The National Environmental Policy Act Applied to Policy-Level Decisionmaking

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Comments

THE NATIONAL ENVIRONMENTAL POLICY ACT APPLIED TO POLICY-LEVEL DECISIONMAKING

Environmental impact statements often cover only small fragments of federal activity and are frequently filed after the important policy alternatives have been foreclosed. In this Comment, the author suggests that narrowly focused, post hoc analysis in impact statements is inconsistent with the purposes of NEPA and was not intended by Congress. Case analysis indicates how judicial decisions encouraged the present state of affairs by appearing uniformly to require highly detailed impact statements and by failing to police impact statement procedures vigorously with respect to timing and project definition. The author examines some of the problems that will arise if more policy-level impact statements are filed—in particular the precedential effect of policy-level statements and the effects of limitations on agency authority.

The National Environmental Policy Act\(^1\) has had an unexpectedly broad impact on the federal bureaucracy, including a number of favorable effects on environmental decisionmaking.\(^2\) However, difficul-

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2. Roger Cramton, Chairman of the Administrative Conference of the United States, summarized the Act's accomplishments:

   The National Environmental Policy Act of 1969 provides us with a relatively successful case study of the possibilities, methods and limitations on the change process as applied to agencies of the Federal Government. The Act was intended to make Federal agencies more responsive to environmental considerations and values, which have been too frequently neglected in governmental decision-making. In the short space of two years the Act has produced, in addition to a number of judicial victories that have been celebrated by environmentalists, a dramatic change in the perspectives of a number of Federal agencies. Even more change—the steady, sure change that is the result of building into the decision-making process new inputs, values and arguments—is around the corner.


   The success of the Act was apparently as unexpected as it was widespread. See note 13 infra.
ties in implementing NEPA's reforms in the decisionmaking process have persisted, necessitating continuing inquiry and analysis by Congress,\(^8\) the courts,\(^4\) federal agencies\(^5\) and legal scholars.\(^6\) This comment focuses on one particular aspect of NEPA's implementation: the desirability of applying the environmental impact statement (EIS) requirement of section 102(2)(C)\(^7\) to policy-level decisions and the role of the courts in allowing and requiring EIS's for such decisions.


4. As of March 1973, about 150 cases involving NEPA had reached the courts; many have involved appellate opinions as well as opinions by the trial courts. F. ANDERSON & R. DANIELS, NEPA IN THE COURTS, Appendix B (1973) [hereinafter cited as ANDERSON]. As of this writing the number of cases has increased substantially.


7. Section 102(2)(C) provides:

The Congress authorizes and directs that, to the fullest extent possible [\(\ldots\)], all agencies of the Federal Government shall [\(\ldots\)] include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irrevocable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President,
For purposes of this discussion a policy-level environmental decision is one which usually is isolated from its environmental effects by other intervening decisions which refine and implement the prior policy decision; such decisions are also frequently separated from their concrete implementation by the passage of time.\(^8\) Agency regulations and guidelines,\(^9\) legislation, and long range plans\(^10\) are generic examples of this sort of decision—more specific examples appear in Appendices A and B. This Comment argues that policy-level decisions should be the subjects of impact statements under NEPA's section 102(2)(C), but it appears that some of these decisions are being made without benefit of the information EIS's provide.\(^11\)

the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes.\(^{42 U.S.C. § 4332(2)(C) (1970).}\)

8. For a more complete explanation of how such decisions fit into the decision-making process as a whole see notes 42-44 infra, and accompanying text.


10. For example, the plans to develop a system of canals and dams on the Trinity River in Texas, the program to develop the Liquid Metal Fast Breeder Reactor as a power source, and planning for large networks of interstate highways involved policy decisions far removed from the changes in the physical environment which might appear after such time consuming, detailed planning. Sierra Club v. Froehlke, 359 F. Supp. 1289, 5 ERC 1033 (S.D. Tex. 1973); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167, 4 ERC 1449 (S.D. Iowa 1972), modified on appeal, 484 F.2d 11, 5 ERC 1751 (8th Cir. 1973). These cases are discussed infra at notes 102-04, 61-66, and 101 and accompanying text respectively.

11. In order to obtain an overall view of the level at which impact statements are being prepared for projects and programs, the author used some crude sampling techniques. A review of 151 draft and 496 final EIS's received by the CEQ from July 1, 1972 to January 31, 1973 revealed 23 statements that, in the author's opinion, constitute policy-level statements. See Appendix A infra. The same review revealed that of the highway impact statements which comprise by far the largest category, the vast majority deal with segments less than ten miles in length. Only two dealt with corridor approval. See Appendix A, numbers 19 & 25 infra. The review disclosed two pilot project EIS's that apparently do not deal with the broader implications of the programs for which the impacted projects are pilots. 102 MONITOR, Feb. 1973, at 29, 39.

A similar review of the Federal Register for the weeks of February 26, 1973 to March 9, 1973 revealed, by a conservative estimate, 12 policy-level decisions dealing with the environment. See Appendix B infra. The estimate was conservative in that only decisions directly related to natural resources were included in the list. Many other decisions dealing with the urban environment which might have been classified as environmental were not counted. It is conceded that the rate of policy-level decisions may not be constant in the periods compared and some policy level decisions may not even appear in the Federal Register. In spite of these or other sampling prob-
In analyzing when policy-level impact statements ought to be filed and what part the courts ought to play in requiring or permitting such statements, Part I briefly investigates two levels of congressional purposes behind NEPA: express intent regarding policy-level impact statements and the broad objectives behind the requirement of impact statements for major federal actions with significant environmental impact.

Part II investigates the policy implications behind impact statements for decisionmaking in the context of limited time, knowledge, and other resources. The analysis focuses on the arguments for and against judicially imposed procedural requirements which have the effect of allowing or requiring policy-level statements. Since project definition and segmentation for EIS purposes is important in the influence of the EIS process on high level decisionmaking, Part II also develops criteria for judicial review of this area of NEPA's implementation.

Parts III and IV investigate two problems of policy-level statements: What should be the effect of policy-level EIS's on subsequent environmental decisions and, to what extent should courts require agencies to consider alternatives lying outside their authority to implement?12

I

CONGRESSIONAL INTENT

A. Express Intent with Respect to Policy-Level Statements

The issue involved here is whether Congress intended that the statutory language "other major federal actions" include high-level policy decisions. Exploration of the intent of Congress with respect to NEPA's implementation can lead to inexact conclusions at best, since legislators voting on the Act neither concurred on a single interpretation of its provisions nor understood how the Act would operate.13


13. In opposing NEPA on the floor of the House of Representatives the day it was approved in final form, Congressman William H. Harsha, objected that "[the impact of [NEPA] . . . would be so wide sweeping as to involve every branch of the Government, every committee of Congress, every agency, and every program of the Nation." 115 Cong. Rec. 40928 (1969). Yet the most wide-sweeping aspect of the Act, the requirement of impact statements in section 102(2)(C) (codified at 42 U.S.C. § 4332(2)(C) (1970)), received relatively little attention in the final deliberations in the House and Senate. See 115 Cong. Rec. 40923-28, 40415-27 (1969). This lack of attention to the probable effects of the Act was further underscored by Daniel A. Dreyfus, staff member of the Senate Committee on
Despite this difficulty, it is useful to look for recurring ideas in the legislative history of NEPA as indicators of congressional intent, at least in some areas, the record reflects broad agreement among the senators, representatives, witnesses, and experts participating in the hearings that preceded NEPA's passage.

Some participants in the pre-NEPA hearings maintained that environmental considerations entered the decisionmaking process at too low a level and that in the future they should be included in overall policy determinations. In fact, the record lacks any counter-argument that environmental matters were being taken into account adequately in high level planning, and refers frequently to the need for coordination at the highest levels. However, discussion of this issue preceded the decision to include an impact statement requirement in

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Interior and Insular Affairs who helped in drafting the final language of section 102 and who was quoted as saying that "there wasn't much wrangling in the Committee" over the addition of the impact statement requirement. "We tried our damndest to get people's attention, but everybody thought it was rhetorical and meaningless. There was a gross lack of appreciation for the significance of that language." Barfield and Corrigan, Environment Report/White House Seeks to Restrict Scope of Environmental Law, 4 Nat'l J. 336, 339 (1972) (hereinafter cited as Barfield and Corrigan). After thousands of impact statements costing millions of dollars and alterations in many major projects, the significance of the language is perhaps better appreciated. 4604 draft or final impact statements had been filed with the Council on Environmental Quality by October 1973. 102 Monitor, Nov. 1973, at 147. The Alaska Pipeline study alone cost 25 million dollars and is largely responsible for the long delay in construction. See Note, NEPA and the Alaska Pipeline, supra note 6, at 1629.


15. E.g., pre-NEPA hearings, supra note 14, at 75 (remarks of Walter J. Hickel, Secretary of Interior):

Development of our natural resources as commodities must protect other values. I am convinced that conservation and development are compatible. They should go hand in hand. To accomplish this goal, we must build environmental values in the development process from the beginning. It is essential that Government take the lead.

16. The following two statements are illustrative.

There must be within the government an agency or group capable of taking the overview. There must be an office which will ensure that environmental considerations are brought into the decision-making processes of government.

Pre-NEPA hearings, supra note 14, at 138 (remarks of Senator Tydings).

We need an improved mechanism to bring environmental issues to the attention of the highest levels of government and to the American people.

Letter from Laurence Rockefeller to Senator Jackson, April 18, 1969, in pre-NEPA hearings, supra note 14, at 161.
NEPA. Thus at best the pre-NEPA hearings support the proposition that the Act generally was intended by those at the hearings to remedy basic inadequacies in high level environmental planning.

After the requirement of impact statements had been included, Senator Jackson, one of the sponsors of the Senate version, explained to the Senate how the Act attempted to implement a national policy for the environment. NEPA was to focus attention on environmental factors in the early stages of planning by requiring impact statements for "project proposals, proposals for new legislation, regulations, policy statements, or expansion and revision of ongoing programs." This statement is neither disputed nor discussed elsewhere in the congressional deliberations on the bill, which suggests that Jackson's interpretation of NEPA, requiring policy-level impact statements, was approved by many congressmen. Thus, the Act's legislative history strongly suggests that policy decisions are major federal actions within the meaning of section 102(2)(C).

The language of the Act itself provides the surest measure of congressional intent. While there is no direct mention of impact statements for regulations, long-range plans, or policy statements, section 102(2)(C) requires statements for "every recommendation or report on proposals for legislation." By analogy, the remaining words "other major federal actions" should be read to include similar high level decisions. Additionally, though only section 102(2)(C) directly requires EIS's, other parts of section 102(2) indicate congressional concern with high level planning decisions which often may be the kind of major, environmentally significant actions requiring an EIS.

17. The language of 102(2)(C) was drafted after and as a result of the April 16th hearings. Barfield and Corrigan, supra note 13, at 336, 337-38. But the "action forcing" EIS requirement was foreshadowed in the pre-NEPA Hearings. See quote in note 41 infra.

18. Senator Jackson was a sponsor of S. 1075 (115 Cong. Rec. 3611 (1969)), and, as chairman of the Senate Committee on Interior and Insular Affairs, he presided over the pre-NEPA hearings. Pre-NEPA hearings, supra note 14, at 1. He also participated in the conference committee and defended the bill on the floor of the Senate. 115 Cong. Rec. 29066 et seq. (1969).

19. Section-by-section analysis of S. 1075 by Senator Jackson, 115 Cong. Rec. 29085 (1969). Earlier in his remarks Senator Jackson emphasized the need for incorporating environmental values into initial planning decisions:

In the past, environmental factors have frequently been ignored and omitted from consideration in the early stages of planning because of the difficulty of evaluating them in comparison with economic and technical factors.

Id.


21. 42 U.S.C. § 4332 (1970) "authorizes and directs, among other things, that Federal agencies "recognize the worldwide and long range character of environmental problems" and "initiate and utilize ecological information in the planning and development of resource-oriented projects . . . ." § 4332(2) (E), (G).

22. See note 7 supra.
This brief review of the legislative history of NEPA and the language of the Act suggests that applicability of section 102(2)(C) to policy-level decisions can easily be implied. The following section examines the broad congressional policies behind the Act. The balance of the Comment explores the extent to which these policies can be fulfilled by policy-level impact statements and the problems presented by such statements.

B. Policies Behind the Impact Statement Requirement

NEPA was enacted in part as a response to inadequacies in environmental decisionmaking by the federal bureaucracy. One of those inadequacies was a lack of high-level environmental planning. Another was the paucity of environmental information in the hands of decisionmakers. Some environmental factors were left out of the decisionmaking process or received too little notice; in particular, traditionally unquantified costs and costs to be incurred far in the future often received inadequate attention. Depending on the agency in question and its statutory functions, different environmental factors were emphasized or deemphasized.

