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Perspective

NEPA's IMPACT ON FEDERAL DECISIONMAKING:
EXAMPLES OF NONCOMPLIANCE AND
SUGGESTIONS FOR CHANGE

Edward L. Strohbehn, Jr.*

Compliance with the National Environmental Policy Act's (NEPA) substantive and procedural requirements has been almost nonexistent in federal policy-level decisionmaking. In this Perspective, the author examines instances of policymaking, including the 1973-74 winter fuel shortage and the Prototype Oil Shale Leasing Program, where the requirements of NEPA were disregarded. The author then considers reasons for the agencies' failure to comply with NEPA and concludes with suggestions for changes both within and outside the agencies that would lead to NEPA compliance in federal policy-level decisionmaking.

The principal goal of the National Environmental Policy Act (NEPA) is to ensure that environmental factors are considered—and considered as an essential element of national policy—in the decision-making processes of all federal agencies. To ensure achievement of this goal, NEPA establishes a series of "action-forcing" procedural requirements. Now, more than four years after NEPA's enactment, it is clear that compliance with both the substantive and procedural provisions of the Act has been less than adequate. Thus, major programs with substantial environmental impacts are being pursued with unabated vigor and without analysis and assessment or reassessment in light of NEPA's objectives. Decisions with substantial environ-

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This Perspective is based upon a presentation to the Environmental Controls Committee of the Section of Corporation, Banking, and Business Law of the American Bar Association, Nov. 3-4, 1973.

2. Id. § 4332. See F. ANDERSON & R. DANIELS, NEPA IN THE COURTS 1-14 (1973) [hereinafter cited as ANDERSON].
4. Such analysis and assessment is required by section 102(2)(C) to be presented in a detailed environmental impact statement. Illustrations of agency failure to assess major programs as required by NEPA abound. For example, the Atomic Energy Commission refused to prepare a NEPA statement on its Liquid Metal Fast
mental significance are made without even a hint of concern for the environment. This lack of compliance violates both good sense and the requirements of NEPA, since adherence to NEPA's substantive mandate and procedural requirements can produce better decisions, decisions which will achieve national policy objectives with minimum harm to the environment and which will result from improved planning, including interagency consultation, use of more comprehensive information, and increased public participation. Moreover, this conclusion is relevant for all agency decisions, not simply for those which allow the agency months or years in which to plan.

It must be noted that NEPA has not been totally ineffectual. Many specific actions, such as the construction of a dam, have been modified to make them less environmentally harmful, and some proposed actions have been abandoned because of environmental considerations. However, agencies have rarely taken environmentally innovative actions and seem generally to view NEPA more as an obstacle than as an opportunity.

This article focuses on NEPA's impact on federal agency policy-making—that is, decisionmaking regarding major issues and programs. The discussion which follows analyzes two recent federal decisions to

Breeder Reactor Program until it was so ordered by a court. Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973). The Bureau of Land Management of the Department of the Interior has not prepared NEPA statements on several of its major programs, such as oil and gas leasing, although it has prepared NEPA statements on individual oil and gas leasing actions. See, e.g., Dept of Interior, Final Environmental Statement, OCS Sale No. 33 (FES 74-6), Jan. 23, 1974, v. 1, at 8. The Department of Transportation (DOT) has not prepared a statement on its highway construction program(s). See, e.g., list of environmental impact statements prepared by DOT in CEQ, 102 Monitor.

5. For example, the Administration submitted proposed legislation to Congress to amend the Clean Air Act to delay the statutory deadline for achieving primary air quality standards without even consulting the Environmental Protection Agency which is responsible for enforcing the Act. Washington Post, Dec. 3, 1973, at 1, col. 1. The Atomic Energy Commission proceeded to detonate a nuclear explosive device on public lands in an attempt to stimulate natural gas production, despite (1) opposition (later muted) by the Department of the Interior which found the AEC's NEPA statement inadequate; (2) an outcry by environmental organizations; and (3) evidence suggesting that an alternative existed that would cause less environmental harm, cost less, and have an equal or greater probability of success. A history of this action is contained in Hearings on Use of Public Lands for Nuclear Stimulation of Natural Gas Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 93rd Cong., 1st Sess. (1973).

