to justify the proposed leasing without reflecting any of these developments, the court saw in NEPA a vehicle for rationalizing the nation's energy policy. Without such rationalization, various agencies might

129. 458 F.2d 827, 3 ERC 1558 (D.C. Cir. 1972).
130. Id. at 835, 3 ERC at 1562.
131. Id. at 837, 3 ERC at 1564.
piece together a crazy-quilt of incompatible policies. As the court put it:

The Executive's proposed solution to a national problem, or a set of inter-related problems, may call for each of several departments or agencies to take a specific action; this cannot mean that the only discussion of alternatives required in the ensuing environmental impact statements would be the discussion by each department of the particular actions it could take as an alternative to the proposal underlying its impact statement.\textsuperscript{135}

A different panel of the same court subsequently reaffirmed the essential holding of the Outer Continental Shelf leasing case in considering the Atomic Energy Commission's contention that it was not required to prepare an environmental statement for its liquid metal fast breeder reactor program (LMFBR).\textsuperscript{136} The AEC proposed to consider environmental consequences in connection with specific reactor construction programs, and contended that the mere policy of pursuing a research program required no environmental statement. The AEC also claimed that insufficient information was available to permit the preparation of a meaningful statement. The court summarily rejected both of these contentions.\textsuperscript{137} Overtly, the decision is significant for imposing a requirement for environmental analysis far in advance of "hardware" proposals. Less prominent but no less clear was the court's contemplation that an adequate statement would necessarily examine energy alternatives ranging far beyond the atomic energy programs of the AEC, in effect trying to rationalize the energy inputs of any potential LMFBR program with all other energy supplies.\textsuperscript{138}

\begin{itemize}
  \item \textsuperscript{135} NRDC v. Morton, 458 F.2d 827, 835, 3 ERC 1558, 1562 (D.C. Cir. 1972).
  \item \textsuperscript{136} SIPI v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973).
  \item \textsuperscript{137} Judge Wright flatly rejected an environmental statement process based on individual facilities:
    \begin{quote}
    The Commission takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed, quite the contrary is true.
    \end{quote}
    \textit{Id.} at 1086-87, 5 ERC at 1422. The court went on to reject the supplementary argument that, even if an environmental statement were required, insufficient information was currently available to make a statement meaningful. The court was impressed with the large amounts of money and attention currently being devoted to the LMFBR Program, and noted that an impact statement for the first demonstration plant contained significant environmental information. Perhaps the most important factor suggesting that an environmental statement should be produced, however, was the availability of a comprehensive study of the alternative ways of producing electrical power through the year 2000. \textit{Id.} at 1097, 5 ERC at 1430.
  \item \textsuperscript{138} Judge Wright noted that one of the available studies included:
    material on the characteristics of the U.S. power industry, the fuel cycles of coal, oil, natural gas and nuclear, a quantification of the effects of these fuels, legal and regulatory influences and what the effects of technological change
\end{itemize}
The essential issue presented in the Outer Continental Shelf and LMFBR cases is not whether the nation should have a coherent and rational energy policy in which the merits of all potential sources of supply have been traded off against each other on environmental, technological, and economic grounds. Rather, it is whether the proper instrument for achieving such a policy is an individual environmental statement prepared by a single agency possessing limited jurisdiction and addressing only one aspect of an energy program. By answering this question affirmatively, the court in both cases displayed excessive faith in the judiciary's ability to compel rational policymaking, and a deficient appreciation of the institutional limitations of the blunt tools for policy formulation incorporated in NEPA.

The conclusion that agencies should not be constrained by existing laws when examining alternatives is clearly unworkable. Agencies, after all, need benchmarks to guide the formulation of energy-related environmental statements. Those who must devise a workable list of alternatives are not the President, or the Director of the Office of Management and Budget, or even members of the Cabinet, but are instead middle-echelon civil servants. How are they to determine what laws are to be considered immutable and which are to be deemed subject to amendment? And how are they to weigh the question whether any hypothetical legislative modification is, to use the circuit court's own test, "reasonably available"? Such a judgment is difficult enough for the President's legislative liaison staff, but certainly beyond the ken of departmental and agency officials. Furthermore, NEPA specifically provides for the preparation of environmental statements for every "recommendation or report on proposals for legislation," and it is that clearly formulated statutory mechanism, rather than every agency proposal, which should exclusively govern the application of NEPA to potential statutory modifications. Otherwise, every energy-related proposal of even modest significance could become the occasion for a mandatory fully-formulated legislative package dealing with energy. Perhaps the court did not mean to go so far. But it is not sufficient guidance for agency officials or a proper exercise of judicial power to frame requirements under which no administrator can know whether he is on sound ground until he reads the next court of appeals decision.

The only exception to this criticism might be a case in which

might be. Id. at 1097, 5 ERC at 1430.
Judge Wright concluded that "One would be hard pressed to give a better description of what the discussion of alternatives in a NEPA statement on the overall LMFBR program should look like." Id.
the proposed course of action advanced by the agency so directly under-
dermines an existing statutory program or congressional policy as to require consideration of possible statutory adjustments to preserve the program. These cases should be rare, but one court faced such a situation in *National Helium Corp. v. Morton*,\(^1\) where the Secretary of the Interior had proposed the termination of certain contracts under which the federal government had, for a number of years, underwritten helium production pursuant to statutory authorization. The district court concluded that termination of these contracts was tantamount to dismantling the entire helium program established by Congress and suggested eight potential ways to salvage the program, none of which the agency had explored. Some of the court's suggestions required congressional action, and the court rejected the Secretary's contention that he need not consider such alternatives:

If this case merely involved the termination of three contracts the Court would fully agree with the contention that a rigorous examination of alternatives beyond the Department's legislative authority would be unnecessary. The Court does not agree. . . . The Court views the Department's proposed action in this case as, in effect, a decision that a comprehensive program authorized by Congress is either unworkable, unwarranted, or unnecessary. It . . . is a decision to totally abandon a farsighted concept of present conservation for future utilization . . . .\(^2\)

*National Helium* is a considerably narrower formulation of the duty to consider new legislation than that expressed in *NDRC v. Morton*, since it confines the obligation to cases in which the proposed course of action would gravely jeopardize a congressionally authorized program. Viewed in that light, *National Helium* imposes a sufficiently constrained standard to guide administrators in framing alternatives, and avoids the problems associated with the *NRDC v. Morton* formulation.

The requirement that agencies preparing environmental statements consider alternatives beyond their own jurisdiction is less easily disposed of. There are typically a great many potential options available where energy is concerned.\(^3\) For any particular form of energy, one may consider alternate sources of supply and alternate methods of transporting the material to market, each option having potentially significant differences in environmental impact. Because one form of energy may be substituted for another in some applications, one can

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2. *Id.* at 105, 5 ERC at 1562 (emphasis in original).
3. It may be that the energy crisis of recent months has limited these options considerably.
also consider alternative forms of energy, and the source and transportation alternatives associated with each. Furthermore, technology holds the promise of entirely new forms of energy supply in the near or distant future. The variety of options available raises questions of manageability, which are discussed in the succeeding section of this article. But it is clear that the court of appeals was analytically correct in identifying the close interrelationships among various energy programs.