The drafters of NEPA recognized that one of the major reasons for such difficulties lay in the mission orientation of the agencies in-

23. In introducing S. 1075, Senator Jackson called the Senate's attention to the close connection between the need for decisionmaking reforms and NEPA's other major goal—reordering national priorities:

Our present governmental institutions are not designed to deal in a comprehensive manner with problems involving the quality of our surroundings and man's relationship to the environment. The responsibilities and functions of government institutions as presently organized are extremely fractionated. This organization reflects our early national goals of resources exploitation, economic development, and conquest.

Our national goals have, however, changed a great deal in recent years. Today Government organization does not reflect this change in objectives and new demands which are being placed on the environment.

115 CONG. REC. 3699 (1969). See generally statements by Dr. Lynton Caldwell (professor of government) and Mrs. Donald Clausen (representing the League of Women Voters of the United States) made at the pre-NEPA hearings, note 14 supra, at 112, 155.


25. See Caldwell, A Report on the Need for a National Policy for the Environment, pt. I, § 4, in pre-NEPA hearings, supra note 14, at 38. In response to this lack of information, 42 U.S.C. 4332(2)(C) requires, as a prelude to each EIS, consultation with and comment by other federal agencies having legal jurisdiction or special expertise in the area of environmental impact. Copies of the statement, comments and views of involved federal, state and local agencies must be made available to the President, the CEQ and the public, and must accompany the statement "through the existing agency review process . . . ." See note 7 supra.

26. See note 19 supra.

27. See pre-NEPA hearings, supra note 14, at 206 (remarks of Senator Jackson introducing an amendment to S. 1075). See also id., at 122, 133 (remarks of Dr. Caldwell).
volved in environmental decisionmaking. The solution to such bureaucratic problems traditionally had been a structural reorganization of the existing agency or the addition of new agencies or Congressional committees, but such solutions were often expensive and ineffectual. Amendments of numerous environmentally important agency mandates to require more attention to environmental matters, and a general statement of environmental policy were also considered. Incorporation of environmental policy in every agency mandate would be very time consuming, and, more importantly, both general and specific statements of policy would be difficult to enforce.

Congress chose a compromise solution involving elements of two of the three major alternatives and the innovative "action forcing" device suggested by Dr. Lynton Caldwell. The Council on Environmental Quality [CEQ] would be created as a small, high-level body

28. Participants in the hearing acknowledged the problems of mission-orientation of the agencies:

Now, I think it is hard in many ways for the Administration to act, because . . . it is a large number of agencies that we have created over a long period of time, and we have done this in sort of an ad hoc manner—when we needed the AEC or the Space Agency, we created them.

Id. at 119 (remarks of Dr. Caldwell). Later in the same colloquy, Senator Jackson concurred with the chairman that there was "a basic conflict of interest between the agencies" and that "each agency will want to water down their own problem and they will want to hold on to what they have." Id. at 120. See also note 23 supra (remarks of Senator Jackson). A list of over 100 agencies and committees in the executive branch which deal with environmental problems is contained in Appendix C of Joint hearings, supra note 14, at 124. Part IV, infra, explores the difficulties which arise where the procedural mandates of NEPA come most directly in conflict with the mission orientation of federal agencies.

29. "New policies and programs imply structures appropriate to their functions and may call for new relationships among existing agencies." Caldwell, supra note 25, pt. II, § 4, at 43. Two papers reprinted for the NEPA hearings dealt mostly with organizational alternatives. Id. at 30; Bailey, Managing the Federal Government, in AGENDA FOR THE NATION 301 (1968) and in pre-NEPA hearings, supra note 14, at 45. Dr. Caldwell's testimony, discussion and written statement before the hearing committee also dealt mainly with this topic. Pre-NEPA hearings, supra note 14, at 112, 128. Both Caldwell and Bailey note in their papers the widespread distrust of additions to the bureaucracy. Id. at 40, 49-50.

30. Pre-NEPA hearings, supra note 14, at 117, 121 (remarks of Dr. Caldwell). But see his argument for accompanying a policy statement with "action forcing" provisions. Id. at 116. The pre-NEPA hearings do not focus on problems with judicial enforcement of policy statements; the discussion reflects only a concern that bureaucrats do not change their ways unless very direct and specific orders are involved. Of course, judicial as well as administrative enforcement is difficult where statutory language is general, because courts tend to defer where agencies interpret statutory language in any reasonable fashion and because general language is more likely to require problematic mandamus enforcement rather than injunctive relief which suffices under NEPA.


32. Pre-NEPA hearings, supra note 14, at 116.
with few substantial powers, to coordinate the effort toward better environmental decisions.\textsuperscript{33} A brief, general statement of national environmental policy would be included\textsuperscript{34} and made more effective by the "action forcing" requirements. In order to effecuate the stated policies, section 102(2)(C)\textsuperscript{35} requires an EIS and the rest of section 102 contains other directions on how agencies should approach environmental decisions.\textsuperscript{36} These section 102 "action forcing" requirements pin-point the difficulties recognized by the drafters: unquantified and distant future environmental costs,\textsuperscript{37} need for a broader, interdisciplinary approach,\textsuperscript{38} the need for exchange, disclosure and discussion of environmental information,\textsuperscript{39} and the need for agencies to review their mandates to locate requirements inconsistent with sound environmental planning.\textsuperscript{40}

Congress' promethean desire to improve environmental decision-making produced all the varied provisions of the Act, but the lack of power in the CEQ and the vagueness of the general policy statement leave the major burden of forcing changes in environmental decision-making on section 102. By far the most specific or "action forcing" provision of the section is the EIS requirement. Thus, it is natural that agencies, courts, and environmentalists have viewed the impact statement requirement as the focal procedure for producing better environmental decisions in mission-oriented agencies.\textsuperscript{41} Whether or not Congress

\textsuperscript{33} The duties and powers of the CEQ involve preparation of an annual report on the environment and other miscellaneous advisory, research, information channeling and reporting activities. 42 U.S.C. §§ 4341, 4344 (1970).

\textsuperscript{34} 42 U.S.C. § 4331(a) (1970) recognizes, among other things, the importance of the environment in man's "overall welfare" and the need for man and nature to coexist in "productive harmony" while fulfilling "social, economic and other requirements of present and future generations." The rest of the policy statement is similarly vague and does not acknowledge conflicts involved in environmental decision making. Id. § 4331(b). See text accompanying notes 68-69 infra.


\textsuperscript{36} Id. §§ 4332(1), 2(A)-(B), 2(D)-(H).

\textsuperscript{37} § 102(2)(B) requires identification and development of methods and procedures "which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." Id. § 4332(2)(B) (1970). Id. § 4332(2)(C)(iv-v) (set out in note 7 supra).

\textsuperscript{38} Id. § 4332(2)(A).

\textsuperscript{39} Id. §§ 4332(2)(C), (F), (H).

\textsuperscript{40} Id. § 4333.

\textsuperscript{41} In a statement introducing the Caldwell essay on the need for "action-forcing" devices, Senator Jackson recognized

\ldots that the declaration of national environmental policy will not alone necessarily better or enhance the total man-environment relationship. The present problem is not simply the lack of policy. It also involves the need to rationalize and coordinate existing policies and to provide a means by which they may be continuously reviewed to determine whether they meet the national goal of a quality life in a quality environment for all Americans. Caldwell, supra note 25, at 31.
intended so to burden the EIS provision, the impact statement has come close to being the *sine qua non* of the entire Act. Part II explores the limitations of the impact statement procedure as a means of rationalizing decisionmaking where decisionmaking resources are limited. Particular attention is given to the potential role of courts in allowing or requiring policy-level statements to minimize the limitations imposed by scarce resources on the impact statement process.

II

THE AGENCY DECISIONMAKING PROCESS AND PREPARATION OF IMPACT STATEMENTS FOR POLICY DECISIONS

Prior to NEPA, federal environmental decisionmaking consisted of choosing objectives and continually rejecting some alternative methods of attaining these objectives in favor of others.42 Within any project or program the alternatives considered became more narrow and detailed as the project progressed.43 Many choices among alter-

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42. As a description of the thought process of bureaucrats and planners, the progression from specification of goals toward evaluation of alternative methods of achieving them may not be accurate. It has been argued that in some situations, planners and policymakers should not even attempt to conform to such a rational model. For a critical discussion of rationality models of decisionmaking, see N.A. Simon, *Models of Man: Social and Rational*, pt. IV (1957), Lindblom, *The Science of 'Muddling Through'*, 19 PUB. ADM. REV. 79 (1959). The more conventional argument is on the other side: Planners ought at least to attempt to decide policy according to ends and means. Banfield, *Ends and Means in Planning*, 11 INT'L SOCIAL SCI. J. 361 (1959). Without resolving this debate, it is justifiable to adopt this goal-alternatives model of decisionmaking for NEPA purposes since the statute itself apparently adopts this model for EIS purposes. Indeed the “alternatives” language of § 102(2)(C)(iii) cannot be understood without it. *See* 42 U.S.C. § 4332(2)(C)(iii) (1970) (set out in note 7 *supra*). Moreover, the goal/alternatives approach gives meaning to other impact statement requirements. Whether adverse environmental consequences can be avoided depends on alternatives. *See id.* § 4332(2)(C)(ii). By showing which long-term alternatives will be available if a particular short-term choice is adopted, the long-term/short-term and the “irreversible and irretrievable commitments” effects of present decisions are clarified as required in *id.* §§ 4332(2)(C)(iv), (v). The goal/alternatives approach to decisionmaking inherent in NEPA's statutory language was given explicit judicial approval in *Sierra Club v. Froehlke* in which the court recognized that “[t]he proper method for approaching a consideration of alternatives under NEPA is to consider first the primary purposes or functions that the project is to serve.” 359 F. Supp. 1289, 1353, 5 ERC 1033, 1075 (S.D. Tex. 1973).

43. In the case of transportation, alternatives may progress from kind of transport (highways, planes, fixed rail) to narrower categories (freeways, limited access) to routes and on down to construction materials and colors. The same analysis may be applied to the licensing process; the kinds of alternatives may begin with control objectives, and then move to granting criteria and procedures, particular cases, and detailed conditions of each license. Similar analyses may be made of planning for the provision of services. Of course, the planning process may reach an impasse, retreat to an earlier stage, and repeat the narrowing process, choosing different alternatives. It is the earlier decisions in this process that are defined as policy-level decisions. *See* text accompanying note 8 *supra*. 
natives were not made until a project became operational while others were made months or even years before the first piece of earth was moved, the first license was granted, or the first service actually was performed for the public. The particular point at which alternatives A and B were rejected in favor of alternative C was not always identifiable; nor, was it always clear which agency or individual was responsible for accepting or rejecting particular alternatives.

NEPA's attempt to rationalize the federal environmental decision-making process by requiring impact statements forces a previously continuous process to proceed in discreet steps. A sequence of decisions within a program or project must be made, or appear to be made, when a statement is filed. Most projects involve several decisions which heretofore would have been made sequentially and each of which must now be formally recognized in the EIS. The requirement that alternatives be examined in the EIS forces careful definition of the project or program and its objectives so that the number and scope of alternatives may be limited. The impact statement process also requires that one agency or official explicitly be made responsible for each decision.

Court enforcement of these fundamental changes in decisionmaking procedures raises questions that may be best answered by reference to the legislative policies behind the Act.

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45. See, e.g., Comment, Mineral King: A Case Study in Forest Service Decision Making, supra note 44, at 500-10.

46. This is not to suggest that all decisions involved in a project must be justified by only one EIS. See note 120 infra and accompanying text.

47. No provision was made for joint statements. The statute speaks of "the responsible Federal official . . ." 42 U.S.C. 4332(2)(C) (1970) (set out in note 7 supra).

48. The courts have not drawn a clear line between substance and procedure under NEPA. Note, Substantive Review Under NEPA, supra note 6, at 181-82. In spite of this confusion, the matters treated in this Comment—proper detail, timing and coverage of impact statements—may be safely treated as procedural. First, a functional distinction between substance and procedure would class these problems under procedure. See Note, NEPA and the Alaska Pipeline, supra note 6, at 1606. More importantly, the cases cited below which deal with these matters all assume without discussion that they are procedural. In fact only a few cases have considered substantive review. See generally Note, Substantive Review Under NEPA, supra note 6.

The importance of the substance-procedure distinction in the NEPA context is that a more stringent standard of review is applied to procedural compliance. Jicarilla
A. Impact Statement Timing

The first issue to be resolved is at what point in the often attenuated decisionmaking process must the first (and perhaps the only) EIS be prepared. While courts have not yet developed a coherent set of rules for reviewing the timing of impact statements, several courts have an-

Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1281, 4 ERC 1933, 1937 (9th Cir. 1973). Understanding the standard of procedural review under NEPA in terms of traditional categories of review of agency action is somewhat problematical. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (D), (E) & (F) (1970), suggests that compliance with statutory procedures is a question of law where courts ought to substitute their judgment for that of the agency, while other aspects of agency action may involve discretion or findings of fact which are due limited deference by courts. This law/fact distinction is somewhat unclear in the EIS area. The lack of procedural detail in the Act and the need for varying procedures to suit the different kinds of agency decisions—varying from refuse permits to the Alaskan Pipeline to development of new technologies—have resulted in apparently different standards of review. At least one court has attempted to include all kinds of procedural review under the "substantial inquiry" rubric. Sierra Club v. Froehlke, 359 F. Supp. 1289, 1345, 5 ERC 1033, 1061 (S.D. Tex. 1973). For a more complete discussion of general formulations of the procedural standard of review under current interpretations of NEPA, see Anderson, supra note 4, at 23-26.