6. E.g., Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970) (the Corps of Engineers refused to issue a dredge and drill permit for environmental reasons); 4 CEQ ANN. REP. 246-47 (1973).

7. See ANDERSON, supra note 2, at 271-74; consider also the tortuous litigation which has proceeded for more than two years regarding compliance with NEPA by the Securities and Exchange Commission: Natural Resources Defense Council, Inc. v. SEC, No. 72-1148, (D.C. Cir., dismissed Feb. 8, 1973); No. 73-1591 (D.C. Cir., action stayed Jan. 15, 1974); No. 409-73 (D.D.C.).
demonstrate not only that agencies have failed to comply with NEPA with respect to major decisions, but also that compliance would have improved the decisionmaking processes and probably resulted in different decisions. Other examples are noted briefly to show the general nature of agency noncompliance at the policymaking level. Various reasons are examined that may account for such noncompliance. Finally, several remedies are discussed.

The examples of agency noncompliance which follow indicate that federal agencies consider NEPA's requirements, when they are considered at all, as primarily procedural requirements which can be met by careful preparation of an impact statement able to withstand legal challenge. As a result, agencies do not seek "to the fullest extent possible" to meet NEPA's underlying objectives, such as full disclosure of relevant information and increased public participation in agency decisionmaking. NEPA is not generally regarded by the agencies as a substantive mandate which requires them to develop new policies and programs or to undertake new actions, nor is the Act viewed as offering an opportunity for innovative policymaking which can enhance the quality of life.

I

EXAMPLES OF NON-COMPLIANCE WITH NEPA

A. The Winter Fuel Shortage

A recent example of agency noncompliance with NEPA that demonstrates most of the basic propositions noted above is the Administration's September 1973 effort to cope with the 1974 winter fuel shortage.9

1. The Full Disclosure Issue

This discussion must begin with a disclaimer of comprehensive knowledge of the relevant facts in issue, such as how many million barrels of oil per day the nation would lack, on the average, during the winter of 1974 by geographical region and by product category (e.g., residual fuel oil; home heating oil; motor gasoline; aviation gasoline; distillate fuel oil), and what reasonable alternatives would be available for meeting these shortages. Other pertinent information included the extent of advance warning or prior knowledge that a win-

9. Publication schedules prevent using a more recent example. The Energy Policy Office, which has since been replaced by the Federal Energy Office, was the federal agency involved and was aware of its NEPA obligations. It prepared a NEPA statement on "Priorities—Low Sulfur Petroleum Products", Final Statement filed with CEQ, Nov. 8, 1973.
ter 1974 fuel shortage problem existed, its potential magnitude,10 and the possible impact of the Israeli-Egyptian conflict on the problem.11 This disclaimer of full knowledge of the relevant facts underscores the major deficiency in agency compliance with NEPA—as stated in Environmental Defense Fund, Inc. v. Corps of Engineers, "[a]t the very least NEPA is an environmental full disclosure law."12 A basic purpose of NEPA is to compel federal agencies to provide the public and other decisionmakers such as the President, the Congress, and high level agency officials with relevant information about the proposed course of action and its reasonable alternatives.13 Yet the public was furnished with no more information about the precise nature of the 1974 winter fuel shortage problem and its reasonable alternatives than would have been provided if NEPA had never been adopted. Moreover, the Administration's policymakers seemed to lack knowledge of essential facts. Thus, at a press conference held on September 8, 1973, to announce the Administration's basic program for dealing with the expected winter 1974 fuel shortage, the decisionmakers could not provide an accurate assessment of the problem.14 NEPA, however, mandates that such information be developed and made available prior to any agency decision that would significantly affect the quality of the human environment.15

10. In public comments as early as March 1973, officials in the White House Energy Office, which antedated formation of the Energy Policy Office, were predicting shortages. Articles and other materials published during May 1970, to January 1972, discussed the general United States energy problem, particularly the rapidly decreasing ability of the country to meet its energy needs from domestic resources, caused in part by demand increasing faster than even planned increases in domestic supplies and in part by failure to meet planned domestic energy resource production schedules. See U.S. Dept. of Interior, United States Energy: A Summary Review (1972), in House Comm. on Interior and Insular Affairs, Selected Readings on the Fuels and Energy Crisis, 92nd Cong., 2nd Sess. (1972).