In view of these relationships, there are at least four potential judicial approaches. First, one may, as did the court, require the agency preparing the environmental statement on a specific proposal to canvass the entire energy field and rationalize its decision with all energy programs and policies. Second, one may require that the agency at least indicate an awareness of the interrelationships between its proposal and the general indicators of energy supply and demand, without an excruciating catalog of and tradeoff among all energy programs. Such an approach would at least require the agency to demonstrate an awareness of events outside its control, without demanding that the proposal be shown superior to any conceivable alternative. Third, one may recognize the institutional futility of seeking to set significant national policies using the inverted mechanism of a single agency proposal, and leave such broad questions of policy to the political arms of government, with the requirement that any legislative proposal be the subject of an environmental statement. Finally, again recognizing the futility of the inverted approach, one might nonetheless insist on the reconciliation of all federal energy-related activities by refusing to approve individual agency environmental statements until a comprehensive "umbrella" environmental statement has been properly prepared at the level of government where authority exists to control the actions of individual agencies. This procedure, which would provide a comprehensive policy backdrop for the more specific proposals of individual agencies, was recognized as a possibility in \textit{NRDC v. Morton}, but dismissed by the court as not required.\footnote{458 F.2d 827, 835, 3 ERC 1558, 1562 (D.C. Cir. 1972).}

Both the second and third approaches have the advantage of giving reasonable guidance to agency officials and of providing a requirement which can be achieved without excessive delay or commitment of major agency resources to prepare individual statements. It seems reasonable to require that the specific proposal at least be placed in perspective against general energy requirements and policies. The approach adopted in \textit{NRDC v. Morton} seems clearly the least workable of the four. Whatever its intellectual appeal, it ignores the realities
of bureaucratic policy formulation, and imposes delay and expense upon the proponent agency without any significant offsetting advantage. Broad policies concerning energy must necessarily be formulated with the participation of many agencies, unless Congress elects to take some action on the apparently moribund proposals to create a Department of Natural Resources.\textsuperscript{145} Given present organizational arrangements, this means that policy is set by the President and elements of the Executive Office of the President, such as the Office of Management and Budget. Whether this structure is desirable or not is not here at issue; the structure and the realities of policy formulation which flow from it are facts of life.

The aftermath of the \textit{NRDC v. Morton} decision has produced the predictable response of bureaucratic organisms to unworkable external instructions. Energy-related environmental statements now contain largely perfunctory recitations of fairly obvious energy programs, which are repeated from one environmental statement to another with only minor revisions and variations. No perceptive student of bureaucracy could characterize these environmental statements as effective instruments of policy formulation. And no knowledgeable Washington observer will entertain the delusion that future energy policies are being formulated by the technicians who prepare individual environmental statements. In short, the rule of \textit{NRDC v. Morton} simply cannot achieve the laudable objectives which the court sought to advance.

From the standpoint of sound institutional policy formulation, the approach considered but held unnecessary in \textit{NRDC v. Morton}—broad formulation of a policy umbrella at the highest levels of government, followed by a more manageable agency consideration of alternatives to specific proposals within the established policy framework—has considerably more appeal. If this concept were judicially enforced, there would be an expansive and no doubt difficult and expensive initial environmental statement followed by much more manageable successive agency statements. The policy would be enforced by refusing to find adequate an agency statement prepared prior to the completion of NEPA procedures for the general policy.

There is a tenable legal basis for this approach. It has been established for some time that NEPA applies to the promulgation of policies and regulations as well as to the implementation of programs

\textsuperscript{145} Legislation to create a Department of Natural Resources was introduced in the 92nd Congress. \textit{See} H.R. 6969, 92d Cong., 1st Sess. No legislation has yet been forthcoming. Congress now has pending before it S. 2135 and H.R. 9090, administrative proposals to create a Department of Energy and Natural Resources.
having discernible physical consequences for the environment.\textsuperscript{146} There is nothing in NEPA which explicitly excludes an official of the Executive Office of the President, or even the President himself, from being considered a "responsible official" within the terms of section 102(2)(C) of NEPA. Two likely legal objections to such a procedure must be anticipated, however. First, as a matter of statutory construction, it may be contended that section 102 applies to "agencies" and that the Executive Office of the President is not an agency. In one non-NEPA case, a court of appeals has recognized that the term "agency" is susceptible to an interpretation which excludes elements of the Executive Office.\textsuperscript{147} Despite this, the court found in the particular case that the Office of Science and Technology was sufficiently distinguishable as an entity to fall within the term "agency" as used in the Freedom of Information Act. Second, there may be objections that imposing a legislatively-structured decision mechanism on the White House would violate the constitutional principle of separation of powers and perhaps intrude on the doctrine of executive privilege, because of the inevitable tendency of NEPA procedures to bring to public view the advice of presidential staff to the President. The answer to the first objection is perhaps that Congress has imposed such requirements before,\textsuperscript{148} and there is no case suggesting the invalidity of reasonable statutory procedures for reaching public policy decisions. The answer to the second is that, so long as the environmental statement sets forth all of the underlying relevant considerations and alternatives in reasonable detail and clarity, there would be no reason to allow an inquiry into the private assessments made by presidential assistants.

Imposing NEPA's requirements on White House policy formulation would no doubt appeal to many environmental organizations, and the suggestion likewise appeals to others who find the decisionmaking processes of all White House organizations, Republican and Democrat, excessively influenced by the perceived pressures of short-term political winds, not to mention other considerations of even more dubious propriety. Yet, the process of formulating high policy is inevitably political, involving the complex power relationships between the executive branch and the Congress, and the underlying pressure groups and constituencies to which both branches respond. It is doubtful that any procedure growing out of NEPA could create much more than a


\textsuperscript{147} Soucie v. David, 448 F.2d 1067, 1073, 2 ERC 1626, 1630 (D.C. Cir. 1971).

minor ripple in the larger pond of political controversy and compromise. For this reason, the most sensible judicial philosophy is one which requires individual agencies to take a careful look at the manageable alternatives reasonably within their control, and to recite the policy framework in which the agency operates in sufficient detail to assure the courts that the proposal does not ignore such policy. Beyond that, courts should recognize their limitations in imposing formal procedures on essentially political decisions.\textsuperscript{149}

\textbf{B. Controlling the "Plethora Problem"}

If an agency must consider alternatives under the jurisdiction of other federal agencies when preparing an environmental statement, and if it must also consider alternatives necessitating the addition of new statutory authority or the elimination of existing legal constraints, the potential number of alternatives available for consideration will obviously be expanded. This is especially true for programs which have significant interrelationships with programs of other agencies. Yet, even if the doctrines of the Outer Continental Shelf Leasing and LMFBR cases are excluded from consideration, significant problems will remain in seeking reasonable limits to the alternatives to be examined. It is apparent that a standard of reasonable diligence, which has been suggested as generally applicable to NEPA compliance,\textsuperscript{150} must control the selection of a manageably small number of alternatives. Otherwise, the process of considering alternatives will lose all focus and meaning, with both the preparers and reviewers of environmental statements wallowing in a mass of nearly indistinguishable alternatives.