The early cases developed a stiffer procedural standard. See H. Green, The National Environmental Policy Act in the Courts 3-4 (1972) and cases cited therein. That review reveals an early tendency by the courts to believe that NEPA procedures could and should be strictly complied with. While the standard of review in this area remains stricter than the abuse of discretion standard applicable to substantive decisions, some deference to agency judgment is now accepted as necessary in reviewing procedural compliance. See, e.g., Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d at 1281, 4 ERC at 1937; NRDC v. Morton, 458 F.2d 827, 834, 3 ERC 1558, 1562-63 (D.C. Cir. 1972) (only alternatives reasonably available and relevant to the problem need be discussed); Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 1091-92, 5 ERC 1418, 1427 (D.C. Cir. 1973). See also Post-NEPA Hearings, supra note 2, at 419 (remarks of Roger Cramton, approving the "rule of reason" applied in Morton); note 78 infra.

Whatever may be the general formulation of the procedural standard and whatever language may be found in earlier cases, recent case law such as the reasonableness standard in Morton and the "substantial inquiry" test of Sierra Club v. Froehlke, together with the burden of proof on the party challenging agency action or inaction, results in a range of behavior in any situation which will be accepted as procedural compliance under the Act. This Comment will not attempt further to generalize the courts' role, but will attempt to adumbrate the questions courts should be asking as they conduct their limited review of those particular aspects of procedural compliance which heavily influence the filing of policy-level impact statements.

49. Several cases have made general remarks about the desirability of preparing impact statements "at the earliest practicable point in time," Daly v. Volpe, 350 F. Supp. 252, 256, 4 ERC 1481, 1483 (W.D. Wash. 1971), or as soon as the project has reached a "coherent stage of development," Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696, 708, 4 ERC 1456, 1464 (S.D.N.Y. 1972). See also Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119-21, 2 ERC 1779, 1785-87 (D.C. Cir. 1971). For a fuller exposition of these cases see Anderson, supra note 4 at 180. The CEQ Final Guidelines, § 1500.2(a), contain similarly vague language: "As early as possible and in all cases prior to agency decision," 38 Fed. Reg. 20550 (1973). Such broad language fails to address adequately the specific and difficult problems of statement timing.
served specific questions concerning separate statements for pilot projects and the planning, design and exploratory aspects of large projects. One court required that the statement for the haul road which was to blaze the way for the Trans-Alaskan Pipeline include an analysis of alternatives to the whole pipeline project rather than the narrow set of alternatives dealing with the haul road alone. \(^{50}\) Another court would not allow the design of a highway to proceed until an EIS was prepared for the entire highway. \(^{51}\) Still another court has decided that an impact statement is required before further development of the Liquid Metal Fast Breeder Reactor. \(^{52}\) Recently it was held that the EPA must file an EIS prior to implementing a state air pollution plan under the Clean Air Act. \(^{53}\) Directly or indirectly these cases bear on this basic question: When must a separate statement be filed for the early stages of a project or program?

1. Preliminary Arguments

Certain arguments which have arisen in the cases on EIS timing or which are likely to arise in future cases should be resolved before discussing the major issues. For example, in the Stop H-3 case the court summarily rejected the agency's contention that delay in highway construction and planning necessitated by the preparation of an EIS would increase the cost of the highway. The court was quick to point out that this argument assumed that the project would be built and thus missed the point of the impact statement—to see whether the highway as planned, or any highway, should be built at all. \(^{54}\) While

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52. Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973). Liquid Metal Fast Breeder Reactors will use liquid sodium rather than light water as a coolant and heat transfer agent. The fission process in these new reactors will result in higher speeds for the neutrons given off in the process. Some of these high speed neutrons will be used to change non-fissionable material into fissionable material. The result is a reactor which releases energy and creates a nuclear fuel supply as well.

53. Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697, 4 ERC 1817 (D. Colo. 1972). The case was reversed on appeal on the grounds that NEPA does not apply to the Clean Air Act [42 U.S.C. §§ 1857 et seq. (1970)] activities of the EPA. 482 F.2d 1301, 5 ERC 1673 (10th Cir. 1973). See generally Comment, Should NEPA Apply to EPA?, supra note 6. Obviously, this reversal does not repudiate the district court's view on proper timing since it is based on whether—not how and when—the Act applies.

54. Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14, 18, 4 ERC 1904, 1907 (D. Hawaii 1972). The court stated that the argument regarding increased costs was based on defendant agency's "mistaken impression that N.E.P.A. contemplates a con-
cost is relevant to some aspects of NEPA procedures, its use in this way would indicate that impact statements should never be filed if they will cause even the slightest delay in the project.

A further preliminary argument likely to be advanced by environmentalist plaintiffs should be accepted without hesitation. An agency violates NEPA by refusing to file a statement at an early stage in the project if the overall environmental impact of determinations at that stage later will be so fragmented that each individual environmental effect alone is insignificant; otherwise, significant environmental decisions would be made without an impact statement. In that case an agency should be allowed to proceed without an EIS only if it agrees to prepare a separate EIS for each minor environmental effect and if such fragmented analyses are not unreasonable on other grounds such as those suggested below regarding segmentation and project definition.

Another point the cases make at the outset is that the kind of agency action which must be preceded by an impact statement includes actions which do not have a direct and immediate physical effect.

\[\text{continuing commitment to a project under review.} \]

\[\text{ld. While the correct result was reached the Stop H-3 court did not point out that much of the research for the EIS is in the nature of general planning which the court enjoined. This failure to distinguish between planning necessary to decide whether to build the freeway or undertake other transportation alternatives and planning which can better await that decision causes the court to miss the major issues underlying EIS timing. See Part II, A, 2 infra.} \]

\[\text{55. See notes 88, 92 and accompanying text infra.} \]

\[\text{56. CEQ, Preparation of Environment Impact Statements: CEQ Final Guidelines, } \]

\[\text{§ 1500.6, 38 Fed. Reg. 20551 (1973):} \]

\[\text{(a) The statutory clause “major Federal actions significantly affecting the quality of the human environment” is to be construed by agencies with a} \]

\[\text{view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . .} \]

\[\text{In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government agencies individually make decisions about partial aspects of a major action.} \]

\[\text{57. Part II, B infra.} \]

\[\text{58. The language of 102(2)(C) does not explicitly require filing of impact statements before major federal actions; it requires only that a statement be “included in” each major action or in each “recommendation or report” on such action, depending on how the ambiguous language of the statute is interpreted. 42 U.S.C. 4332(2)(C) (1970) (set out in note 7 supra). However, the CEQ's Final Guidelines,} \]

\[\text{§ 1500.11(b), make it clear that the statements must be filed before taking any major action—at least 30 days after filing the final statement and 90 days after filing the draft statement. 38 Fed. Reg. 20556 (1973). In rare cases, courts have allowed limited action to proceed while the statement was being prepared. EDF v. Froehlke, 348 F. Supp. 338, 4 ERC 1541 (W.D. Mo. 1972); EDF v. Armstrong, 352 F. Supp. 50, 4 ERC 1760 (N.D. Cal. 1972).} \]
The effects of expenditures for planning, however indirect, may be environmentally significant, and the scope of the total environmental effects of pilot projects or exploratory efforts is not limited to direct environmental consequences. Any contrary interpretation of NEPA would destroy its effectiveness in steering agencies away from short-sighted planning.

2. The Need for Information Gathering Prior to Filing the EIS

While the courts are correct in reasoning that information gathering activities such as the writing of detailed plans or the construction of test facilities and pilot projects may have tremendous environmental effects, requiring an EIS before some information has been gathered is absurd. Without any information gathering directed at program or project alternatives, an impact statement would usually be an exercise in futility—a "crystal ball inquiry." When reviewing an agency determination about the amount of information gathering which should precede the preparation and filing of an EIS, courts should keep in mind the nature of the bias which information gathering imposes on subsequent decisions. For example, in transportation planning, each route, mode (cars, trucks, buses, barges), and financing method will not be explored with the same depth—in part because some alternatives quickly appear as undesirable and in part because the cost of collecting informa-

59. Stop H-3 Ass'n v. Volpe resulted in the extension of a previously issued injunction to cover planning expenditures. 353 F. Supp. 14 (D. Hawaii 1972). The injunctions dealing with the haul road for the Alaskan Pipeline and the Liquid Metal Fast Breeder Reactor Program, while directed toward stopping construction, may have the effect of stopping planning expenditures if the agencies involved feel that planning for the projects cannot be productive in the absence of information which pilot projects and exploration can provide.


61. The AEC argued unsuccessfully in Scientists' Institute that actual commercial development of the reactor was remote and speculative and that an EIS at the stage in question would "require the Commission to look into 'a crystal ball.'" 481 F.2d at 1086, 5 ERC at 1421. The AEC lawyers may well have chosen their language with an eye to the dictum in NRDC v. Morton, 458 F.2d 827, 837, 3 ERC 1558, 1564 (D.C. Cir. 1972) that "crystal ball" inquiry was not required. Judge Wright meets the argument head on by inquiring into the actual state of available information, both within the AEC and elsewhere, as revealed in the record. 481 F.2d at 1095-97, 5 ERC at 1428-30. This attempt to evaluate the existing state of agency knowledge closely resembles the approach taken other courts to project definition. See note 109 and accompanying text infra.

CEQ Final Guidelines, § 1500.2(b), 38 Fed. Reg. 20550 (1973) make it clear that the need-for-information argument may not be used where the lack of sufficient information on environmental impact is due to agency tardiness in beginning proper research:

Initial assessments of environmental impacts of proposed action should be undertaken concurrently with initial technical and economic studies. . . .
tion may be disproportionately greater for some alternatives than for others. In effect this means that information gathering cannot be separated totally from the decisionmaking process; a decision to focus inquiry on some alternatives puts those less intensively studied alternatives at a distinct disadvantage in later choices. Unresearched alternatives require research expenditures and thus are expensive relative to alternatives which have been developed more thoroughly. Ultimately, agencies must balance the risk of bias resulting from uneven research against the need for information sufficient to form the basis of an intelligent decision.

62. Put in slightly different and more general language: NEPA's attempt to collapse sequential decisionmaking into a single statement (see text accompanying note 46 supra), or even a series of statements, is bound to cause some distortion in the decisions as they appear in the EIS.

63. In Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14, 17, 4 ERC 1904, 1906 (D. Hawaii 1972), the court recognized that continued planning for the freeway biased subsequent decisions:

[W]hile the N.E.P.A. review is ongoing, there should be . . . no action undertaken which makes it more difficult for the reviewing agency to impartially review and subsequently, if warranted, alter the project.

Certainly the halting of construction pending review is critical. [citing cases] But so, as well, is the continued expenditure of money. As the court in Keith v. Volpe, 352 F. Supp. 1324, 1355, 4 ERC 1562 (C.D. Cal. 1972) stated:

The Court would anticipate that the more the defendants spend on the freeway . . . the more difficult it will be to decide to abandon the project.

The Stop H-3 court cited some 15 cases in support of its decision to enjoin planning and design as well as construction. 353 F. Supp. at 17, 4 ERC at 1906.

In Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1972) (opinion by Wright, J.) the court argued that in programs aimed at developing technology (in this case an advanced kind of nuclear reactor—the Liquid Metal Fast Breeder Reactor), the effects of research expenditures were such that construction of several such reactors was all but inevitable by the time commercial feasibility had been demonstrated. Thus the court in that case required that an EIS be filed before any further research on the reactor would be allowed.

64. The CEQ Final Guidelines, § 1500.6(d)(2), 38 Fed. Reg. 20552 (1973) recognize the nature of this tradeoff in the area of "major technology research and development programs:["

Statements must be written late enough in the development process to contain meaningful information, but early enough so that this information can practically serve as an input in the decision-making process. Where it is anticipated that a statement may ultimately be required but that its preparation is still premature, the agency should prepare an evaluation briefly setting forth the reason for its determination that a statement is not yet necessary. This evaluation should be periodically updated, particularly when significant information becomes available concerning the potential environmental impact of the program. In any case, a statement must be prepared before research activities have reached a stage of investment or commitment to implementation likely to restrict later alternatives.

This timing choice appears in any program where information gathering or planning constitutes a significant part of the agency effort. Thus the above language should be interpreted to include activities such as highway planning and large natural resource development projects.
In reviewing the balance struck between these competing goals of unbiased decisionmaking and informed choice, considerable deference ought to be given the agency which is presumably better acquainted with the particular project. If an agency clearly goes too far toward extensive research before filing an impact statement, courts can and should enjoin such research until an acceptable statement has been filed.