11. In particular, by how much would the Middle East conflict increase the expected shortfall and would it alter substantially the range and effectiveness of alternatives which could deal with the problem? Articulate discussion of this issue has been presented by James Akins, a high-ranking official of the State Department's Office of Oil and Gas, who played a prominent role in the preparation of the President's 1973 Energy Message. Akins, The Oil Crisis, This Time The Wolf Is Here, 51 FOREIGN AFFAIRS 462 (1973) [hereinafter cited as Akins]. See also Selected Readings on the Fuels and Energy Crisis, supra note 10, at 17, 24-25, 38, 61-63.


15. 42 U.S.C. § 4332(2)(C) (1970); see Daly v. Volpe, 350 F. Supp. 252, 256, 4 ERC 1481, 1483 (W.D. Wash. 1972); Citizens for Clean Air v. Corps of Engineers,
2. **The Planning Issue**

One might argue that the winter 1974 fuel shortage was an immediate crisis in September 1973 and, therefore, that decisions would have to be made on the best information available, as scanty as that might be. But the winter 1974 fuel shortage was anything but a short-term problem. It had been known for some time that a major fuel shortage was to be expected for winter 1974. Members of the Energy Policy Office certainly knew of the prospective shortage since early in 1973, eight or nine months before the "Energy Crunch" erupted. Predictions that there would be a 1974 winter fuel shortage had been made during the preceeding winter, when the nation also faced a fuel shortage. If plans to cope with the problem had been developed then, one of the issues which policymakers confronted in October 1973—the impact of a substantial reduction or embargo of Middle Eastern supply—would have been a much simpler one because the policymakers would have considered such a denial of supply as a distinct possibility earlier in agency decisionmaking processes and would have developed plans for meeting it.

3. **The Procedural Issue**

One might also argue that a NEPA impact statement would not have been of assistance in the winter 1974 fuel shortage decisionmaking processes because decisions, not treatises, were required. However, NEPA requires decisions which incorporate environmental factors as an essential element of national policy. The NEPA statement is a tool for meeting this objective, one which can be extremely useful. Moreover, in those cases where for one reason or another, a detailed and carefully prepared statement cannot be developed prior to making a decision, the agencies are required to meet NEPA's mandate "to the fullest extent possible." Regarding the Administration's

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16. See note 10 supra.
17. See U.S. Cabinet Task Force on Oil Import Control, The Oil Import Question—A Report on the Relationship of Imports to the National Security, at 238-47 (1970), which recommended, among other possibilities, development of storage capacity sufficient to supply national needs during an embargo of approximately nine months' duration. See also Akins, supra note 11.
proposal for coping with the winter 1974 fuel shortage, a statement could have easily been prepared that explained the issue, set out the relevant facts, and described the reasonable alternatives, the benefits and risks of each, and the reasons for adopting the final proposal in light of this analysis. At almost every press conference announcing major policy decisions, the press is provided fact sheets describing the announced decision. No such statement was prepared in this case, and officials who announced the decision did not remedy this deficiency by their responses.20

4. The Substantive Issue

Finally, whether or not the agency complies with its duty to issue a NEPA statement, NEPA requires an agency, in making decisions which significantly affect the quality of the human environment, to consider environmental factors, which are essential elements of national policy,21 and reasonable alternatives to the proposed action, and to assess the benefits and environmental risks of each alternative before adopting a course of action.22 We can assess against this mandate, albeit less adequately than if we were given the relevant facts, the September 1973 fuel shortage decisions. The proposed solution to the winter fuel shortage epitomizes the failure of policymakers to meet NEPA's mandate. The Administration decided to waive requirements of the Clean Air Act23 by seeking relaxation of state and local emission standards designed to meet primary and secondary national ambient air quality standards, thereby permitting the use of high-sulfur fuel.24 This solution not only endangers the environment and threatens our health,25 but it also may fail to provide the supplies necessary to meet the expected fuel shortage. On the other hand, practicable alternatives were available which could have met the supply shortage problem forecast by the government in September 1973. Short-term energy conservation techniques could have been employed that would maintain and perhaps improve air quality. Such techniques