Consider some specific and recurring situations. A large multipurpose dam may be planned to provide flood control, recreation benefits, storage of municipal and industrial water supply, agricultural irrigation storage, and storage for downstream water quality control through planned releases of diluting water.\textsuperscript{151} The relative mix of each

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{149} Oakes, \textit{Developments in Environmental Law}, 3 ELR 50001, 50008, 50011 (1973) [hereinafter cited as Oakes].
\item \textsuperscript{150} See \textit{Life of the Land} v. Brinegar, 485 F.2d 460, 472, 5 ERC 1780, 1787 (9th Cir. 1973); SIPI v. AEC, 481 F.2d 1079, 1092, 5 ERC 1418, 1426 (D.C. Cir. 1973); NRDC v. Morton, 458 F.2d 827, 834, 3 ERC 1558, 1562 (D.C. Cir. 1972); Montgomery v. Ellis, 364 F. Supp. 517, 525-29, 5 ERC 1790, 1793-96 (N.D. Ala. 1973); Maryland-Nat'l Capital Planning Comm'n v. Schultz, — F. Supp. —, 5 ERC 1340, 1343 (D.D.C. 1973); Iowa Citizens for Environmental Quality v. Volpe, 4 ERC 1755 (S.D. Iowa 1972); see also \textit{Anderson}, supra note 11, at 221; Cramton & Berg, supra note 4; Comment, \textit{Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency?}, 3 Ecology L.Q. 597 (1973).
\end{itemize}
\end{footnotesize}
of these project elements is determined by a complex of factors, including input from state and local authorities and from federal agencies. Yet there is nothing sacrosanct about either the inclusion or omission of alternatives for a particular project purpose, or about the particular level of storage provided for such purpose. There is a continuum of alternatives, for example, even for a prescribed reservoir size, with alternatives numbering in the dozens, if not hundreds.

Even the basic scale of the project is not fixed by any immutable principles. Generally, such projects are supposed to be scaled to the point of "maximizing net benefits," but there is a certain amount of witchcraft involved in defining that elusive figure, and its validity is inextricably tied to the validity of the standard rules for calculating benefit-cost ratios for such projects—rules which have traditionally not given adequate expression to environmental costs. There is room for argument about the level of flood protection to be provided—should the dam be able to contain the 50-year flood, the 100-year one, or the Noah-like "standard project flood"? Accordingly, one may postulate a dam five, ten, or 20 feet lower or higher, with consequently altered reservoir size, and accompanying variation in "benefits." Further, there is perhaps nothing fixed about the location of the dam itself. While engineering considerations may dictate the elimination of some sites because of unsuitable foundation conditions, a number of options may remain. In fact, these may not consist simply of different locations along a particular river; often there is a choice of placing the reservoir on an entirely different river fork, again at a number of possible locations.

Added to these possibilities are basic variations in concept and policy. There is often a tradeoff between several smaller tributary dams and a single large mainstream dam. It may be suggested that an alternative to flood control is floodplain zoning to restrict development, or that it would be cheaper for the government to purchase all the threatened property than to provide protection. It may be argued, that loss of life can be averted by installing flood-warning devices, and that property damage should be tolerated.

Similar problems face agency officials concerned with highway lo-
cation and design. While the options may be limited if most of the highway net has been completed and only a connecting link is under consideration, the same is not true in the earlier planning stages for an entire urban highway system. Here, too, there are an almost endless number of ways to organize the system. In addition to basic route considerations, segments may be elevated or buried, the number of entrance and exit ramps may be varied, and their locations manipulated. Furthermore, apart from questions of highway location, major questions arise as to whether to have one at all, and this may lead to tangled debates about mass transit, bus lanes, car-pool lanes, commuter taxes, and perhaps to proposals that the city be redesigned so that more people live within walking distance of jobs and shopping areas.

It is apparent, then, that unless some restraint is exercised by both administrators responsible for selecting alternatives and reviewing courts, the nation may become one vast study project. The public does have a stake in seeing that environmentally sound projects which meet rational human needs are not alternatived to death. There is likewise a stake in keeping study costs at some sensible level. Furthermore, agency personnel who consider alternatives in good faith are entitled to some assurance that they will not be sent back to the starting post after the race has run full course.

The problem is not that courts have unreasonably required the extensive consideration of dozens of alternatives; apart from the Outer Continental Shelf leasing case, it cannot fairly be said that courts have required agencies to consider vast numbers of alternatives. Rather, the difficulty stems from the near certainty that after the agency has selected a number of alternatives, opponents of the project will be able to postulate yet another alternative which cannot be dismissed as patently unreasonable. The agency bears the responsibility for framing alternatives to be examined. It cannot rely on project opponents failing to frame a request for consideration of an additional alternative as it commences drafting the environmental statement.

The agency, therefore, is forced to speculate in advance what number and kind of alternatives courts are likely to view as constituting good faith compliance with NEPA in the event of a challenge to the en-


157. See discussion of the active role required of an agency, at text accompanying notes 85-99 supra.
environmental statement. Under these circumstances, there may be an understandable tendency to reject the entire alternatives-formulation process as unworkable, and either to consider a very few alternatives or to give superficial examination to a larger number. Neither approach is calculated to afford the NEPA alternatives requirement the central role it deserves. In short, a mechanism for formulating alternatives must be provided, which assures the public that significant alternatives will be examined, and at the same time gives agencies a reasonable assurance that their efforts to comply with NEPA will not be deemed inadequate because one particular variant of the agency proposal was not analyzed. One suggested method of achieving these objectives is considered in the conclusion to this article.¹⁵⁸

IV

THE JUDICIAL ROLE IN REVIEWING AGENCY CONSIDERATION OF ALTERNATIVES

Because alternatives present understandable choices rather than abstractions, selection of alternatives will be a central focus of whatever judicial review ultimately takes place in NEPA cases. Thus far the discussion of judicially-developed requirements under NEPA has been kept free of the various rubrics of administrative law used in describing judicial review of administrative action. These doctrines deserve special consideration, for the degree to which judges are willing to reject procedures, interpretations, and judgments of administrators will determine the significance of federal judicial participation in molding NEPA’s rather malleable language. No effort will be made to fully elaborate the arcane concepts which underlie the doctrine of judicial review. Professors Jaffe and Davis have struggled to bring the subject under some reasonable semantic control, and those left troubled by what follows might wish to pursue the subject in greater depth.¹⁵⁹

A few comments establish the basic framework. Judicial review is presumed by the courts; unless the statute clearly precludes review, review there will be.¹⁶⁰ In conducting review, a court may proceed in various ways, not all of which fit nicely into any general theory of judicial conduct. It may substitute its judgment for that of an agency by making a contrary judgment, without explicating the relative role

¹⁵⁸. See text accompanying notes 216-17 infra.
of judge and administrator, or the importance of “expertise.” 161 It may affirmatively endorse an administrative interpretation, thereby potentially transforming it into an inflexible rule of law which the agency is not thereafter free to alter. 162 Or the court may apply some standard rubric of judicial review, such as “rational basis,” and either approve or disapprove the administrative interpretation. As Professor Davis notes, the absence of explanation for judicial conduct confirms that the scope of review is itself largely a matter of judicial discretion. 168

A. Substance and Procedure

A number of circuits 164 have concluded that review of agency decisions under NEPA will be governed by the “arbitrary, capricious, abuse of discretion” standard prescribed by the Administrative Procedure Act. 165 On the other hand, a number of courts have also said that a court “may not substitute its judgment for that of the [administrator] on the necessity or desirability of the projects in question.” 166 Other courts assert that NEPA creates no substantive rights. 167

161. Speaking of the Supreme Court, Davis says, “When the court substitutes its judgment, its usual custom is simply to decide the question, with no discussion of reasons for not applying the rational basis test.” DAVIS, supra note 83, at § 30.07.

162. For a treatment of court review of agency interpretation and application of regulations see DAVIS, supra note 83, at § 30.12.

163. DAVIS, supra note 83, at § 30.81.

164. See Silva v. Lynn, 482 F.2d 1282, 5 ERC 1654 (1st Cir. 1973); EDF v. Corps of Engineers, 470 F.2d 289, 4 ERC 1721 (8th Cir. 1972); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 3 ERC 1232 (2d Cir. 1971), cert. denied, 407 U.S. 926, 4 ERC 1750 (1972); Ely v. Velde, 451 F.2d 1130, 3 ERC 1280 (4th Cir. 1971); Calvert Cliffs’ Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).