Any doubt about the reasonableness of agency decisions concerning impact statement timing for a particular project or program should be resolved in favor of early preparation of impact statements. An important purpose of impact statements is to foster disclosure and discussion of agency alternatives among persons and institutions outside the agency. This is particularly important for broad alternatives which remain available only during the early stages of a project. Often the conflicts among broad alternatives, including the important alternative of not undertaking any project, are not amenable to resolution by gathering technical information. The choice may rest on subjective interpretation of the broad policy directives highlighted in NEPA's section 101, and may be essentially political.

65. The Scientists' Institute court was aware of the difficulty of the judgment required in EIS timing and thus recognized that the issue should be decided in the first instance by agency experts. 481 F.2d at 1094, 5 ERC at 1427.

66. After reviewing facts indicating an advanced state of technological development, the Scientists' Institute court reversed the decision below, specifically finding "no rational basis for deciding that the time is not yet ripe for drafting an impact statement on the overall LMFBR program." Id. at 1095, 5 ERC at 1428.

67. A detailed discussion of the cases on public disclosure, public participation and the interagency commenting process is contained in ANDERSON, supra note 4, at 202-07, 223-39.

68. The difficulty in being scientific about choices results from the difficulty of agreeing on value measures. The problem is even more complicated because of the frequent absence of even physical quantitative units:

More or less precise standards, minimum standards, can be agreed upon for some aspects of environmental quality: parts per million of certain chemical compounds in a community's air or water supply or the number of decibels on a street. But some environmental dimensions cannot be expressed in objective, quantitative terms.

Remarks of Russell Train before the Joint Hearings for Discussion of a National Policy for the Environment Before the Senate Comm. on Interior and Insular Affairs and the House Comm. on Science and Astronautics, 90th Cong., 2d Sess. 221 (1968). See also notes 80, 82 & 83 and accompanying text infra.

69. Even though the broad language of section 101 of NEPA fails to deal adequately with tradeoffs and conflicts between the policy goals it expresses, it does reveal concern with far reaching aspects of national policy that are probably best considered early in project planning. The first paragraph is typical:

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of
in these fundamental areas that environmentalists often challenge agency action,\textsuperscript{71} the debates ought to be focused early enough so that agencies will be in a position to change if convincing arguments are raised—before the broad policies behind agency action become \textit{faits accompli}.

Because it is very unlikely that courts will overturn policy decisions in such areas\textsuperscript{72} the timing of policy-level EIS's becomes crucial. By forcing agencies to follow section 102 procedures, the Act seeks to help agencies overcome, through study and discussion, anti-environment biases resulting from inertia and ignorance. Agencies will be more likely to question seriously their basic assumptions in the early planning stages before they have committed substantial funds and personnel to particular alternatives.

Should a court determine that the time chosen by an agency for filing an impact statement is unreasonable, ample authority for forcing earlier filing can be found in the judicial decisions on planning activities and pilot projects set out above.\textsuperscript{73} Further authority may be derived from the probable intent of Congress that environmental decisions

\begin{itemize}
  \item man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
  
  
  70. Murphy, \textit{supra} note 6, at 985-87, discusses some aspects of fuel and energy policy that he believes can be resolved only by exercising subjective judgment. He believes that they should be made only by a political body, even though many are in fact now made by agencies.
  
  71. Environmentalists may often disagree with the most basic premises behind agency action with deleterious effects on the environment. The country may not really need all the energy that it demands through its willingness to pay. The same may be true of highways and pesticides. These basic disagreements are unlikely to appear in litigation since sound legal grounds for attacking agency action lie mostly in technical areas.
  
  72. Decades of judicial deference to agency value choices will not be erased over night. The debate as to whether judicial deference in the environmental area should be reduced is a continuing one:
  
  \begin{quote}
  I do not believe, however, that it is the function of a reviewing court to balance the conflicting values that have been placed by the legislature in the hands of administrators.
  \end{quote}

Roger Cramton at the Post-NEPA Hearings, \textit{supra} note 2, at 423. A cogent expression of the arguments for and against increased substantive environmental decisionmaking in the courts appears in Cramton & Boyer, \textit{Citizen Suits in the Environmental Field: Peril or Promise?}, 2 ECOLOGY L.Q. 407 (1972). For a development of the contrary position—that the judicial function should be extended, and is being extended, beyond traditionally broad deference to agency judgment in reviewing substantive decisions or value choices—see Note, \textit{Substantive Review Under NEPA}, \textit{supra} note 6, at 185-86.

73. See notes 49-53 and accompanying text \textit{supra}.
be accompanied by impact statements at the policy level and from the emphasis placed by the CEQ on early filing.\textsuperscript{74}

3. \textit{Flexibility in Required Environmental Analysis}

If, in addressing the major issues in EIS timing just discussed, an agency fails to convince the courts that under the particular circumstances its timing decision represents a reasonable balance of the need for information upon which to base a sound decision against the possibility of bias and inadequate public participation, the agency may argue that NEPA requires detailed research and precise analysis for all impact statements, irrespective of the differing roles they may play in agency decisionmaking. This section will suggest that no such uniform level of precision or detail is or should be required—especially where it conflicts with the need for early disclosure and unbiased choice among policy alternatives.

The requirement of explicit identification, evaluation, and comparison of alternatives\textsuperscript{75} raises several questions which are especially important with respect to policy-level EIS's: Which alternatives must be formally recognized in a section 102 statement? How deeply and in how much detail must such alternatives be analyzed? What form of analysis is required? Apart from the limits which courts ought to impose upon environmentally recalcitrant agencies, an enlightened agency dedicated to NEPA's goals faces many difficult problems. There are an infinite number of ways in which possible physical configurations may be divided for consideration as alternatives. Only some of the alternatives that occur to a decisionmaker or planner warrant formal recognition; other alternatives will be ruled out by a threshold evaluation of their merits. After making these initial judgments, the remaining alternatives must be studied. An agency must then decide which alternatives need only cursory description and which require detailed description and whether they should be quantified in physical units or units or value or both.\textsuperscript{76} The CEQ's final guidelines

\textsuperscript{74} The record of congressional concern with preparation of impact statements for high-level decisions is set out in Part I, A supra. For CEQ's position on the appropriate time for filing statements see notes 49, 64 supra.

\textsuperscript{75} 42 U.S.C. § 4332(2)(C), (D) (1970).

\textsuperscript{76} It may be appropriate for aesthetic purposes to describe the effects of air pollution in terms of increased opacity without attempt at quantification since the units may be of little use to the decisionmaker. The effects of the same pollution on wildlife, however, might be better understood in terms of numbers of animal deaths. In some cases physical quantities may have an easily ascertainable market value—real estate experts might be able to put a price on a view to be obscured by air pollution. Non-dollar value units may also be used in appropriate cases. 3 CEQ ANN. REP. ch. 1.
for the preparation of impact statements speak only very generally to these difficult questions:

The amount of detail provided in [descriptions of proposed actions, alternatives, and effects] should be commensurate with the extent and expected impact of the action and with the amount of information required at the particular level of decision-making.\textsuperscript{77}

Agencies may fairly read this language to permit them considerable flexibility for statements generally and to permit the filing of policy level statements although knowledge is incomplete.

Agencies can make errors of judgment in choosing the appropriate level of detail. Out of ignorance or bias, agencies may choose alternatives for study and analyze them in ways which will clearly lead to anti-environmental decisions. In past attempts to review agency selection and discussion of alternatives, courts appear to have varied in the degree of flexibility allowed.\textsuperscript{78} A movement toward requir-

\textsuperscript{77} § 1500.8(a)(1), 38 Fed. Reg. 20553 (1973).

\textsuperscript{78} Few courts have carefully analyzed the issue of the required level of detail, and the opinions touching on the issue do not often distinguish between the required level of detail and other procedural issues such as timing and segmentation which are discussed elsewhere in this Comment. The indications that exist vary between relatively strict and more flexible requirements. Compare Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1113, 2 ERC 1779, 1781 (D.C. Cir. 1971) (emphasis on "systematic", "finely tuned" and detailed analysis) and EDF v. TVA, 339 F. Supp. 806, 809, 3 ERC 1553, 1555 (E.D. Tenn. 1972) (objecting to broad conclusions unsupported by detailed analysis), with EDF v. Corps of Engineers, 342 F. Supp. 1211, 1217, 4 ERC 1097, 1101 (E.D. Ark. 1971) (requirement only that detail be sufficient for a decisionmaker to arrive at an informed decision). As to the range of alternatives that must be discussed, the leading case, NRDC v. Morton, 458 F.2d 827, 834-37, 3 ERC 1558, 1562-63 (D.C. Cir. 1972), argues that only "reasonably available" alternatives must be considered and that study of alternatives need not be exhaustive. Accord, Sierra Club v. Froehlke, 359 F. Supp. 1289, 1341-42, 5 ERC 1033, 1066-67 (S.D. Tex. 1973). Final CEQ Guidelines require "rigorous exploration and objective evaluation of . . . all reasonable alternative actions" § 1500.8(a)(4), 38 Fed. Reg. 20554 (1973). This approach is more flexible than the dicta in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1122, 2 ERC 1779, 1788 (D.C. Cir. 1971), requiring "consideration of any and all types of environmental impact of federal action." The dicta in Calvert Cliffs' ignore the limitations on agency time and manpower; the Morton language contains the sounder rule. In view of the conflicting inferences that may be drawn from the above handful of cases, judicially enforced requirements of breadth and detail remain uncertain. The present state of the law is best expressed by Judge Wright, who recently set out a vague but more realistic standard than that indicated by his earlier opinion in Calvert Cliffs: "The issues, format, length and detail of impact statements for actions as diverse as [short highway segments and broad technological development] must of course differ. NEPA is not a paper tiger, but neither is it a straight-jacket." Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d at 1091-92, 5 ERC at 1425 (footnotes omitted). The same approach appears in NRDC v. Morton: "But if this requirement [of compliance to the fullest extent possible] is not rubber, neither is it iron." 458 F.2d at 837, 3 ERC at 1504. For a more complete discussion of the cases on the required level of detail and a different resolution of the issue than that represented here, see Jordan, supra note 6, at 724-29.
ing more detailed identification, description, quantification and even monetization of environmental costs has been encouraged by one commentator,\textsuperscript{79} but the argument ignores the need for the kind of analysis which will fit the problem. An ecological analysis of the effect of a dam on species whose habitat will be disrupted can be as detailed and precisely measured as time, money, and scientific knowledge allow. But in the case of the Alaskan Pipeline, 25 million dollars and 2½ years permitted only an indication of the possible kinds of damage rather than carefully measured effects on different species of plants and animals.\textsuperscript{80} The same level of detail is not possible for each alternative in each project. Nor is such uniformity always desirable, since some alternatives may reveal themselves as clearly unacceptable after only a brief inquiry.\textsuperscript{81}

Not only is it impossible and undesirable to require equal treatment of all conceivable alternatives in all projects, but it is unwise to appear to do so by requiring particular forms or modes of analysis in all cases. When environmental damage consists of destruction of unique ecosystems or wilderness of particular scientific or aesthetic value,\textsuperscript{82} perhaps the basic judgment to preserve or alter will be obscured by dependence on physical quantification and value quantification in the form of dollars.\textsuperscript{83} Dependence on such quantification cre-

\textsuperscript{79} Note, \textit{NEPA and the Alaska Pipeline, supra} note 6, at 1598-1601. The author discusses in some detail the cases cited in note 78 supra. The argument made is that quantification is required, but the requirement is brought more into line with the position set forth here by the qualifications that the quantities need only be certain enough for "realistic cost-benefit comparisons" as determined by courts under a reasonableness standard. \textit{Id.} at 1601. Notwithstanding these qualifications, the argument does call for at least a formally quantitative analysis in all EIS's. For a brief argument more in agreement with the position presented here, see Comment, \textit{Should NEPA Apply to EPA?}, supra note 6, at 616.

\textsuperscript{80} Note, \textit{NEPA and the Alaska Pipeline, supra} note 6, at 1629.

\textsuperscript{81} If, as one alternative to the Alaskan Pipeline, the Department of the Interior were to consider air lifting the oil from Alaska, preliminary calculations and estimates might well show that alternative to be much more expensive in terms of cash outlays and environmental harm than a pipeline or other alternatives. It would be irrational to go through the useless effort of quantifying every detail of such a proposal if there were clearly available and preferrable alternatives; yet that is the implication of a strict approach to the "detailed statement" requirement.

\textsuperscript{82} As examples, consider Jewett's Brook, which attracts significant rare birdlife; Harrington's Cobble, "an abruptly rising limestone hillock with a peculiar profusion of herbs and wildflowers, unique in Bennington County [Vermont]"; and Chisivilve beaver pond which contains a "unique juxtaposition of wetland softwoods and hardwoods." Conservation Society v. Volpe, 343 F. Supp. 761, 765, 4 ERC 1226, 1228 (D. Vt. 1972).