20. See note 14 supra.
22. Id. § 4332(2)(C) (1970). The decision which explains these requirements most precisely is NRDC v. Morton, 458 F.2d 827, 33-34, 3 ERC 1558, 1561 (D.C. Cir. 1972). Detailed discussion appears in ANDERSON, supra note 2, at 211-12, 217-21.
25. The relaxations would increase ambient levels of sulfur oxides in the air and might cause an increase in deaths due to emphysema, bronchitis, and other respiratory diseases. See, e.g., Rail, A Review of the Health Effects of Sulfur Oxides, Oct. 9, 1973, (report prepared for Office of Management and Budget).
include reducing consumption and production of motor fuels by limiting national gasoline sales, requiring car pooling for rush-hour work trips in major metropolitan areas, lowering speed limits on major highways, and cutting the speed and frequency of airline flights. These solutions were hardly novel, and most were adopted in November and December 1973. Moreover, these techniques had been suggested by various federal agencies and officials (e.g., the now defunct Office of Emergency Preparedness\textsuperscript{26}), and by environmentalists,\textsuperscript{27} as important and relevant means for meeting our short- and long-term energy problems. The amount of fuel that would be saved by such measures was substantial and fully consistent with the expected winter 1974 shortfall announced by the Administration in September 1973. Data substantiating the accuracy of such fuel savings already had been developed by a number of sources.\textsuperscript{28}

In sum, this example of a federal agency's solution to a problem severely affecting the quality of our environment demonstrates a patent disregard for both the substantive and procedural requirements of NEPA. Most egregious was the general lack of planning. The approach taken violated a basic premise of NEPA and transformed an essentially longer-term problem into an extremely short-term one.

B. The Prototype Oil Shale Leasing Program

The Prototype Oil Shale Leasing Program is one instance highlighting agency disregard of NEPA without a crisis atmosphere, when fully sufficient time existed to consider and implement the Act's policies.\textsuperscript{29} The government proposed a prototype oil shale leasing program which would stimulate development of commercial oil shale technology. Recovery of even a small fraction of the oil shale resources


\textsuperscript{27} See, e.g., Sierra Club Energy Policy Statement; Novick, Looking Forward, 15 \textit{Environment} 4 (1973) which provides references to numerous other sources, particularly other articles in \textit{Environment}.


\textsuperscript{29} See Dep't of Interior, Final Environmental Statement on Proposed Prototype Oil Shale Leasing Program (6 vols.) (1973) [hereinafter cited as Final Environmental Statement], as announced by Dep't of Interior, Notice of Availability of Final Environmental Statement on Proposed Prototype Oil Shale Leasing Program, 38 Fed. Reg. 23343-44 (1973); see also Dep't of Interior, Draft Environmental Statement for the Proposed Prototype Oil Shale Leasing Program (1972) [hereinafter cited as Draft Environmental Statement], as announced by Dep't of Interior, proposed Notice of Availability of Draft Environmental Statement, 37 Fed. Reg. 18098-99 (1972).
would provide sufficient oil to meet the nation's demands for many decades. Similarly, the government apparently intends to develop the coal resources of the northern great plains, primarily in Montana and Wyoming. An examination of the possible consequences of alternative development strategies on the region's resources, including coal, is the subject of a major Department of the Interior study entitled the Northern Great Plains Resource Program. Previously, at the behest of the Interior Department and with partial governmental assistance, industry prepared a plan—called the North Central Power Study—for massive development of these resources. Recovery of a portion of these coal resources could also meet the nation's needs for many decades for various uses, including electric power generation, since coal can often be substituted for oil. Additionally, processes exist for conversion of coal to gas and oil, and some of these processes appear commercially feasible. The environmental and socio-economic effects of developing oil shale and mining coal are approximately equal, although less coal than oil shale need be extracted to produce an equivalent amount of oil because of coal's much higher hydrocarbon content per ton of extracted material. Thus, it seems obvious that policymakers would seriously consider the alternative of developing only one of these resources, given the severe environmental harm which will result from developing either. Both the oil shale and coal development programs and studies are the responsibility of the Department of the Interior. Yet, the original government proposal to lease oil shale lands that was presented in a three-volume draft environmental statement prepared by the Department never mentioned the government proposal to develop Northern Great Plains coal.