167. See Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537, 540, 4 ERC 1301, 1303 (7th Cir. 1972), where the court said that the declarations of policy in NEPA “are not sufficient to establish substantive rights . . . .” Similar expressions are found in Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 4 ERC 1933 (9th Cir. 1973); Pizitz v. Volpe, 4 ERC 1195 (M.D. Ala. 1972) aff’d, 467 F.2d 208, 4 ERC 1401 (5th Cir. 1972); Conservation Council v. Froehlke, 340 F. Supp. 222, 3 ERC 1687 (M.D.N.C. 1972); Morningside-Lenox Park Ass’n v. Volpe, 334 F. Supp. 132, 3 ERC 1327 (N.D. Ga. 1971); EDF v. Corps of Engineers, 325 F. Supp. 728, 2 ERC 1260 (E.D. Ark. 1971).
Although these statements might appear irreconcilable, the divergence is more semantic than substantive. "Substitution of judgment" could be applied to mean any court reversal of an ultimate administrative decision on the merits even if the court operates under a scope-of-review rubric such as "arbitrary, capricious" which allows significant play to the administrator's discretion.168 To another court, substitution of judgment might mean de novo review, with the court rebalancing all decisional elements and reaching its own conclusion unaffected by an administrator's prior decision. The latter is clearly the interpretation of the Ninth Circuit in Jicarilla Apache Tribe v. Morton.169 In Jicarilla, the court eschewed substitution of judgment, saying that "we are limited to the question of whether the Secretary's action followed the necessary procedural requirements,"170 and yet in almost the next judicial breath accepted the scope of review of substantive NEPA-controlled decision formulated by another court: whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."171

Virtually all of the decided cases are consistent with the view that "substantive review" exists to the extent of permitting judicial reversal of an arbitrary or capricious decision, but that NEPA does not create a right to specific judicially enforceable results in particular cases.172

168. See Davis, supra note 83, at § 30.06-.13; Jaffe, supra note 83, at 556-64.
169. 471 F.2d 1275, 1279-80, 4 ERC 1933, 1936 (9th Cir. 1973).
170. Id. at 1280, 4 ERC at 1936.
171. Id. at 1281, 4 ERC at 1937, quoting from Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971).
172. See, e.g., Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d at 1112, 2 ERC at 1780. In the Gillham Dam case, the Eighth Circuit reversed the district judge, who had held that NEPA created no substantive rights, saying that "Courts have an obligation to review substantive agency decisions on the merits." EDF v. Corps of Engineers, 470 F.2d 289, 298, 4 ERC 1721, 1726 (emphasis supplied). The italicized language suggests some form of de novo review; yet the court proceeded to make it clear that it was applying the "arbitrary and capricious" standard. 470 F.2d at 299-300, 4 ERC at 1727-28. The Seventh Circuit decision in the Bradford Township case did not involve federal action and the court, in ruling that NEPA created no substantive rights, was simply saying that no specific rights to stop state actions were created by NEPA. Pizitz v. Volpe, 4 ERC 1195 (M.D. Ala. 1972), aff'd, 467 F.2d 208, 4 ERC 1401, affirrmance modified, — F.2d —, 4 ERC 1672 (5th Cir. 1972), does not appear to involve a specific question concerning application of the "arbitrary and capricious" test to an ultimate policy decision, although that conclusion cannot be stated with assurance. Conservation Council v. Froehlke, 340 F. Supp. 222, 3 ERC 1637 (M.D.N.C. 1972), principally concerned the special role of Congress in deciding questions involving benefit-cost calculations. Two Tenth Circuit cases refer to NEPA as providing only procedural rights: National Helium Corp. v. Morton, 455 F.2d 650, 3 ERC 1129 (10th Cir. 1971); Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 3 ERC 1418 (10th Cir. 1971). In the former, the statement is merely dictum, wholly unnecessary to the decision. The latter case cites the former, along with the overruled district court opinion in the Gillham Dam case, but again the question was not necessary to decision, and the statement of the court that NEPA creates "no substantive
Clearly, then, the arbitrary/capricious test applies to the ultimate balancing of environmental and other values which contribute to the final administrative decision. This is the test which courts have applied in the few cases where they have passed on the final decision of the administrator.¹⁷³ This final judgment, which Professor Jaffe aptly describes as an "intuitive leap,"¹⁷⁴ is the supreme policy determination, subsuming all lesser issues and judgments. Less clear is the standard which applies to these subsidiary judgments. Generally, such issues are mixed questions of law and fact, which are most commonly decided within the "rational basis" test, in those cases where a court announces the governing principle.¹⁷⁶ One may question whether there is any practical difference between a "rational basis" standard and one based on the arbitrary/capricious test.¹⁷⁸ More often than not, courts have not referred to a specific standard of review in addressing these mixed questions.

B. Judicial Attitudes and NEPA Review

While it is useful to know that the arbitrary/capricious test will govern most judicial review of NEPA cases, one must recognize that application of that test will vary with the reviewing court, with individual judges, and with the agency and issue being reviewed. Although judges recognize that proper exercise of judicial power requires some deference to administrators, it is also true, as Professor Jaffe has recognized, that it is "much easier to defer to a decision one approves than to one which [the judge] dislikes."¹⁷⁷

Several factors come into play when courts review competing alternatives with different mixes of environmental, economic, and other attributes. First, the generally favorable judicial attitude toward NEPA will perhaps be the most important influence. There is every

rights in citizens to safe, healthful, productive and culturally pleasing surroundings," 452 F.2d at 1236, 3 ERC at 1420, is consistent with the view that no specific results are dictated in a particular case and is not inconsistent with application of the arbitrary/capricious standard.


¹⁷⁴. JAFFE, supra note 83, at 556.

¹⁷⁵. See, e.g., SIPI v. AEC, 481 F.2d 1079, 1095, 5 ERC 1418, 1428 (D.C. Cir. 1973), where the court found an AEC conclusion concerning the timing of the impact statement to have "no rational basis;" Hanly v. Kleindienst, 471 F.2d 823, 829, 4 ERC 1785, 1788 (2nd Cir. 1972), where the court concluded that the term "significantly" in NEPA § 102(2)(C) could be isolated as an issue of law. See generally DAVIS, supra note 83, at § 30.05.

¹⁷⁶. See DAVIS, supra note 83, at 29.02. In SIPI v. AEC, Judge Wright thought it "largely irrelevant which standard of review [rational basis or arbitrary/capricious] is verbalized." 481 F.2d at 1095 n.68, 5 ERC at 1428 n.68.

¹⁷⁷. JAFFE, supra note 83, at 565.
indication that most judges believe that there is an environmental crisis, that NEPA is a constructive step toward meeting that crisis, and that the judiciary should play a role in ensuring NEPA's vitality. ¹⁷⁸

Second, the role of expertise, which has traditionally been the principal articulated basis for judicial deference to administrative decisions, will have a lesser role under NEPA than elsewhere. Professor Jaffe properly italicizes his observation that "[i]n judicial review, the court must evaluate the relevance and weight of expertness." ¹⁷⁹ Most judicial review of administrative action has involved either an agency specifically created to administer a particular body of law, or an interpretation of a particular statute where a single executive department is the repository of administrative wisdom on the subject. ¹⁸⁰ Although NEPA does set up a presumably expert body—the Council on Environmental Quality—the difficult decisions which come to the courts commonly do so with no review by the Council and with no indication as to the Council's evaluation. Hence, the courts are not reviewing agency actions which satisfy the criteria for judicial deference.