\textsuperscript{83} See Note, \textit{Cost-Benefit Analysis and the National Environmental Policy Act of 1969}, 24 STAN. L. REV. 1092, 1113 (1972). This Note also discusses difficulties with cost-benefit analysis of environmentally significant projects under NEPA beyond its tendency to evade difficult value judgment questions: \textit{e.g.}, appropriateness in the environmental context of the assumptions necessary to make the benefit-cost
ates an aura of rationality which hides the difficult value judgments which ought to be explicit so that they can be debated on their merits.\(^4\) If courts consistently force analysis of alternatives according to such strictly rational forms, the disclosure and discussion goals of NEPA will be thwarted.

In addition, both agencies and courts may use this rigid form of EIS analysis as a vehicle to make their work easier. Agencies with limited resources would necessarily focus on putting their judgments in acceptable form, rather than putting available resources to work on the merits of each project and alternative.\(^6\) Agencies which are biased ratio the sole decisionmaking criterion and the recurring abuses of cost-benefit analysis.

84. This problem will be particularly acute where environmental costs appear only in a monetary form without complete explanation of the analysis resulting in the dollar amounts. A court's reluctance to penetrate the technical aspects of cost-benefit analysis in this situation would leave plaintiffs without any review of possible arbitrary and unfounded decisions. \(\text{See, e.g., EDF v. Corps of Engineers, 348 F. Supp. 916, 924-25, 4 ERC 1408, 1413 (N.D. Miss. 1972); Conservation Council v. Froehlke, 340 F. Supp. 222, 226, 3 ERC 1687, 1689 (M.D.N.C. 1972) (motion for preliminary injunction based on substantive review denied), rev'd after trial on the merits, 473 F.2d 664, 4 ERC 2039 (4th Cir. 1973).}\) Fortunately, some courts have realized that cost-benefit analysis frequently contains more than technical calculations and unreviewable value judgments. The interstices of cost-benefit calculations may contain irrelevant factors purporting to justify the decision or may not contain factors of substantial importance. Grossly fallacious reasoning which would be unacceptable if expressed in prose may slip by an uncritical court if dressed up as cost-benefit analysis. \(\text{See, e.g., EDF v. Corps of Engineers, 325 F. Supp. 749, 761, 2 ERC 1261, 1269 (E.D. Ark. 1971) (Memorandum Opinion Number Five); Sierra Club v. Froehlke, 359 F. Supp. 1289, 1322-31, 5 ERC 1033, 1053-59 (S.D. Tex. 1973) (see further discussion of this aspect of the case in notes 101-103 and accompanying text supra).}\)

The final CEQ guidelines attempt to solve the problem of hiding fallacious reasoning and poor judgment behind a screen of technical jargon by the following provisions: (1) "Highly technical and specialized analyses" should be included in the statements only as footnotes and appendices (§ 1500.8(a)(1)). (2) Where statements attempt to show whether or how economic or other benefits outweigh projected environmental damage of a proposed action, "agencies that prepare cost-benefit analyses of proposed actions should attach such analyses, or summaries thereof, to the environmental impact statement, and should clearly indicate the extent to which environmental costs have not been reflected in such analyses" (§ 1500.8(a)(8)). (3) In analyzing alternatives and environmental effects, "agencies should make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decisionmakers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement" (§ 1500.8(b)). 38 Fed. Reg. 20553-54 (1973). These provisions, to the extent they are enforced, may diminish the danger in requiring technical analyses. However, the result of these rules may be that simplistic, conclusory statements in the body of the statement are justified by the existence of appendices full of technical, and for many courts, almost impenetrable analyses. This danger should make courts cautious about fostering increased use of this material in impact statements.

85. The size of the decisionmaking resources allocation problem can well be illustrated by the result of Kalur v. Resor, 335 F. Supp. 1, 3 ERC 1458 (D.D.C. 1971), which held that EIS's are required for environmentally significant refuse permits is-
can more easily continue their customary ways by instituting purely formal changes. Such a result confuses formal changes with the intended improvement in the results of environmental decisions. Similarly, if courts primarily focused on form they no longer would be an effective check on the biases of agencies; rather they would spend their time on ascertaining whether particular forms have been observed.

Rigid and formal requirements of detailed EIS analysis have one further drawback—compliance may be enormously expensive. Since neither courts nor agencies have infinite resources, they inevitably will have to economize on the time spent on each problem. In NEPA cases the courts ought to do so by recognizing that the standard they must apply is a loose one; they should not be quick to overturn agency judgments or to scrutinize them strictly unless plaintiffs can show clear errors. Agencies should apportion their planning resources

sued by the Army Corps of Engineers under the authority of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970), and 33 CFR § 209.131 (1971). One result of this decision is that about 25,000 permit applications were pending in 1972, a substantial number of which may have been environmentally significant. Post-NEPA Hearings, supra note 2, at 3 (remarks of Senator Baker). If too much is made of each EIS in this situation, there is danger that from the point of view of some agencies, NEPA can become a wooden, formal, mechanical requirement, in which you grind out a lot of pieces of paper—a new kind of bureaucratic gamesmanship in which the writing of the environmental impact statements becomes an esoteric art form, like producing advertising copy—but has no meaning in terms of the decision-making process in the life of the agency. Id. at 391 (remarks of Roger Cramton). The Corps' reaction to this problem was to seek a legislative exemption from NEPA. Another partial solution suggested to the Corps was a policy level statement covering several permits. Ultimately the question was not resolved because of changes in agency jurisdiction and new legislation which removed the permit program from NEPA's application. See Comment, Should NEPA Apply to EPA?, supra note 6, at 619-22.

86. See quotation in note 85 supra.

87. The CEQ has estimated that compliance with NEPA may impose direct costs (expenditures) of $65 million each year on federal agencies. 3 CEQ ANN. REP., at 258 (1973). Whether or not this is an adequate expenditure on environmental analyses, it is obvious that there is some limit. See NRDC v. Morton, 458 F.2d at 837, 3 ERC at 1564. It is important that limited funds be spent wisely.

This reference to cost is not meant to imply that cost of compliance should be accepted by the courts as an excuse for noncompliance where excessive cost of compliance is a result of previous agency reluctance to make any substantial effort to comply or where the amount agencies chose to allocate for NEPA compliance is unreasonably small in view of the circumstances.

If [the EIS review procedure] is done properly it will take a significant amount of time. . . . Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered "to the fullest extent possible."

Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1118, 2 ERC 1779, 1785 (D.C. Cir. 1971). The language should be read in context; the AEC evinced a "thoroughgoing reluctance" to comply with NEPA. Id. at 1119, 2 ERC at 1786. See also Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14, 4 ERC 1904 (D. Hawaii 1972).
as best they can to study alternatives in the manner and depth that in
the agency's judgment is warranted.\textsuperscript{88}

In short, courts should resist the tendency to use rigid standards
to judge the adequacy of analysis of alternatives under NEPA. They
should require brief or general discussion, quantification, formal cost
benefit analysis, or other techniques only when methods chosen by the
agency are clearly inadequate;\textsuperscript{89} they should not require an appear-

\textsuperscript{88} It seems absurd to require the Army Corps of Engineers to spend the same
amount of planning and research resources on each refuse permit (see note 85 \textit{supra})
as should be spent on the EIS for the Alaskan Pipeline (see notes 80 and 81 and
accompanying text \textit{supra}); or, put another way, why limit the level of research on the
pipeline to the level used to review refuse permits? Such an allocation of resources
is too rigid and counterproductive to have been intended by Congress, yet it is the
logical result of rigid standards for the inclusion of alternatives in impact statements,
uniform levels of detail in studying each alternative, and required quantification in
each case.

\textsuperscript{89} The following three cases nicely demonstrate the flexibility that courts
should allow with respect to detail and form: EDF v. Corps of Engineers, 348 F.
Supp. 916, 4 ERC 1408 (N.D. Miss. 1972), recognized that, "[i]f perfection were
the standard, compliance would necessitate the accumulation of the sum total of sci-
entific knowledge of the environmental elements affected
by
the proposal. It is un-
reasonable to impute to the Congress such an edict." \textit{Id.} at 927, 4 ERC at 1415.
But the court qualified its position by noting that it would not allow analysis "that is
merely partial or performed in a superficial manner." More important than the court's
general language, however, was its description and analysis of the impact statement
itself. The court concluded that the 55-page statement, exclusive of technical append-
dices, which resulted from studies carried out over six months by a six-man inter-
disciplinary scientific team, was an adequate analysis of the proposed Tennessee-
Tombigbee waterway. The court refused to require computer analysis as suggested
by plaintiffs:

Although computers may some day be used to quantify ecological elements
more precisely, we conclude that at this point in time a valid ecosystems
analysis may be achieved by an interdisciplinary team of scientists conducting
a rigorous examination of the areas affected by the project.
\textit{Id.} at 928, 4 ERC at 1416.

EDF v. Hardin, 325 F. Supp. 1401, 2 ERC 1425 (D.D.C. 1971), held that
NEPA requires "the completion of an adequate research program"—one "sufficiently
detailed to allow a responsible executive to arrive at a reasonably accurate decision
regarding the environmental benefits and detriments to be expected from program
implementation." \textit{Id.} at 1403-4, 2 ERC at 1426. The court made numerous findings
about the danger of the imported fire ant, possible methods of control, and the
kinds of research that had been undertaken. \textit{Id.} at 1405-6, 2 ERC at 1428-29. The
EIS covering the Fire Ant Control Program was approved.

explored at considerable length the areas of environmental impact in the impact
statement for the Gillham Dam proposed to be built over the Cossatot River.
Plaintiffs demonstrated that many important areas had been totally ignored and that
alternative uses of the river had not been seriously considered. The statement was
held inadequate. Plaintiffs had contended that an adequate EIS would necessarily
include a cost-benefit analysis showing net economic benefit; the court cautioned
that techniques of cost-benefit analysis were various and subject to heated debate—
especially where applied to river use—and that Congress had not yet provided com-
plete standards in the area. Because of these uncertainties, cost-benefit analysis would
not be an absolute prerequisite for passing NEPA muster.
ance of omniscient decisionmaking which cannot actually be achieved. An important result of allowing and encouraging flexible analysis would be to remove one major impediment to preparation of adequate impact statements for policy decisions; agencies could no longer argue that judicial interpretation of NEPA required them to delay the impact statement process.

B. Project Size and Definition Segmentation

Theoretically, all alternatives should be on an equal footing at the outset of the planning process when policy goals are being defined. As a practical matter, however, there is always a favored alternative or, in the language of section 102(2)(C), a "proposed action." Project size and agency structure may make it useful to study certain proposed actions in groups. When such groupings do not bias decisions against the environment, they should be allowed as a matter of agency discretion since NEPA was not intended to place courts in the position of reviewing matters dealing only with administrative efficiency. However, where administrative costs can be avoided only at the expense of sound environmental planning, courts should carefully scrutinize the balance struck to see if it is reasonable. This section investigates how unduly limited project definition can result in unwarranted environmental damage, and suggests how courts can avoid such restricted environmental planning.

I. Independent Justification and Accounting for Cumulative Environmental Effects

Several courts have answered challenges of segmentation of large projects for impact statement purposes. Among the cases dealing with highways, Committee to Stop Route 7 v. Volpe, Indian Lookout

90. Roger Cramton argues in favor of flexible EIS analysis in a statement contained in the Post-NEPA Hearings, supra note 2, at 389. His comments, like the analysis above, focus on the necessity for realistic assumptions about attainable levels of decisionmaker knowledge. See, e.g., the quotation in note 118 infra.

91. See Part II, A, supra for the argument in favor of early EIS analysis.

92. A classic example:

What I am trying to point out is that sheer size of the program, the number of actions that are involved, requires that we do some delegation to the field. . . . We handle from 7,000 to 18,000 projects a year in the highway program.

To have every one of those shipped to Washington for consideration in here would just be an impossible kind of a job to staff up to handle.


93. In Thompson v. Fugate, 347 F. Supp. 120, 124, 4 ERC 1468, 1470 (E.D. Va. 1972), the court held that fractionalization of a highway project would frustrate
Alliance v. Volpe, Movement Against Destruction v. Volpe, have faced the question most squarely. In Committee to Stop Route 7 v. Volpe, the court refused to allow separate statements for each of a group of highway segments that together would link Norwalk and New Milford, Connecticut. In that case the court made two points to justify its decision: (1) short segments preclude adequate consideration of alternatives such as not building a highway to connect the two cities, building another type of transportation system in its place, or choosing alternative routes; and (2) where the problem to be solved was transportation between two given points, consideration of segments covering only part of the distance was inappropriate. It should be noted that (1) follows from (2); deciding on a partial solution to a problem necessarily precludes consideration of some complete solution alternatives or at least makes some much less attractive. Since the court noted that after filing an EIS covering the whole highway, separate statements could be prepared to deal with environmental matters particular to small segments, the case can be easily understood as holding that a policy level impact statement is a prerequisite to segmentation of a project.