30. 2 Final Environmental Statement, supra note 29, at IV-1.
31. Id. at V-107 to V-112.
33. 2 Final Environmental Statement, supra note 29, at V-104.
34. Id. at V-103. This is particularly true for these resources since it will take several years to develop either resource, and in that time electric power generating stations could be modified to provide for coal/oil fuel switching.
35. Plumlee, Perspectives in U.S. Energy Resource Development, 3 ENVIRONMENTAL AFFAIRS at 1, 10-11 (1974); Dep't of Interior, FES 74-6, supra note 4, at v. 2, pp. 200-25.
36. Plumlee, supra note 35, at 11; Dep't of Interior, FES 74-6, supra note 4, at 200-25.
38. See, e.g., letter from Thomas B. Stoel, Jr. and Edward L. Strohbehn, Jr., on behalf of Natural Resources Defense Council, Sierra Club, and the Nat'l. Wildlife Fed'n, to Dep't of Interior Nov. 7, 1972, containing Comments on Dep't of Inte-
The clear relationship between the oil shale and coal programs was pointedly noted in comments submitted on the draft statement.\textsuperscript{39} Then, almost a year later, the final environmental impact statement on the oil shale program was issued.\textsuperscript{40} Although the coal program was discussed,\textsuperscript{41} it was not actually considered as a possible alternative to development of oil shale resources, as NEPA requires. The statement lacks a thorough, precise comparison of the benefits and environmental risks of the proposed oil shale and coal programs. Sufficient information was supplied, however, to indicate that coal development is a reasonable alternative to oil shale development. Why pursue both? No reasons were provided. Presumably, better information about alternatives will be presented in future NEPA statements, since agencies are now required to "indicate the extent to which . . . countervailing benefits could be realized by following reasonable alternatives to the proposed action."\textsuperscript{42}

One explanation for this failure to consider a reasonable alternative to the Oil Shale Program may be that the Department decided to undertake the Proposed Prototype Oil Shale Leasing Program as currently proposed in 1970-71,\textsuperscript{43} and has since devoted substantial time and resources attempting to justify the program and rebut criticisms rather than identifying and weighing reasonable alternatives.

C. Other Examples of Noncompliance

Other examples of NEPA's limited impact at the policymaking level demonstrate that the problem is far-reaching. For example, no NEPA statement was prepared concerning the 1971 Energy Message. Litigation regarding a major program proposed by the message produced a court of appeals opinion indicating that such a statement would have been appropriate.\textsuperscript{44} Yet, two years later both the 1973 and January 1974 Energy Messages were published without a NEPA statement. No NEPA statement was being prepared for the Atomic Energy Commission's Liquid Metal Fast Breeder Reactor Develop-

\textsuperscript{39} See Dept. of Interior, Preliminary Draft Environmental Statement on the Proposed Prototype Oil Shale Leasing Program (1971); Draft Environmental Statement, supra note 29; Final Environmental Statement, supra note 29.

\textsuperscript{40} NRDC v. Morton, 458 F.2d 827, 835, 3 ERC 1558, 1563 (D.C. Cir. 1972).
ment Program until the court of appeals ordered that one be prepared.\textsuperscript{45} Nor has a statement been prepared regarding the clearcutting program of the Department of Agriculture's Forest Service.\textsuperscript{46}

In the meantime, these programs and others\textsuperscript{47} which significantly affect the quality of the human environment proceed. In the main, impact statements have been prepared only on individual actions within major programs; these statements have not assessed the environmental impact of the program itself and reasonable alternatives.\textsuperscript{48} At the specific project level, NEPA has had some impact, making individual projects less environmentally destructive.\textsuperscript{49} However, NEPA requires much more, and four years after its enactment, we should expect much more.

II

WHY AGENCIES HAVE FAILED TO COMPLY

A. Lack of Qualified Staff

Agencies, such as the Energy Policy Office, which make decisions of major environmental significance have appointed staff members who are neither knowledgeable about nor sensitive to environmental issues, but who are nonetheless charged with making recommendations in such matters. Until this deficiency is remedied, it is unlikely that the agencies will consider environmental factors fully and objectively in policy-level decisionmaking. Consider the public disclosure of an Energy Policy Office staff memorandum in October 1973 by a group of environmental organizations.\textsuperscript{50} The memorandum recommended that EPA not issue proposed no-discharge thermal effluent guidelines under the Federal Water Pollution Control Act Amendments of 1972.\textsuperscript{51} Among the reasons cited in support of this recommendation was the beneficial effect of hot-water discharges in melting ice in rivers and possibly making waters more comfortable for swimming.\textsuperscript{152} Whether

\textsuperscript{45} Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973).