Of course, the Federal Highway Administration knows how to build highways, just as the Corps of Engineers knows how to build canals and dams. But the issue which NEPA crystallizes is not how to build in an engineering sense, but whether to build at all, and, if so, in what form. The author's experience in supervising the Corps' program for four years indicates that, even if one looks simply at economic analysis and disregards environmental factors, the Corps is much less expert in deciding the policy-dominant "whether" and "what" issues which NEPA generates, than it is at assessing the technological issues of how to build. ¹⁸¹

As the courts address NEPA cases arising in a number of different agencies, they are likely to find few of these agencies well-equipped

¹⁷⁸. "The NEPA represents the first comprehensive congressional response to the environmental concerns that surfaced so dramatically during the 1960's." EDF v. TVA, 468 F.2d 1164, 1173, 4 ERC 1850, 1854 (6th Cir. 1972). "The National Environmental Policy Act is a legislative expression of the significance this society attaches to the preservation of the environment." EDF v. Armstrong, 352 F. Supp. 50, 55, 4 ERC 1760, 1762 (N.D. Cal. 1972). Judge Wright commented in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1111, 2 ERC 1779, 1780 (D.C. Cir. 1971): "Several recently enacted statutes attest to the commitment of the Government to control, at long last, the destructive engine of material 'progress'. . . . We must for the first time interpret the broadest and perhaps most important of the recent statutes: the National Environment Policy Act of 1969."

¹⁷⁹. JAFFE, supra note 83, at 579.

¹⁸⁰. E.g., the Department of Agriculture with respect to subsidy programs; Interior with respect to mining claims and the public lands; GSA with respect to federal laws regarding non-defense procurement.

¹⁸¹. The Corps, however, does a significantly better job than most other mission-oriented agencies with respect to the nontechnical issues.
to make the ultimate balancing which Judge Wright refers to in Calvert Cliffs.\textsuperscript{182} Ascertaining the proper degree of judicial deference is not solely dependent upon the agency's expertise, however, but must include an assessment of the comparative expertise of court and administrator.\textsuperscript{183} This comparison may vary from case to case with the same court and agency. For example, a dispute involving merely the flood control benefits of alternate dam sites would not invite substitution of judgment to the same extent as one involving allegations of damage to ecological, social, or economic values.

The extent of review will also depend on a court's confidence in a particular agency's ability and willingness to carry out the spirit, and not merely the letter, of NEPA. There is a justifiable judicial tendency to regard construction-oriented agencies as inherently unsympathetic with NEPA's objectives, and hence to review any of their decisions with suspicion. In a recent address, Judge Leventhal expressed such apprehensions with regard to the Corps of Engineers\textsuperscript{184} Similar attitudes toward other agencies have occasionally found expression in judicial opinions.\textsuperscript{185} More often than not, these attitudes will remain unarticulated but implicit.\textsuperscript{186}


Courts have at their disposal a number of doctrines other than "substitution of judgment" to deal with agencies whose decisional processes are suspect. In fact, the number of cases remanded on the basis of some procedural defect far outstrips the number in which an administrative judgment is openly branded as arbitrary or capricious. These doctrines, although classified as procedural, may overlap with substantive review concepts. They reflect a strong concern that the administrative process reflect thoughtful and thorough consideration of relevant factors, rather than inattention, carelessness, conscious disregard of conflicting evidence, political pressures, or weak reasoning.

\begin{itemize}
\item \textsuperscript{182} 449 F.2d at 1112-25, 2 ERC at 1780-83.
\item \textsuperscript{183} See generally DAVIS, supra note 83, at § 30.09; JAFFE, supra note 83, at 576-85.
\item \textsuperscript{184} Address by Hon. Harold Leventhal before New York City Bar Ass'n, Mar. 23, 1973.
\item \textsuperscript{186} For example, such judicial suspicions toward the Interior Department must have weighed heavily in the district court's holding in National Helium Corp. v. Morton, 361 F. Supp. 78, 5 ERC 1545 (D. Kan. 1973), rev'd 486 F.2d 995, 6 ERC 1001 (10th Cir. 1973).
\end{itemize}
Ideologically, they reflect an abiding faith that improving the decisionmaking process will improve the decision.

These feelings have been expressed most clearly in the District of Columbia Circuit, possibly because that circuit has had special status with respect to review of certain agency decisions,¹⁸⁷ and has been a favorite forum for litigation against federal officials. In emphasizing the increasing pervasiveness with which administrative decisions are affecting "fundamental personal interests in life, health, and liberty," Chief Judge Bazelon has emphasized that the primary function of courts is to "protect these interests from administrative arbitrariness."¹⁸⁸ However, strict judicial scrutiny of agency action will not insure the necessary protection:

Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.¹⁸⁹

It is fair to surmise that the agencies do not share Judge Bazelon's warm feeling toward the new era; they may well be apprehensive that the new judicial activism will involve forays into administrative discretion of a kind never before contemplated.¹⁹⁰ Nevertheless, this judicial activism is having an important effect on environmental administrative law.

¹⁸⁹. We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference . . . . On matters of substance, the courts regularly upheld agency action . . . . Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions. Strict adherence to that requirement is especially important now . . . . courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.
¹⁹⁰. Some judges have said that this is precisely what is happening. See EDF v. Hardin, 428 F. 1093, 1100, 1 ERC 1347, 1351-52 (D.C. Cir. 1970); Welford v. Ruckelshaus, 439 F.2d 598, 603, 2 ERC 1123, 1125-26 (D.C. Cir. 1971) (Robb, J., dissenting).
1. The "Hard Look" Doctrine

In *Greater Boston Television Corp. v. FCC*, Judge Leventhal elaborated what appears to have become a new doctrine of judicial review—the "hard look" requirement. The doctrine calls for judicial intervention if "the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decisionmaking." If there has been a "hard look," however, "the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards." Application of this doctrine requires courts to study the whole record carefully, "even as to the evidence on technical and specialized matters," which traditionally courts have tended to avoid. In *NRDC v. Morton*, Judge Leventhal had occasion to place the doctrine in a NEPA context, explaining that the court would not interject itself into NEPA-controlled decisions "so long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress . . ." The "hard look" doctrine is nearly indistinguishable from the requirement for "individualized consideration and balancing of environmental factors—conducted fully and in good faith . . ."—which has been applied under NEPA.

No court has defined the relationship between the "hard look" doctrine and the ultimate scope of review. One can conceive of an industrious but not terribly bright administrator reaching a manifestly unreasonable decision after the most painstaking review. Certainly the doctrine does not insulate such a decision from judicial reversal; the doctrine simply reflects judicial experience that an administrative decision made after a hard look at its ramifications will rarely fail to

192. The doctrine was casually referred to in *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969), and elevated to the status of an administrative law doctrine a few months later, *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).
194. *Id.* at 850.
195. For an example of an uncharacteristic foray into technical matters of considerable complexity see *International Harvester v. Ruckelshaus*, 478 F.2d 615, 4 ERC 2041 (D.C. Cir. 1973), which involved the Environmental Protection Agency's auto pollution control program.
197. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1115, 2 ERC 1779, 1783 (D.C. Cir. 1971). A number of other courts have also used the expression "good faith." See *SIP v. AEC*, 481 F.2d 1079, 1092, 5 ERC 1418, 1426 (D.C. Cir. 1973); *EDF v. Froehlke*, 473 F.2d 346, 353, 4 ERC 1829, 1833 (8th Cir. 1972); *Hanly v. Kleindienst*, 471 F.2d 823, 830, 4 ERC 1785, 1789 (2d Cir. 1972); *EDF v. Corps of Engineers*, 470 F.2d 289, 296, 4 ERC 1721, 1725 (8th Cir. 1972); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1341, 5 ERC 1033, 1067 (S.D. Tex. 1973).
satisfy any applicable standard of review. Thus, judicial application of the "hard look" doctrine is merely preliminary to a consideration of the ultimate balance which the agency has struck:

Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine . . . whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."