Indian Lookout further explained what types of projects must be accompanied by a comprehensive impact statement before segmentation. The trial court held that segmentation for purposes of federal approval and financing was not necessarily determinative, and that a statement was required for the whole project, in view of the limited size of the entire project, the fact that the outstanding scenic, geological, historical and archaeological features of the route were not considered as a whole and because of the congressional policy by not protecting the environment threatened by some highway sections "to the fullest extent possible," citing NEPA section 102 without further explanation. Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep't, 446 F.2d 1013, 1023, 2 ERC 1872, 1878 (5th Cir. 1971), cert. denied, 403 U.S. 932 (1972), held that segmentation of a highway so that the portions not affecting parklands were considered in isolation would make destruction of the park almost inevitable and thus limit examination of "feasible and prudent alternatives." In support of this holding the court cited section 4(f) of the Dept of Transportation Act of 1966, 23 U.S.C. § 138 (1970); NEPA was mentioned only in connection with other issues.

95. 345 F. Supp. 1167, 4 ERC 1449 (S.D. Iowa 1972), modified on appeal, 484 F.2d 11, 5 ERC 1751 (8th Cir. 1973).
97. 346 F. Supp. at 740, 4 ERC at 1334.
98. Id. at 740-41, 4 ERC at 1334-35.
99. The considerations which may make it advisable to segment a project for federal approval and financing or for the purpose of construction contracts do not necessarily have any relationship to the environmental impact of the project.

345 F. Supp. at 1170, 4 ERC at 1451.
cive effect the construction of one segment of the highway has on another . . . .100

Since the "coercive effect" on subsequent segments and the need for consideration of factors affecting the whole route are arguments applicable to any project if viewed as part of a larger whole, the trial court opinion in *Indian Lookout* and the Route 7 opinion leave the basic issue underlying the segmentation problem unresolved: How and by whom should the project or program be defined? That is, in the context of Route 7, why was all of the highway from Norwalk to New Milford viewed as one project rather than as a series of smaller projects or part of one larger project?

If an agency were to argue seriously that the segment for which an EIS would be required constituted all of the highway that it presently contemplated building and if a plaintiff were to challenge the scope of the EIS claiming that a broader transportation problem should be addressed, how should a court decide the case? At a minimum, the proposed project should be justified without reference to other highways not yet built or dealt with in an impact statement. Instead, it should be considered in light of existing highways and those already treated in impact statements although still not constructed. If these two minimum conditions could be met, double counting of transportation benefits to justify environmental damage would be avoided, and the incremental environmental effects of each project would be taken into account. Application of these minimum conditions alone would alleviate significant problems:

There has been a tendency, if not a custom for highway agencies to emphasize the desirable features of the entire length of a highway if and when complete, but to limit consideration of any unfavorable environmental effects to the immediate area of the segment.100a

At least two cases have required wider project definition than the agency desired because the proposed actions lacked independent justification. The limited reversal on appeal of the trial court decision in *Indian Lookout Alliance* required expansion of EIS coverage from a 14-mile section to a 36-mile section of freeway F-518 in Iowa. Plain-
tiffs had argued for inclusion of the whole 1,877 mile Freeway Expressway System. EIS coverage beyond that required by the trial court was justified because segments that fit into an actual highway plan overall should be as large as feasible under present construction and financing practices and at least be independently supportable by meaningful terminal points. . . . [The 14-mile segment of F-518-4] does not have an independent utility of its own.\textsuperscript{101}

In the recent case of \textit{Sierra Club v. Froehlke}, the court in the Southern District of Texas focused on independent justification in holding that an EIS was required for the whole Trinity River Project before the work could proceed on the Wallisville section.\textsuperscript{102} In particular, the court implied that over 65 percent of the benefits of the Wallisville section of the multipurpose series of canals, dams, and locks might depend on completion of the whole project\textsuperscript{103} and that the benefits independent of completion were questionable.\textsuperscript{104}

Another district court has acknowledged obliquely the significance of accounting for incremental effects of additional projects. A later opinion in the \textit{Route 7} litigation ruled that the impact statement of the Norwalk-New Milford freeway should include the environmental effects of an already completed segment. Unfortunately, the court did not articulate the reason for its decision\textsuperscript{105} and thus may have confused the need to include the environmental effects of past projects in the backdrop against which new projects must be viewed with the recurring error of using previously incurred expenditures to justify present and future decisions.\textsuperscript{106}

\begin{itemize}
  \item \textsuperscript{101} 484 F.2d 11, 19-20, 5 ERC 1751, 1755 (8th Cir. 1973) (emphasis supplied).
  \item \textsuperscript{102} 359 F. Supp. 1289, 1322-32, 5 ERC 1033, 1053-60 (S.D. Tex. 1973).
  \item \textsuperscript{103} \textit{id.} at 1325, 1329, 5 ERC at 1055, 1058.
  \item \textsuperscript{104} \textit{id.} at 1331, 5 ERC at 1059. The court reached this conclusion after careful review of local benefits claimed in connection with water supply, crop protection, navigation, recreation, and fish and wildlife protection. \textit{id.} at 1325-31, 5 ERC at 1055-59. The criticism of claimed local benefits was not that the dollar amount of the Corps' estimates was wrong, but that the record lacked adequate information to support the estimates and to demonstrate a connection between the benefits claimed and the Wallisville section, and that the Corps' arguments were generally inconsistent.
  \item \textsuperscript{105} [Defendants] urge that the span of completed highway within Norwalk be exempted from the impact statement required by the judgment. This cannot be done consistently with [NEPA's requirement that alternatives be considered].
  \item \textsuperscript{106} The proposed action is to build an expressway that links Norwalk with, at least, New Milford. In considering alternatives to this proposal, a proper impact statement will have to give appropriate consideration to the need for an expressway between these two cities, and, if the need is established, then to the pros and cons of alternative routes. The fact that an independently usable segment already exists in Norwalk does not in any way lessen the need to articulate such considerations.
  \item \textsuperscript{4} ERC 1681, 1682 (D. Conn. 1972).
  \item \textsuperscript{106} No matter how much has been spent on a project, the decision to com-
2. **The Scope of Planning**

Independent justification and proper accounting for cumulative effects are not enough to guarantee that segmentation will result in no prejudice to the environment. It is possible that a completely different approach to transportation, flood control, or any other problem would have been environmentally sounder and thus would have been chosen if the problem had been viewed more broadly. Unfortunately, there is no a priori assurance that such comprehensive planning will lead to a different and better solution than short-sighted incremental planning. Moreover, comprehensive planning is an expensive, time-consuming process whose appropriateness has been questioned by planners themselves.

In determining their role in choosing a proper scope of planning for EIS's, courts have established a sensible preliminary rule; once comprehensive planning has taken place the cases discussed above indicate that the agency will be held to its previously established scope of planning in the impact statement context. The flavor of the opinions and the application of the rule, however, vary widely. Some courts look to the formal aspects of planning and others attempt to look beyond formal determinations and bureaucratic categories to the actual state of agency plans and ideas for the future. Whatever approach complete it can be justified only if the project benefits outweigh the cost of completion. Only a stubborn and illogical unwillingness to ask if past expenditures were ill-considered or if conditions have changed can explain agency propensity to bring up past costs as a justification for continuing construction. Unfortunately, some courts have allowed past expenditures to influence their decisions to allow the project to proceed. See Note, Substantive Review Under NEPA, supra note 6, at 206-07.

107. For example, there is no way of knowing prior to doing careful research whether a highway system which may be constructed incrementally is a better or poorer answer to transportation needs than a mass transit system which is perhaps not so well adapted to incremental construction.

108. See authorities cited in note 42 supra.

109. In Movement Against Destruction v. Volpe, 361 F. Supp. 1360, 1375, 5 ERC 1625, 1633 (D. Md. 1973), the court held that state highway proposals accepted by the FHWA for funding "based on Scheme 3A" did not require EIS coverage of the whole Scheme. 361 F. Supp. at 1385, 5 ERC at 1640. The court relied heavily on lack of legal commitment to all of the Scheme. 361 F. Supp. at 1380, 5 ERC at 1637. In spite of awareness of the difficulties and abuses inherent in piecemeal analysis (see text accompanying note 100a supra), the court looked principally to formal aspects of FHWA decisionmaking to justify its result. The case may well be limited to the particular facts since the scope of EIS coverage proposed by the FHWA was approved by an extraordinary EPA-FHWA "consensus" to which the court gave considerable weight. 361 F. Supp. at 1377, 5 ERC at 1634. The court noted that "it will not suffice in the future to consider the environmental impact of certain segments... entirely apart from other segments... or from... the 3A system." The brief justification for this prospective language is persuasive. 361 F. Supp. at 1385, 5 ERC at 1640.

Other courts have based their decisions on a more realistic approach to agency planning:
is taken to define the existing stage of agency plans, the wisdom of requiring the inclusion in the EIS of existing agency information is apparent since preparation of comprehensive impact statements will cost less where some of the necessary work has already been done.

In holding agencies to their previously established scope of planning, courts ought to consider the arguments set out above concerning statement timing. If the state of planning for related activities which plaintiffs seek to have included in the EIS is so far advanced that a statement is needed on timing grounds alone, an EIS should be filed without delay. An agency attempt to engage immediately in only one of several related activities serves only to advance the time when a comprehensive statement should be prepared. 110

If a case were presented where planners had not studied the segments in a comprehensive way, or proposed them as a system, when should a court require that more comprehensive planning be done?

Committee to Stop Route 7 v. Volpe, 346 F. Supp. at 740, 4 ERC at 1334.

In Indian Lookout Alliance v. Volpe, the trial court apparently justified its holding with respect to the required scope of the EIS by reference to the current state of planning in the Federal Highway Administration. Freeway 518 and the Freeway-Expressway System were found to be tentative, long-range plans made without federal financing or approval. See note 51 supra. In contrast, the part of Freeway 518 in Johnson County had "reached the project stage" and had "received a project number F-518-4. It is not contended that this project is not a 'major federal action significantly affecting the quality of the human environment.'" 345 F. Supp. at 1170, 4 ERC at 1450. In by far the most cogent opinion on highway segmentation, the Indian Lookout appellate court analyzed previous decisions, the CEQ position, and FHWA's internal rules. The court concluded, in broad agreement with the court below, that "the nature of the proposal will bear on the determination of the appropriate length to be considered." 484 F.2d at 18, 5 ERC at 1754. The court based its modification of the decision below on other important criteria. See text accompanying note 101 supra.

In Sierra Club v. Froehlke, the court reviewed carefully the planning history of the Trinity and Wallisville projects.

Although the record is not clear, it appears that numerous projects were funded separately for budgetary reasons, administrative manageability or because of some 'urgent' local problem. Nevertheless, these various projects including Wallisville, Aubrey and Lakeview Lakes, existing navigation channels, and high level bridges, were included and considered as being part of the Trinity River comprehensive development program.

359 F. Supp. at 1315, 5 ERC at 1048.

110. This subtle interplay between timing and project definition is most explicitly recognized in Conservation Society v. Secretary of Transp., 362 F. Supp. 627, 636-38, 5 ERC 1683, 1689-90 (D. Vt. 1973), where the trial court, with explicit trepidation of reversal on appeal, made the filing of an EIS covering all of Route 7 (extending through three states) a condition on allowing construction of the immediately proposed local segment. The court drew a limited analogy to Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973). See discussion in notes 63, 65, 66 and accompanying text supra.
Since the agency's decision on the appropriate scope of planning is a discretionary matter, it should be reversible by the courts only where unreasonable. Thus, only if the plaintiff can show that environmental values actually are injured by the proposed scope of planning and that the increased administrative cost of more comprehensive planning is clearly smaller than the environmental damage, should he be allowed to force the agency to broaden its scope.

Thus far the only court to hint at forcing the agencies to adopt a broader scope of planning in the interest of sound environmental planning has been the Second Circuit in *Greene County Planning Board v. FPC.* In dicta, the court discussed briefly the possible need for more comprehensive planning for electric power production and transmission, particularly in light of the language in NEPA demonstrating congressional interest in long-range planning for the environment. The court suggested that decisions on some aspects of power transmission might best await more complete study. However, these remarks were prefaced by noting that the burden of showing the necessity of such widened planning would fall on the plaintiff. The court's refusal to require more complete planning is understandable,

111. 455 F.2d 412, 3 ERC 1595 (2d Cir. 1972) cert. denied, 409 U.S. 849 (1973).
112. The court discusses planning duties under § 10(a) of the Federal Power Act, 16 U.S.C. § 803(a) (1970), and concludes that, while past decisions may not have established long-range planning requirements, they evidence a clear intent that the Commission at least should consider all available and relevant information in performing its functions.