\textsuperscript{46} See NRDC v. Butz, 4 ELR 20226 (1974).

\textsuperscript{47} See note 4 supra.

\textsuperscript{48} See, e.g., Final Environmental Statement, OCS Sale No. 33, supra note 4, v. 1, at 8; Bureau of Indian Affairs, Dept' of Interior, Final Environmental Statement, Crow Ceded Area Coal Lease—Westmoreland Resources Mining Proposal (FES 74-8), Jan. 29, 1974.

\textsuperscript{49} See note 6 supra.

\textsuperscript{50} Letter from representatives of four environmental organizations—Sierra Club, Environmental Policy Center, NRDC, Fisherman's Clean Water Action Project—to Russell E. Train, EPA Administrator, Oct. 18, 1973. Attached was a memorandum of Sept. 17, prepared by a staff member of the Energy Policy Office.


\textsuperscript{52} Energy Policy Office staff memorandum, supra note 50, at 6.
suggested in good faith or facetiously, this kind of analysis hardly com-
plies with the spirit of NEPA, let alone its explicit provisions.

B. Closed-Door Decisionmaking

Policymaking on issues of environmental significance continues
to be made behind closed doors with no public debate, contrary to
the policies of NEPA. NEPA has been described as "at the very
least . . . an environmental full disclosure law." Moreover, the
President, in discussing implementation of NEPA, directed federal
agencies to "develop procedures to insure the fullest practicable provi-
sion of timely public information and understanding of Federal plans
and programs with environmental impact in order to obtain the views
of interested parties." Regrettably, these commands have not been
heeded.

With regard to full disclosure, agencies have acted more diligently
to reveal the environmental impact of projects mainly because the
courts have been enforcing this NEPA requirement, but, as the winter
1974 fuel shortage example demonstrates, information about major
policy decisions often has not been disclosed. With regard to public
participation, however, the record is much poorer. For example, soon
after his appointment as Director of the Energy Policy Office, Gov-
eror Love met with a number of environmentalists. Those in at-
tendance exchanged pleasantries and views; that was the last the en-
vironmentalists heard from Director Love or his staff. Other agencies
seem to follow essentially the same pattern: while there exist a num-ber of industrial advisory committees, there are few analogous en-
vironmental committees. The Federal Energy Office, which was
created in November 1973, established an Environmental Advisory

53. For example, Project Independence, announced by the President on Novem-
ber 7, 1973, is considered to be "the Nation's energy program for the future." Office
of the White House Press Secretary, "Fact Sheet" for the President's Energy Message,
Jan. 23, 1974, at 2. The basic goal of the program is to "achieve self-sufficiency in
energy . . . [so that] by 1980 . . . we are no longer dependent to any significant
extent upon potentially insecure foreign supplies of energy." Office of the White
No NEPA statement was prepared on this program or on its major components, nor
was it announced that NEPA statements would be prepared.

54. EDF v. Corps of Engineers, 325 F. Supp. 728, 759, 2 ERC 1260, 1267 (E.D.


56. See text accompanying note 9 supra.


58. See Subcomm. on Budgeting, Management, and Expenditures of the Sen.
Comm. on Government Operations, Federal Advisory Committees, First Annual Report
of the President to the Congress, Including Data on Individual Committees, March
1973 (May 2, 1973) (4 parts) (more than 1400 federal advisory committees were in
existence).
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Committee. This may be the forerunner of similar committees for other federal agencies, such as the Interior Department. But, there generally is little dialogue between agency policymakers and environmentalists.

At this time NEPA can be expected to have only a limited impact on agency decisionmaking, particularly at the policy levels. This is extremely disheartening, since it is the policymakers who devise new programs and make substantial modifications in existing programs. And although specific projects (e.g., dams or highways) undertaken with due regard for environmental considerations are preferable to those built without considering the environment, what is critically needed is reassessment of entire programs and policies in light of NEPA's substantive mandate to preserve and enhance the environment to the fullest extent possible.