2. "Substantial Inquiry"

If courts have imposed a "hard look" burden upon administrators, they have imposed a similar burden upon themselves. In *Citizens to Preserve Overton Park v. Volpe*, the Supreme Court applied the narrow arbitrary/capricious standard in reviewing an administrative decision, yet required the reviewing court "to engage in a substantial inquiry" concerning the agency's decision. The familiar presumption of regularity does not shield the administrative action from a "thorough, probing, in-depth review," entailing a "searching and careful" review of the facts. *Overton Park* is a clear warning that it no longer suffices for an agency to bring a bulky administrative record into court capped by a few conclusory bits of boilerplate, and expect to receive a quick judicial blessing.

3. "Statement of Reasons"

A reviewing court must have some practical means of ensuring that the administrative decisionmaker has taken a hard look, and some way of satisfying its own obligation to conduct a substantial inquiry. These twin needs have converged in the requirement that administrators furnish a "statement of reasons" which explains the basis of the ultimate

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198. EDF v. Corps of Engineers, 470 F.2d 289, 300, 4 ERC 1721, 1728 (8th Cir. 1972).
200. Id. at 415, 2 ERC at 1256.
201. Id. at 416, 2 ERC at 1256.
202. Although *Overton Park* contains no such explicit suggestion, some courts have tied the duty of careful judicial review to the existence of "individual and personal" or "fundamental" rights, relying on Supreme Court cases arising in constitutional contexts. See, e.g., Federation of Civic Ass'ns v. Volpe, 434 F.2d 436, 440-43, 1 ERC 1316, 1318-21 (D.C. Cir. 1971); EDF v. Ruckelshaus, 439 F.2d 584, 2 ERC 1114 (D.C. Cir. 1971). However, many cases have refrained from tying strict judicial scrutiny to notions of fundamental rights. See, e.g., EDF v. Froehlke, 473 F.2d 346, 353, 4 ERC 1829, 1833 (8th Cir. 1972); EDF v. Corps of Engineers, 470 F.2d 289, 300, 4 ERC 1721, 1728 (8th Cir. 1972); Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 410-11, 5 ERC 1283, 1286 (W.D. Va. 1973); Brooks v. Volpe, 350 F. Supp. 269, 281; 4 ERC 1492, 1499 (W.D. Wash. 1972).
decision and relates it to information in the record. This requirement is not a novel one. Section 8(c)(A) of the Administrative Procedure Act requires that all agency decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."\textsuperscript{203} Supreme Court cases since the 1940's have stressed the need for explanation of agency decisions to permit adequate judicial review,\textsuperscript{204} and a number of circuit courts have followed suit.\textsuperscript{205} Professor Davis characterizes such explanations as "one of the best procedural protections against arbitrary exercise of discretionary power."\textsuperscript{206}

The requirement of reasoned articulation has been emphasized in several non-NEPA environmental cases,\textsuperscript{207} and has found expression 203. 5 U.S.C. § 557(c)(A) (1970).
205. See Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); Community Serv., Inc. v. United States, 418 F.2d 709 (6th Cir. 1969); NLRB v. Tallahassee Coca-Cola Bottling Co., 381 F.2d 863 (5th Cir. 1967); Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962); Berko v. SEC, 297 F.2d 116 (2d Cir. 1961); Kahn v. SEC, 297 F.2d 112 (2d Cir. 1961). Again, its most prolific proponents are found in the District of Columbia Circuit. To take but a few examples, see Poole Broadcasting Co. v. FCC, 442 F.2d 825, 831 (1971); Public Serv. Comm'n of the State of New York v. FPC, 436 F.2d 904, 907 (1970) ("The Commission's decision and the rationale supporting it may be entirely valid, but the Commission cannot take refuge in its alleged expertise in this field, when it does not set forth convincing reasons for its determination in sufficient detail to allow the validity of those reasons to be critically examined. . . ."); National Air Carrier Ass'n v. CAB, 436 F.2d 185, 196 (1970); Williams v. Robinson, 432 F.2d 637, 641 (1970) (the standards set by "long experience with judicial review of administrative action" are that the "agency must show the information upon which it relied" and "explain the course of reasoning by which the result was reached"); FTC v. Crowther, 430 F.2d 510, 514 (1970); Local 833, UAW-AFL-CIO v. NLRB, 300 F.2d 699, 705, cert. denied, 382 U.S. 836 (1965); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851, cert. denied, 403 U.S. 923 and 404 U.S. 877 (1971) (The "function of the court . . . calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts."). Coupled with his elaboration of the hard look doctrine in Greater Boston, Judge Leventhal explained the need for:
articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal. Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers.
Id. at 852.
207. EDF v. EPA, 465 F.2d 528, 4 ERC 1523 (D.C. Cir. 1972); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 3 ERC 1682 (D.C. Cir. 1972); Wellford v. Ruckelshaus, 439 F.2d 398, 2 ERC 1123 (D.C. Cir. 1971); EDF v. Ruckelshaus, 439 F.2d 584, 2
in NEPA cases as well. In \textit{Ely v. Velde},\textsuperscript{208} the court succinctly characterized the importance of reasons in NEPA cases:

To enable a court to ascertain whether there has been a genuine, not a perfunctory compliance with NEPA, the [agency] will be required to explicate fully its course of inquiry, its analysis and its reasoning.\textsuperscript{209}

The Revised CEQ Guidelines reinforce this requirement by prescribing that the discussion of alternatives must reveal, rather than merely permit, a comparative evaluation of the environmental aspects of alternatives.\textsuperscript{210} Once an alternative has been chosen, an agency must indicate "what other interests and considerations of Federal policy are thought to offset the adverse environmental effects . . . "\textsuperscript{211} and the extent to which reasonable alternatives might also provide these offsetting benefits.\textsuperscript{212}

Some courts have suggested that the balancing or trading-off of competing values ought to take place in the body of the environmental statement.\textsuperscript{213} This suggestion misapprehends the role of the environmental statement. The statement is not a decision; it is a tool to facilitate decisionmaking. The NEPA requirement that the impact statement accompany the proposal through the agency review process\textsuperscript{214} contemplates that there will be cases in which a decision is made at echelons in the agency higher than that at which the statement was prepared. If in such cases the statement must anticipate and include all the discretionary balancings involved in the ultimate decision, it will supplant the role of the ultimate decisionmaker. It is that decisionmaker who must say that a certain level of environmental damage is justified by a given quantity of economic or other benefit. The environmental statement may provide supporting analyses, including in-

\textsuperscript{208} ERC 1114 (D.C. Cir. 1971); EDF v. Hardin, 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970).