The Commission's "hands-off" attitude is even more startling in view of the explicit requirement in NEPA that the Commission "recognize the worldwide and long-range character of environmental problems" and interpret its mandate under the Federal Power Act in accordance with the policies set forth in NEPA. NEPA §§ 102(1), (2) (E), 42 U.S.C. §§ 4332(1), (2) (E). Any doubt about the intent of these provisions is obviated by the following statement in the Senate Report accompanying the Act:

"Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." S. Rep. No. 91-296, 91st Cong., 1st Sess. 5 (1969).

455 F.2d at 423-24, 3 ERC at 1602.

113. For example, it may be that it would be proper to defer the decision on the Gilboa-Leeds line until these plans the [Blenheim-Gilboa Project] were crystallized, particularly if there is a likelihood that future development might affect the optimum allocation of the line or even make the line unnecessary.

*Id.* This language also indicates the court's awareness of the cumulative effects problem. See notes 104, 105 and accompanying text supra.

A later opinion in the case, (— F.2d —, 6 ERC 1172 (2d Cir. 1973)), denies plaintiffs' motion for injunction on procedural grounds, but Mansfield, C.J., dissents on the procedural question and notes that he would decide the case in accord with the court's dicta set out above. — F.2d at —, 6 ERC at 1175.

114. 455 F.2d at 423, 3 ERC at 1602.
since some had in fact been done and included in the EIS. Nevertheless, the court's approach suggests the direction to be taken in future cases where the scope of planning chosen is unreasonable.

In summary, analysis of the above cases suggests that segmentation will be allowed (1) where an appropriate umbrella EIS has been filed at the policy level; or (2) if more inclusive analysis has not in fact been done, as long as each segment is an independently justified addition to existing systems, and the segment does not reflect too narrow a scope of planning in light of the environmental damage it might cause. These recent cases have discredited earlier, inadequate analysis of segmentation found in Jicarilla Apache Tribe of Indians v. Morton, for example, where segmentation was allowed without careful analysis of the facts.

III

THE EFFECT OF POLICY EIS'S ON SUBSEQUENT DECISIONS

One of the most important aspects of grouping a few broad alternatives early in the planning process for study and decisionmaking

115. The FPC disclosed to the EIS writers all feasibility studies it had done on power generation and transmission for the region in question and assumed the writers would take this into account in assessing the environmental effects of the project covered by the EIS. Id.

116. The only language in the CEQ's final guidelines on project definition for impact statement purposes (§ 1500.6(d)(1) ) leans toward broad definition but does not attempt to develop any particular course of inquiry for agencies or courts to follow:

Agencies should give careful attention to identifying and defining the purpose and scope of the action which would most appropriately serve as the subject of the statement. In many cases, broad program statements will be required in order to assess the environmental effects of a number of individual actions on a given geographical area (e.g., coal leases), or environmental impacts that are generic or common to a series of agency actions (e.g., maintenance or waste handling practices), or the overall impact of a large-scale program or chain of contemplated projects (e.g., major lengths of highway as opposed to small segments).


117. 3 ERC 1919 (D. Ariz. 1972), aff'd, 471 F.2d 1275, 4 ERC 1933 (9th Cir. 1973). Conclusion of law number 19 stated that "a single environmental impact statement detailing all projects in the region described by plaintiffs is not required by the National Environmental Policy Act." 3 ERC at 1921. The findings of fact which appear relevant to the legal conclusion are that all but two of the power generation plants were located in separate air sheds. 3 ERC at 1929. However, it was apparent from the findings that environmental studies were done which considered all the plants together. Id. More recent decisions make it clear that an agency may not treat the project as one entity within the agency and segment it for EIS purposes. See note 109 supra.
under section 102 procedures is the effect of such statements and decisions on future planning and EIS's. In the process of making and implementing policy, carefully made decisions should not be challenged continually and made again. Periodic reconsideration at reasonable intervals is sound practice, as will be discussed below, but reconsideration of basic decisions at each instance of their application tends to result in agency inactivity.

A. Dependence on Decisions Made on the Basis of Previous Impact Statements

An agency may contend that further information is necessary to clarify the details of the different alternatives. One obvious answer is that subsequent impact statements may be used to iron out such details; indeed multiple impact statements have been encouraged by the CEQ and others. This section develops a major argument buttressing the call for multiple impact statements within large projects: Later statements need not challenge the basic decisions reached on the basis of earlier EIS's.

118. Roger Cramton felt constrained to remind Congress of this point in order to put NEPA in perspective:

We cannot reconsider our life style every morning when we face the day. That road is the road to insanity. We cannot reexamine first principles in every case. We cannot in fact canvass all alternatives and the implications of all alternatives in a sequence of individual cases. If NEPA is interpreted to mean that, NEPA requires the impossible, and the impossible cannot be done. Post-NEPA Hearings, supra note 2, at 394.

119. See Part III, B infra.

120. Program Impact Statements—As noted above, many Federal agency programs involve a multiplicity of individual actions, such as grants or permits, administered under relatively uniform policies. It was pointed out that NEPA's substantive duties can often best be implemented in such cases by writing environmental policies into the general rules governing a program. Similarly, the procedural duties of section 102(2)(C) can often be implemented more effectively by preparing a single statement on the program as a whole rather than by filing separate environmental impact statements on the individual actions. An intermediate possibility is to prepare an overall statement assessing basic policy issues common to all actions under a program, then to follow it when necessary with a separate statement for each major action, limited to issues needing individualized treatment. This range of possibilities is present also when a large project is divided into small segments for administrative purposes— as in the case of a major highway project. . . . A program statement can be supplemented or updated as necessary to account for changes in circumstances or public policy and to measure cumulative impacts over time. 3 CEQ ANN. REP., at 233-34 (emphasis supplied).

The CEQ Final Guidelines, § 1500.6(d)(1), 38 Fed. Reg. 20552 (1973) state the official CEQ position on multiple impact statements within a project:

Subsequent statements on major individual actions will be necessary where such actions have significant environmental impacts not adequately evaluated in the program statement.

See also ANDERSON, supra note 4, at 290.

An important area of analysis beyond the scope of this comment is the standards courts should use in determining if and when subsequent EISs are required in projects where a policy level statement has already been prepared.
Unfortunately, the proposition that one cannot challenge basic assumptions at every point has not been easily accepted by courts applying NEPA. One of the holdings in *Calvert Cliffs’ Coordinating Committee, Inc. v. AEC* was that previously promulgated standards of radiation safety could not be used to justify the levels of radiation that would result from the operation of the proposed Calvert Cliffs reactor. Insofar as *Calvert Cliffs’* is interpreted as questioning prior agency decisions, it appears to thwart NEPA since time spent re-evaluating past decisions postpones the implementation of positive solutions to environmental problems. However, such an interpretation is not necessary, since no EIS was prepared before the rules in question in *Calvert Cliffs’* were promulgated and thus the rules themselves were suspect. Requiring reevaluation of past standards may also have been justified if the standards were not intended to cover such a situation as that presented to the AEC in *Calvert Cliffs’*. The opinion, however, apparently did not rest on the lack of an impact statement for the standards followed, or upon their inapplicability to the facts of *Calvert Cliffs’*; rather, the holding appears to rely on the doubtful proposition that previously promulgated standards cannot be relied upon in later decisions.

Whatever may be the correct interpretation of *Calvert Cliffs’,* more recent cases have accepted reliance on decisions for which impact statements previously have been prepared—albeit without purporting to overrule or distinguish *Calvert Cliffs’*. Even more directly on point are the new CEQ guidelines under NEPA which specifically require impact statements for “[t]he making, modification, or establishment of regulations, rules, procedures, and policy.” It cannot be

121. 449 F.2d at 1124, 2 ERC at 1789-90. The court reasoned that NEPA does not relieve agencies of duties created by other statutes (citing 42 U.S.C. § 4334 (1970) ), but that pollution control standards and certification under the Water Quality Improvement Act of 1970 (33 U.S.C. § 1171 (1970) ) created only minimum requirements. The court viewed NEPA as requiring consideration of more stringent standards.

122. NEPA’s section 101 declares that it is national policy to “create and maintain conditions under which man and nature can exist in productive harmony.” 42 U.S.C. § 4331 (1970) (emphasis supplied). Use of NEPA only to impede change rather than to select positive changes which improve the environment would violate this policy. See Murphy, *supra* note 6, at 981.

123. See note 126 infra.

124. In *Scientists’ Institute for Public Information, Inc. v. AEC, 481 F.2d 1079,* 1092, 5 ERC 1418, 1426 (D.C. Cir. 1973), the court suggested that an original program statement be relied upon in subsequent statements covering specialized areas of impact and detailed alternatives (citing 3 CEQ ANN. REP. at 234 (1972) ). In *Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731,* 740-41, 4 ERC 1329, 1334-35 (D. Conn. 1971), subsequent special statements were also suggested; it is fair to infer that such statements would rely on the prior overall policy set in the original statement.

contended that the CEQ intended to require repeated justifications for rules and policy—once at the inception of the rules and again at each application.126

Apart from difficulties with continual reevaluation of past decisions generally, reevaluation in the impact statement context presents its own peculiar problems. As explained previously, the principal dilemma in finding the appropriate time to file an impact statement is balancing the need to gather information against the public's need to be informed and the possibility of bias from overly detailed research.127 One way of alleviating the severity of this dilemma is to file program or project-wide statements covering the broad alternatives at a very early stage when the possibilities for bias are minimal and the likelihood of effective public and extra-agency governmental input is high.128 Later statements can be prepared on the basis of more detailed research. If each subsequent statement has to repeat and update analysis contained in the original program statement, considerable political and economic incentives will be created to attempt analyses of all alternatives within the project—both broad and detailed—in one impact statement and thus forego the usefulness of multiple impact statements. Reevaluation of broad alternatives will subject previously chosen agency policy alternatives to another round of debate and challenge from outside the agency. Moreover, repetition will likely be costly in terms of agency time, project delay, and possible extensive updating of earlier research. These possibilities will cause agencies to attempt to justify all aspects of the project, however large, in one statement rather than in a series of statements. In order to include detailed information in the single EIS, agencies may delay filing the statement longer than is desirable.129 The result may be that specific plans including a high level of engineering detail will be presented in support of projects such as freeways while alternative routes, mass transit possibilities, and alternative freeway designs will have been effectively foreclosed by the absence of comparable data on their operation.130

126. The CEQ allows reliance on previous decisions on which statements have been filed in its final guidelines, § 1500.8(a) (4), 38 Fed. Reg. at 20554:
Where an existing impact statement already contains [an adequate analysis of alternatives], its treatment of alternatives may be incorporated provided that such treatment is current and relevant to the precise purpose of the proposed action.
Presumably incorporation of analysis of alternatives would allow incorporation of previous conclusions. For a discussion of the proper interpretation to be given the word "current" in this context, see generally Part III, B infra.
127. See notes 58-74 and accompanying text supra.
128. See note 67-71, 120 and accompanying text supra.
129. See generally discussion of timing in Part II, A, 2 supra.
It may be argued that NEPA envisions an "individualized balancing analysis" in which general policy statements or rules should play either a small part or no part at all. It is true that general rules cannot take full account of particular circumstances; however, that problem is more relevant to a choice between one set of rules and another. For example, if in the Calvert Cliffs' case the water quality-radiation standards in question had been promulgated subsequent to the filing of a section 102 statement, an important inquiry in that statement should have been the degree to which individual consideration must be given in each particular case and the degree to which general rules should be used. These difficult judgments are for administrators and only if they are unreasonable should they be overturned by courts which have no special expertise in this area.

B. Reconsideration of Decisions Based on Prior Impact Statements

NEPA was not designed to enable environmentalist groups to force acceptance of their favorite alternatives by delaying as long as possible the implementation of alternatives chosen by federal agencies. Neither did Congress intend that NEPA operate as a vehicle to establish basic agency policies and insulate them forever from scrutiny by the public and the courts. Notwithstanding the intent of Congress, NEPA will sometimes function at least partially as a strategic weapon for either side. Possibilities for purely obstructionist use

131. This oft-quoted language was used in Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1123, 2 ERC 1779, 1788 (D.C. Cir. 1971). For a discussion of the meaning this phrase ought to be given, see the remarks of Roger Cramton at the Post-NEPA Hearings, supra note 2, at 420-21.

132. "Rules" as used here includes any precedent and is therefore much broader than the concept of "rules" in administrative law. An analysis of the place of formal rulemaking under NEPA appears in Murphy, supra note 6, at 1003-05.

133. Where plaintiff corporation contended that the SEC could only change its interpretation of a statute it administered by way of agency rule which would operate prospectively, the Supreme Court upheld the Commission's order disapproving plaintiff's plan of reorganization. The Court explained:

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

134. See note 122 supra.

135. It cannot be a surprise to anyone connected with the field [of environ-
by environmentalist groups add more weight to the earlier arguments that courts should defer to agency judgments concerning the appropriate level of detail and precision in discussion of alternatives, timing of policy-level statements, and project segmentation unless plaintiffs can show unreasonableness on the facts.\textsuperscript{188} Unfortunately, restraining agencies from strategic use of NEPA poses more severe problems, since the agencies are vested with the power of substantive environmental decisionmaking. The courts may only overturn substantive decisions which are arbitrary and capricious and may enjoin the implementation of decisions not subjected to NEPA procedures.\textsuperscript{137} However, rational exercise of even these limited judicial powers will provide some protection against use of NEPA by agencies to insulate their decisions from public scrutiny and judicial review.