III

REMEDIES

A. Changes in Executive Branch Staff and Operations

Remedies available to improve federal agency compliance with NEPA include executive-branch actions such as appointment of pro-environmental officials to policymaking positions in the "mission-oriented" agencies. Such officials could better ensure that environmental risks of a proposed action and its alternatives are appropriately considered, especially by insisting that environmental impact statements be prepared on major programs and on policy decisions. Their appointment would probably encourage career officials to comply with NEPA's requirements, and, in addition, would probably attract other persons to government service sympathetic to environmental concerns. This, in turn, would result in more environmentally sound project proposals and in improved techniques for limiting the environmental impacts of ongoing activities.

Second, an environmental staff should be established within each department or independent agency. This staff would be responsible for identifying reasonable alternatives to proposed programs, policies, and actions and for presenting the best case on the merits for such alternative proposals to the secretary or administrator. Such a staff would improve substantially the quality of what is probably the most important section of an impact statement, the discussion of alternatives. A major factor underlying present inadequate identification and analy-

sis of alternatives is the self-interest and mission-orientation of the agencies since the persons who prepare the statements are also often responsible for implementing the proposed action. Indeed, employment security for these persons might be jeopardized by advocating alternatives to proposed agency actions which are better environmentally but inconsistent with the agency's mission. Another means for setting out the merits of reasonable alternatives for the decision-makers is to request representatives of agencies with expert knowledge of the relevant alternative to take major responsibility for preparation of the alternatives section of the NEPA statement and also to present such information directly to decisionmakers.

Unfortunately, neither of these two remedies is likely to be implemented, since the principal reason for NEPA's limited impact is that current decisionmakers are not sympathetic to NEPA's objectives. Thus, action on other fronts is necessary to make administrative decisions more environmentally responsible.

B. EPA and CEQ Actions

It is possible that procedures dormant for four years may be brought to life and used innovatively and effectively by government agencies to assist in meeting NEPA's goals. The agencies involved are the Council on Environmental Quality (CEQ) and the Environmental Protection Agency (EPA), agencies whose environmental mandates should make them strong advocates of NEPA's goals. Thus, the Council on Environmental Quality could use its power under section 204(3) of NEPA "to review and appraise the various programs and activities of the Federal Government in light of the policy set forth in title I of [NEPA]" and its authority to "[d]etermine the need for new policies and programs dealing with environmental problems not being adequately addressed." The CEQ has been assigned the task of coordinating federal programs related to environmental quality in order to identify federal activities that are environmentally destructive and to seek less harmful alternatives. It could increase the impact of its activities and recommendations by conducting public hearings or conferences on issues of environmental significance, such as on controversial agency actions and on new program and policy recommendations of the Council.

The Environmental Protection Agency, acting pursuant to section

63. Id.
309 of the Clean Air Act, 64 and CEQ, acting pursuant to NEPA, 65 the implementing Executive Order, 66 and the Clean Air Act, 67 could assess the adequacy of impact statements and inform both the preparing agency and the public of any inadequacies. 68 Since a project or program cannot proceed if NEPA's requirements have not been met, these actions would be very effective in ensuring compliance with out requiring a protracted and expensive court battle. Moreover, EPA could utilize the provisions of section 309 to refer environmentally detrimental projects to CEQ for further action, and CEQ could then hold public hearings on such projects. If EPA and CEQ would adopt firm procedures and cooperate in implementing them, the most environmentally destructive projects and programs of the federal government would be subjected to intensive public scrutiny which should result in their termination or substantial modification. 69 However, to date the federal agencies have not sought to use NEPA imaginatively to advance the environmental protection goals of the Act.