\textsuperscript{209} Id. at 1139, 3 ERC at 1286. \textit{Ely v. Velde} was cited with approval in \textit{EDF v. Froehlke}, 473 F.2d 346, 351, 4 ERC 1829, 1832 (8th Cir. 1972). For other NEPA cases discussing a statement of reasons or "explication" requirement see SIPI v. AEC, 481 F.2d 1079, 1095, 5 ERC 1418, 1428 (D.C. Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 827, 4 ERC 1785, 1787 (2d Cir. 1972); 5 ERC 1418, 1428 (D.C. Cir. 1973). In \textit{SIPI v. AEC}, Judge Wright noted the absence of reasons but, rather than remanding, found sufficient information in the record to justify rejecting the agency position. See also Silva v. Lynn, 482 F.2d 1282, 1283-88, 5 ERC 1654, 1655-58 (1st Cir. 1973).

\textsuperscript{210} See text accompanying notes 124-28 supra.

\textsuperscript{211} Revised CEQ Guidelines § 1500.8(a)(8), 38 Fed. Reg. 20550, 20554 (1973).

\textsuperscript{212} Id.

\textsuperscript{213} See, e.g., EDF v. Froehlke, 473 F.2d 346, 350, 4 ERC 1829, 1831 (8th Cir. 1972), which held that a statement should include the agency's own evaluation of alternatives so that reasons for its choice are clear.

formation on social, economic, or technical matter relevant to the proposal; but it is not the job of the statement to dictate a decision on ultimate questions involving discretion, policy, and judgment which are committed by law or regulation to a higher authority. Accordingly, if a court is to understand the basis for an agency decision, the statement of reasons must come from the person who decides.

CONCLUSION: TWO PROPOSALS FOR REFORM

The general direction for the future seems fairly clear. Judges, reflecting personal concern for environmental protection, will seek to make NEPA an effective instrument for rational assessment of the environmental implications of administrative decisions. Agencies will feel the cutting edge of judicial activism on issues relating to consideration of alternatives. Shallow, conclusory, and uninformative alternatives assessments are likely to be rejected. The bulkier but typically incomprehensible "staple job" is no more likely to survive; the insistence of judges on rational explication dooms this hodge-podge approach. The environmental statement capable of passing muster will be one in which reasonable alternatives are thoroughly and comprehensibly examined, linking environmental and other policy considerations to the underlying facts.

Against this background of developing doctrines governing the consideration of alternatives, there remain a number of problems, addressed in the earlier portions of this Article, as to which no emerging administrative policy or judicial doctrine can be detected. There is the difficulty of keeping the number of alternatives considered within manageable bounds, a difficulty which remains whether or not "alternatives" is defined so broadly as to include those within the competence of outside agencies or the Congress. There is the lack of judicial confidence in the objectivity of "mission agencies" faced with the mandate to formulate alternatives to their traditional missions. There are the frustrations of administrators operating in good faith, who find precious little firm guidance or consistency in NEPA, the CEQ Guidelines, and the various judicial pronouncements. There is the likelihood of continuing chaos bred by eleven courts of appeals, sitting in various panels, and innumerable district judges, all acting without benefit of a single significant Supreme Court opinion interpreting NEPA, producing a prospect of years of delay in piecing together a definitive judicial mosaic.\(^\text{215}\) There is the increasing paperwork burden

\(^\text{215}\) There have been proposals for an environmental court. *See* Kiechel, *Environmental Court Vel Non*, 3 ELR 50013 (1973). The advantages of such a court would be expertise and uniformity of precedent. The arguments against such a court, however, have been impressively marshalled by Judge Oakes. Oakes, *supra* note 149,
on bureaucracies never known for the brevity of their decisionmaking processes. Finally, there is the obvious need to bring together the results of years of administrative study, review, and decision in a way which will satisfy reviewing judges that the process has been marked by "hard looks" and reasonable objectivity culminating in a sensible explanation of the resulting decision.

This writer sees two potential reforms which offer some chance of serving the objectives of NEPA and satisfying the reasonable judicial concern for rationality in the administrative process, yet allowing government programs to proceed toward some of the purposes they were created to satisfy.

A. Reforming the Alternatives Selection Process

Competing concerns dominate the conflict over selection of alternatives. Administrators have two legitimate objectives: (1) to keep the number of alternatives within reasonable bounds and consistent with available money, manpower, technical expertise, and time limits; (2) to proceed with some assurance that, after months or years of study and analysis, a court will not find that the elimination of a particular alternative from examination constituted a fatal defect, requiring the preparation of a new environmental statement. Environmentalists challenging agency action also have two legitimate objectives: (1) to assure that the selection of alternatives does not come so late that an agency, for all the windowdressing of environmental statements, is irrevocably committed in terms of schedule and agency pride to a path which excludes serious consideration of alternatives; (2) to assure that those alternatives selected for consideration, even if few in number, focus on the key choices which have environmental consequences and avoid any tendency to skirt promising variations unattractive to the agency.

Accepting as perhaps inevitable the mutual suspicion which affects agencies and environmentalists, and recognizing the unwillingness of courts to defer to basic choices made by agencies with no demonstrable claim to special expertise, some adjustment in current procedures is essential. I suggest that a reasonable accommodation can be made by creating a new "alternatives definition" process.

Early in the process of considering a proposal, well before the draft environmental statement has been undertaken, the responsible agency would publish a notice both in the Federal Register and in other pub-

particularly persuasive are his recognition that the competing values which will be involved in major environmental cases call not for specialization but for benign generalism, and his concern that undue pressure would be brought to bear on the judicial appointment process for seats on such a court.
lications likely to reach the concerned audience, defining the objectives it seeks to achieve by agency action and the alternatives currently under consideration. The notice would invite the submission of suggestions of other alternatives. At that point, control over the selection of alternatives would pass from the responsible agency to another body, chosen because of its ability to select impartially a reasonable number of alternatives for full study and elaboration in an environmental statement. That body might hold public hearings to let interested persons air their views. It might use its own staff, or retain experts, to develop a list of feasible alternatives deserving study. In any event, it would ultimately say to the responsible agency: Study these specific alternatives.

What body ought to be selected or whether a new body should be created raises difficult questions. EPA would not be appropriate; it has too much to do already, competes with the other agencies in certain areas, and is reaching the limits of manageable administration itself. CEQ has somewhat more appeal. It is still relatively small, has no missions which compete with other agencies, and has attracted a bright and irreverent staff, essential to any agency seeking to shake up established bureaucracies. Even those who might not trust CEQ to make ultimate policy judgments on proposals might concede that it is well equipped to frame alternatives. Of course, some environmentalists would doubtless be suspicious of a process heavily influenced by the politically appointed council members. That objection could perhaps be met by appointing and developing a special board with the kind of independence the Armed Services Board of Contract Appeals has attained, with its decisions technically reviewable by political officials but with a healthy tradition of nonreview. Whatever form of organization is chosen, however, it would be essential that the participating personnel represent a balance between environmental and other views, and have a reputation for both openmindedness and a willingness to compromise.

The proposed system would not be perfect, but in government

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216. Far too few public hearings have been held under NEPA, thanks to the failure of the Act to require them, the wishy-washy administrative regulations governing them, and an almost morbid fear of such hearings by agency personnel. The Revised CEQ Guidelines direct agencies to "indicate as explicitly as possible those types of agency decisions or actions which utilize hearings as part of the normal agency review process. . . . To the fullest extent possible, all such hearings shall include consideration of the environmental aspects of the proposed action." Agencies are also specifically directed to "include provision for public hearings on major actions with environmental impact, wherever appropriate." Revised CEQ Guidelines 1500.7(d), 38 Fed. Reg. 20550, 20553 (1973). Thus, the ultimate question of whether to hold hearings is delegated to the agencies. See generally ANDERSON, supra note 11, at 325-38; Cramton & Berg, supra note 4, at 523-27.
the best is the enemy of the good. Perhaps some alternative of merit will be excluded from the approved list. Perhaps some agency will be forced to study a scheme which turns out to be as devoid of merit as agency sages had predicted. I would be confident that these potential mishaps would be more than offset by the superior analysis of reasonably limited numbers of alternatives which would result.