As argued above, basic agency policies, established by decisions for which impact statements were prepared, should not be reconsidered at each application. However, neither should they be decided initially and thereafter followed blindly without any adjustment for changes in circumstances or additional information. If the results of implementing a particular policy show that it was probably unwise, it ought to be reconsidered.\textsuperscript{158} Not every new bit of information or unexpected difficulty in implementation should be grounds for reconsideration, but

\addcontentsline{toc}{section}{Notes}

\textsuperscript{6} Murphy, \textit{supra} note 6, at 981. In fairness to obstructionist environmentalists it must be added that it is no surprise to those familiar with environmental law that some agency personnel wish that hearings and other methods of analysis and disclosure under NEPA would never take place at all. To them an environmental value preserved is a developmental value denied. \textit{See} remarks of Roger Cramton at the Post-NEPA Hearings, \textit{supra} note 2, at 391.

\textsuperscript{136} See generally Part II \textit{supra}.

\textsuperscript{137} See note 48 \textit{supra} and authorities cited therein.

\textsuperscript{138} In a case not involving the environment, the D.C. Circuit indicated that it would require reconsideration of a policy statement because it is the obligation of an agency to make reexaminations and adjustments in the light of experience.

\textit{... [O]ur affirmance of the [Civil Aeronautics] Board's action is without prejudice to the right of the combination carriers to reopen the question of their exclusion from the sale at wholesale rates of large "blocks" of cargo space upon a showing that the Board's assumptions could not reasonably continue to be maintained in the light of actual experience, that their overall cargo business was significantly impaired, or that the air freight market had sufficiently expanded so that promotion of the air cargo industry through blocked space reduced rates would not be imperiled by their participation. American Airlines v. CAB, 359 F.2d 624, 633 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 (1966). A strong analogy might be drawn between the CAB's assumptions ("findings of legislative fact") and agencies' assumptions about population growth which may be used to justify increased construction of highways, power generation and transmission facilities, or other environmentally significant projects. \textit{See generally 3 CEQ ANN. REP.,} ch. 2.}
if after the policy has been in effect for a substantial period, a plaintiff can show that new, clear, and convincing evidence has accumulated showing that the assumptions upon which the policy was based are false, then the plaintiff has made a good case for reconsideration. In effect, continuing a policy in the face of such evidence is itself a decision with significant environmental impact, thereby requiring reconsideration by the agency. Until now no court has issued a definite opinion concerning such a theory.

Many courts have faced the similar problem of retroactivity. In deciding whether or not pre-1970 decisions are subject to NEPA some courts have explicitly recognized that they must ask if continuation of old policies is sufficiently questionable to be considered a new decision. That view is consistent with the willingness of the Calvert Cliffs' court to require that radiation standards established without preparation of an EIS had to be reconsidered. While courts have been suspicious of decisions for which no EIS has been compiled, it would disturb the NEPA scheme to be equally suspicious of decisions covered by prior impact statements. Thus, the strong showing of clear and convincing new facts is appropriate in cases where the decision sought to be relied upon has previously been found to be environmentally sound pursuant to the Act.

Another approach to reconsideration has been suggested by one commentator: A time limit may be put on the original decision. Remarks of Roger Cramton at the Post-NEPA Hearings, supra note 2, at 422. See also Senator Jackson's interpretation of the Act quoted in the text accompanying note supra. The test formulated in the text above does not require affirmative rethinking or restructuring by the courts but does allow courts to force recalcitrant agencies to take such action where an aggrieved party can make a strong showing. Such review cannot fairly be called judicial fiat; it calls for very limited review with a presumption in favor of agency action or inaction. The closest any courts have come to this issue is in requiring review of previous legislation as the Act explicitly demands. 42 U.S.C. § 4333 (1970). See note infra.


At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue from that it might no longer be "possible" to change the project in accordance with Section 102 of NEPA. Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1331, 3 ERC 1995, 2000 (4th Cir. 1972). See also Note, Litigating The Freeway Revolt: Keith v. Volpe, 2 Ecology L.Q. 761 (1972).

See note 121 supra.

Note, Proper Time Limitations on the Outer Continental Shelf Leases Under
In *NRDC v. Morton*, since the Department of Interior admitted to the court that off-shore oil leases were chosen to alleviate a problem over a limited period (energy shortages until about 1980), the solution should not be extended beyond the range of the original problem confronted.\textsuperscript{145} It follows from this reasoning that oil leases issued without limits to the relevant period go beyond the scope of the decision pursuant to the EIS and can therefore be enjoined as action taken pursuant to a decision for which no impact statement was prepared. Perhaps similar arguments may be made in other cases to convince agencies and the courts that time limits ought to be set on other decisions as well. This interpretation of NEPA would allow agencies flexibility in effecting interim programs while prohibiting such programs from becoming permanent without analysis of long-range environmental effects.

**IV**

LIMITATIONS ON AUTHORITY OF MISSION-ORIENTED AGENCIES

The previous discussion of policy decisions under NEPA ignores the problems of the limited authority of mission-oriented agencies. The agency or other governmental body which will take primary responsibility for particular decisions may not have the authority to implement all relevant alternatives. Agencies are probably biased in favor of alternatives within their power to effectuate. This bias is strengthened by a lack of familiarity or expertise with activities outside the normal purview of the agency's operations. Thus, an EIS prepared by an agency whose power and expertise do not extend to all reasonable alternatives might be superficial or inaccurate and downgrade alternatives outside its authority, thus at least partially defeating the purpose of the Act.

Where an agency proposes to make (or has made) a decision involving alternatives outside its authority and expertise, a court could not attempt to relocate the decisionmaking and responsibility for preparing an EIS in another agency which has authority to deal with those alternatives. Not only is there no authority for such action, but NEPA's language and history indicate that Congress wanted to avoid reorganizing federal agencies and shifting their responsibilities.\textsuperscript{146}

Another approach was chosen in the only case to date which focuses on the issue of alternatives outside agency authority. *NRDC v. Morton* held that in attempting to alleviate mid-range energy shortages...
by proposing to lease drilling rights on the Outer Continental Shelf, the Department of the Interior had to consider alternatives that it could not effectuate. In particular, the court mentioned changes in oil import quotas which the Department could not authorize. Morton may fairly be criticized as requiring unrealistic objectivity and expertise of mission-oriented agencies. After all, it is unlikely that agencies will often find alternatives outside their authority preferable to those they can implement. It may be that Morton unrealistically attempts to make federal agencies slip out of their old skins and blossom into ideal decisionmakers. Perhaps this approach is blind to the limitations inherent in NEPA’s attempt to improve environmental decisionmaking without restructuring the federal bureaucracy.

On closer examination, however, such pessimism is not wholly justified. Even if agencies remain unwilling to recommend alternatives outside their authority initially, it does not follow that consideration of such alternatives should not be required. Discussion of outside alternatives under the Morton holding may provide certain benefits. By requiring input from other federal, state, and local agencies better equipped to implement those alternatives, the outlook of the primary agency may be broadened with reference to future problems, even if those alternatives ultimately are not chosen in cases where they should have been. As a secondary benefit, the commenting agencies are alerted to the existence of these alternatives and the possibility for an innovative approach to their own problems. Moreover, agencies may be impelled to press Congress to increase their authority in a particular area or to create new programs suggested by the alternatives.

147. 458 F.2d 827, 834, 3 ERC 1558, 1562 (D.C. Cir. 1972).
148. See Jordan, supra note 6, at 734-35.
149. NEPA § 102(2)(C) (42 U.S.C. § 4332(2)(C) (1970)) requires consultation with federal agencies having “jurisdiction by law or special expertise with respect to any environmental impact involved.” While this language is phrased in terms of jurisdiction or expertise relating to impacts rather than alternatives, it seems likely that agencies responsible for particular areas of impact would have authority to implement alternatives which affect their area of expertise. Consistent with the intent of the Act and under the authority of this language courts ought to require consultation with agencies which can implement any of the alternatives worth considering in the EIS but which lie outside the sphere of the initiating agency. Requiring such consultation would diminish the likelihood that best alternatives might be discovered in the EIS process but never implemented. See discussion in Murphy, supra note 6, at 981.
150. The Act itself suggests that agencies request alterations in their mandates in the interest of better environmental decisionmaking. 42 U.S.C. § 4333 (1970). The NRDC v. Morton court reiterated this aspect of NEPA when it said:

The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch. But the need for an overhaul of basic legislation certainly bears on the requirements of the Act.
Thus, consideration of outside alternatives may contribute to an elimination of the institutional biases at which NEPA was directed.  

Another potential benefit of the Morton rule may result if agencies required to consider outside alternatives informally request a decisionmaker possessing broader authority to file impact statements on policy decisions before handing the project down to a more specialized agency for implementation. This would reduce the burden of EIS preparation on more narrowly focused agencies. If such voluntary changes in EIS responsibility occur, enforcement of the Morton rule will indirectly result in relocating decisionmaking in agencies with appropriate authority, even though NEPA does not explicitly mandate such changes.

Finally, it should be pointed out that while the Morton rule may be beneficial in cases where it properly applies, the importance of outside alternatives may easily be overemphasized. Many policy decisions significantly affecting the environment are already made by Congress. Thus, alternatives may have been rejected before the problem is assigned to an agency charged with complying with NEPA. Certainly if Congress has narrowed the alternatives to be considered, NEPA offers no authority to ignore that mandate. Thus, the task of the courts is to decide which alternatives have in fact been eliminated by Congress. The fact of a congressional mandate for agency action should not by itself be understood to be an implied rejection by Congress of all alternatives outside agency authority. Congress may not have considered carefully all alternatives. Since NEPA includes provisions for feedback to Congress, 452 it cannot be argued that NEPA should be interpreted to require that all congressional decisions be accepted at face value regardless of their legislative history. Thus, unless the agency can show that Congress in fact did examine and reject specific alternatives, the agency should be required to further examine these alternatives in its EIS.

Putting outside alternatives in perspective, deference to specific legislative decisions should limit the application of the Morton rule, but there will continue to exist areas where it should be applied to improve decisionmaking within the confines of mission-oriented agencies. NEPA's inability completely to reform the federal bureaucracy should not be an excuse for denying the limited benefits of its requirements.


151. For a brief discussion of the positive effects of EIS preparation and review on agency personnel see the remarks of Roger Cramton at the Post-NEPA Hearings, supra note 2, at 414-15.

152. See note 150 supra.
CONCLUSION

Congress fashioned the “action forcing” provisions of NEPA to improve environmental decisionmaking by requiring broad study of environmental problems and exchange of information and ideas among various agencies and the public. It was hoped that the resulting information, debate, and increased agency expertise in environmental matters would help to overcome biases and environmental ignorance of mission-oriented agencies without substantial bureaucratic reorganization. Congress was particularly concerned with curing the inadequacies in environmental decisionmaking in the high level policy and planning area. These goals are most likely to be achieved if broad alternatives are considered early in the planning process despite incomplete information and absence of agency authority to implement every relevant alternative.

Although major responsibility for NEPA’s success rests with federal agencies, the courts which must review the implementation of EIS procedures in each case can help to promote the preparation of impact statements at the policy level by allowing agencies to analyze alternatives in a manner and a depth suitable to resolution of the problem. To further encourage early filing of umbrella impact statements, which leave the fleshing out of technical details to later statements, the courts should allow agencies to depend on decisions which have been covered in previous impact statements; reconsideration of such decisions, however, should be required at reasonable intervals or where conditions have materially changed. Attempts to require omniscient decisionmaking or continual reexamination of each prior decision will frustrate the legislative intent to obtain impact statements for policy decisions.

Two related areas of judicial review which go to the heart of policy-level environmental analysis are statement timing and project segmentation. Courts have the important task of insuring, with the help of interested plaintiffs, that agencies do not wait so long to complete consideration of environmental alternatives that the analysis becomes moot. Similar care must be taken to assure that government activities are not artificially fragmented. If the courts fail in this regard, environmental analysis under NEPA may be reduced to the production of numerous narrowly focused, if highly detailed, reports no one of which explains or analyzes broad and important alternatives.

Jerry B. Edmonds
## APPENDIX A

**Twenty-Five Policy-Level Decisions Which Reached the Draft or Final Stage of Impact Statement Preparation Between July 1, 1972 and January 31, 1973**

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**APPENDIX B**

Twelve Policy-Level Decisions Which Appeared in the Federal Register Between Monday, February 26, 1973 and Friday, March 9, 1973 inclusive

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