C. Congressional Action

It is likely that Congress will continue to take the lead in protecting and preserving the environment by enacting legislation with the force, impact, and significance of the recent Clean Air and Clean Water Acts. 70 These acts demonstrate, however, that even when Congress seeks to limit administrative discretion as much as it can by, for example, prescribing specific deadlines, subsequent monitoring and enforcement by environmentally concerned persons and organizations

65. Id. § 4344 (1970).
68. EPA has adopted procedures for implementing section 309 of the Clean Air Act. EPA, Manual: REVIEW OF FEDERAL ACTIONS IMPACTING THE ENVIRONMENT, TN 1640.1. A basic feature of the system is a rating classification system employed at the draft impact statement stage, by which both the environmental impact of the proposed project and the adequacy of the impact statement are evaluated. See id., ch. 3. These ratings are published periodically in the Federal Register. The proposed project is also reviewed at the final impact statement stage, but no similar coded ranking system is employed. In addition, EPA has established procedures for implementing section 309 with respect to proposed actions when no environmental impact statement has been prepared. See id., ch. 4.
69. CEQ has yet to adopt any procedures for implementing its section 309 responsibilities despite the statutory mandate to do so and despite recommendations by environmental organizations submitted to the CEQ. Comments on Proposed CEQ Guidelines, submitted by NRDC, National Wildlife Federation, Environmental Defense Fund, Sierra Club, and National Parks and Conservation Association, June 25, 1973.
are essential to achieving the statutes' environmental goals. Congress has been notably remiss in requiring compliance with NEPA's command that environmental impact statements be prepared on legislative proposals. Only the Senate Committee on Public Works has adopted a rule which requires the Executive Branch to prepare and submit such statements to the Congress before the Committee will consider Administration-proposed legislation.

D. Citizen Participation and Enforcement

Because Congress and the agencies have been remiss, citizen efforts to spur administrative compliance with NEPA will continue to be vital in realizing the Act's environmental protection goals. Moreover, the public will probably become a more effective mover in the administrative process. Citizens are becoming more experienced in participating in the commenting and public hearing processes, and the agencies, in turn, have begun to respond to citizen suggestions. Critique and analysis of NEPA statements by experts who volunteer their services or who are retained by public-interest organizations will probably be employed more often and more effectively. An example of this type of effort is the Environmental Impact Assessment Project of the Institute of Ecology. These critiques will force agencies to continue to improve their environmental analysis techniques and produce more informed decisions. However, litigation by public-interest organizations and citizens must be maintained in order to assure adequate attainment of NEPA's goals. Since agency policymakers still seem less than sympathetic to NEPA's substantive goals and procedural requirements, agencies would probably not even attempt to observe the procedural provisions of the Act without the citizen-suit prod. Requiring strict observance of the Act's procedural requirements forces disclosure of much of the agency's decisionmaking processes, which NEPA aims ultimately to reform.

CONCLUSION

To date, NEPA has had little impact at the policymaking levels of the federal agencies. Possibilities for significant change exist, however, particularly as a result of citizen suits. The several hundred court decisions under the Act have tended to support the broad en-

71. See, e.g., Comment, Litigation Under the Clean Air Act, 3 ELR 10007 (1973) (discussing the large number of cases brought by environmental organizations to enforce the Act); NRDC v. Train, No. 1609-73 (D.D.C. 1973) (brought to enforce the § 304(b)(1)(A) deadline of the Clean Water Act); NRDC v. Fri, No. 849-73 (D.D.C. 1973) (brought to enforce 14 deadlines of the Clean Water Act).

72. See ANDERSON, supra note 2, at 125-33.

73. Id. at 131 & n.324.
environmental objectives of NEPA and have enjoined agency actions not in compliance. Changes in agency behavior may be expected to occur that will reflect these decisions and legal requirements. In addition, the Atomic Energy Commission has been required by court order to prepare a NEPA statement on its major energy program—the Liquid Metal Fast Breeder Reactor Program—and several suits have been brought recently seeking preparation of NEPA statements for long-term agency programs of substantial environmental significance. In time, policymakers may realize NEPA's potential for improving government decisionmaking, making it more open, more informed, and dedicated to the important goal of "creating and maintaining a productive harmony between man and his environment." NEPA offers the government and the public a great opportunity and one which remains unrealized.

74. See id., passim, particularly the list of 151 cases decided as of March 1973 which is set out in Appendix B.
75. Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079, 5 ERC 1418 (D.C. Cir. 1973).
76. See, e.g., a suit filed by NRDC against the Secretary of the Interior concerning the public lands grazing program, a suit by NRDC against the Secretary of Agriculture concerning increased timber sales, including clearcutting practices and a suit by the Sierra Club against the Secretary of the Interior concerning the coal leasing program.