Ideally, the choice-of-alternatives decision by the independent body should be free from subsequent attack in judicial proceedings. To fully achieve this objective would require legislation clearly excluding judicial review.\textsuperscript{217} Still, most of the advantages can probably be realized without legislation, since the formalized process of defining alternatives in a way which removes control from the proponent agency should go far toward stilling the interventionist tendencies of judges. Indeed, environmental organizations themselves may exercise greater restraint in challenging particular agency decisions, if they are persuaded that the overall process gives reasonable weight to their views.

It is fair to anticipate objections to the suggested procedure. Agencies will say it imposes yet another step, wasteful of time. Nothing, however, is more wasteful than the current process of running proposals through the entire environmental statement process only to find that an early misstep will require yet another round of procedures; and there can also be considerable waste of time and money in studying additional alternatives out of lack of confidence that a more restricted list will be considered satisfactory. Environmentalists may be concerned that the process of defining alternatives will occur too early, before public interest can be sufficiently stimulated, and that a promising alternative may emerge later. These are valid concerns, which can be met by allowing for a midstream addition to the alternatives list where there is substantial justification outweighing the delay which will likely ensue.

\textbf{B. Improving the Decision Papers}

It is not sufficient merely to improve the process of defining alternatives. There remains, even then, a defect of enormous practical importance in the NEPA procedures for considering alternatives:

their failure to produce more than afterthought analyses, and the failure of the analyses so produced to become a part of the real decisionmaking processes of the agencies. One has only to examine the decided cases and read a random selection of final environmental statements to observe that most environmental statements are merely pieces of administrative excess baggage. It is essential that the NEPA statement precede, rather than follow, the first significant decision regarding a proposal, if NEPA policies are to be reflected in agency actions. The second proposed reform addresses this need.

Two factors have made many of the environmental statements heretofore prepared essentially post facto justifications for decisions already reached. Perhaps most significant has been the retroactive application of NEPA to proposals already well along the normal processes of approval. Obviously, many decisions had already been made, along with psychological, if not physical, commitments on the part of the agencies. The habits formed in writing environmental statements for these already middle-aged proposals appear likely to carry forward to new proposals where it is feasible to begin writing on a fresh slate. Furthermore, NEPA itself is structured so as to encourage, if not require, prejudgment among alternatives, because it assumes an initial proposal to which the agency has already given some form of blessing. The CEQ Guidelines perpetuate the predisposition to prejudgment by making the predefined agency proposal the focus of required environmental statement procedures. Indeed, although the Revised Guidelines contain repeated exhortations calculated to invoke environmental analyses at the earliest possible time, they omit reference to a procedure, contemplated in an earlier version of the Guidelines, under which an agency would decline "to favor an alternative until public hearings have been held on a proposed action."218

Deferring NEPA procedures until the agency is committed seriously undermines the important potential of environmental factors to influence agency views before the real decision has been made. Once that decision is made, any outsider who seeks to deflect the agency onto another course faces an uphill battle. Furthermore, the environmental statement becomes a defensive document whose chief purpose is to justify a decision already made. This defensive aspect emphasizes that the statement is prepared after the normal decision processes have concluded.

Further cleavage between the real decisionmaking processes of the agency and the procedures necessary to comply with NEPA is encouraged by the failure to combine economic, social, and other factors relevant to the choice among alternatives in a single supporting

staff paper from which the ultimate decisionmaker can reach a conclusion. If these additional and highly significant factors are not articulated at all in the documents supporting the decision, or are set forth in wholly separate documents, there is a subtle undermining of the NEPA statement. Worse, it becomes even more difficult for the public to understand the real elements of decision, and for courts to review the completed process.

The CEQ Guidelines encourage such a separation by requiring analysis sufficient to reveal the "environmental benefits, costs and risks of the proposed action and each reasonable alternative."219 "Environmental" clearly modifies "benefits," "costs," and "risks." This sort of one-eyed approach, considering only the environmental ledger accounts, without regard to any other relevant policy considerations, can hardly aid the decisional process. NEPA, after all, does speak of fulfilling the "social, economic, and other requirements" of the nation,220 and prescribes that economic considerations are to be weighed "in decisionmaking along with economic and technical considerations."221 A statement of reasons which does not strike a balance among all relevant considerations in evaluating alternatives is not likely to be helpful to or accepted by the courts. If the ultimate decisionmaker must make such a multifactor evaluation, why should the underlying staff work be fragmented, making the process of decision and subsequent judicial review more difficult?

Those facts relevant to weighing economic and social values ought to be set forth together with those concerning environmental issues and woven into a single document capable of meeting the requirement of the Revised CEQ Guidelines for "an essentially self-contained instrument, capable of being understood by the reader without the need for undue cross reference."222 The obvious solution is to include in the environmental statement's discussion of alternatives all those factors which will in fact bear on the decision. This will rationalize and streamline agency procedures, reduce duplicative paperwork, bring environmental considerations into the central flow of decisionmaking, and focus the issues for "downstream" decisionmakers.223 Finally, it will not only facilitate judicial review but will also

223. As the court stressed in NRDC v. Morton:

The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the al-
help persuade judges that rationality has governed the administrative process.

The suggested improvements in NEPA procedures can contribute to the objectives which Congress had in mind when it thrust this nobly motivated but poorly considered statute upon the federal agencies. Ultimately, however, the agency's approved course of action will reflect value judgments with which others will inevitably differ. It is delusive to believe that the best of procedural systems can eliminate such disagreements. Thus the issue becomes one of the power to decide. Environmentalists feel that they have lost too often in the administrative process, and therefore prefer an expansion of judicial intervention. The agencies obviously prefer to be the ultimate arbiters, citing their statutory missions and their expertise.

The choice between these competing viewpoints is not easily made. As Judge Oakes has observed, the courts are not well equipped to decide transcendent issues such as the proper mix of energy sources for the nation or the optimal tradeoff between economic growth and environmental protection. Yet those who have observed the agencies at work may also question how well equipped they are to grapple with such sweeping issues.

On balance, the toss must go to the agencies. As Professor Jaffe has noted, courts should not exercise "broad discretionary powers where these are ill-defined or not governed by rules of law."224 Placing ultimate power in the hands of agencies may not be so much a question of expertise; the required level of omniscience may not be found in any of our institutions. Rather, the power rests there because Congress has "conferred the power on the executive branch and thought it proper to confer discretion in the exercise of that power."226

That, indeed, is the case with NEPA. For all the Act's sweeping statements of principle, there is no indication of an intention to alter the locus of ultimate decision. Thus, the judiciary is left to an important supervisory role, forced to content itself with the benevolent "needling" function which Judge Oakes has described.227 Although such needling can be beneficial, when NEPA litigation finally reaches the substantive merits, the agency involved should be free to make the ultimate choice among alternatives, subject to those political influences to which it responds.

458 F.2d 827, 835, 3 ERC 1558, 1562 (D.C. Cir. 1972).
226. Id. at 1567.
227. See Oakes, supra note 149, at 10011.