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Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969

Richard Alan Liroff*

The quality of the American environment stands in mute testimony to the neglect or undervaluation of ecological considerations in public and private decisionmaking. The nasty environmental impact of government actions in particular is often attributed to the lack of efficient policy coordination among federal agencies. More often than not, however, it is the product of the value biases and selective perceptions of agency decisionmakers, reinforced by symbiotic relationships developed with clientele groups and with Congress.

This essay is an attempt at synthesizing selected theoretical material on administrative behavior and decisionmaking with several recent court decisions concerned with administrative response to the National Environmental Policy Act of 1969 (hereafter the NEPA). The NEPA's enactment marked the recognition by Congress that the gross neglect of environmental impacts could no longer be tolerated, and that a greater effort had to be made to assure that a full, fair accounting of environmental costs would be incorporated into future agency decisions; the Act can be interpreted as a call for environmentally coordinated rational

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1. Pub. No. 91-190 (42 U.S.C. § 4321 and § 4331 et seq.).
decisionmaking. But as an analysis of agency structures and processes will suggest, the information necessary for rational decisionmaking can often be consciously or unconsciously ignored in resolving questions of environmental choice. Most importantly, the internal structure and external social environment of most administrative agencies discourage the full evaluation of environmental costs. The division of labor within agencies, the nature of their short-term goals and reward structures all discourage ecologically innovative decisionmaking. Actions are often undertaken which provide immediate, readily-perceived economic gratification, while the accompanying short- and long-term ecological costs remain neglected or underassessed.

While it would be hoped that the Council on Environmental Quality (hereafter the CEQ), the primary environmental advisory group in the Executive Office of the President, would compensate for some of these inherent decisionmaking weaknesses, an analysis of its role will suggest that it is not primarily concerned with, and is not capable of, conducting a comprehensive project-by-project review of agency actions.

Given this state of affairs, the courts can play a significant role in policing the environmental decisionmaking of government agencies. The NEPA places on agencies the burden of demonstrating that they have fully weighed all the environmental costs of their actions—it stipulates that environmental consequences must be considered throughout the entire range of government activities and it establishes a decision-making procedure which must be observed by all agencies. The Gilham Dam and Calvert Cliffs decisions, in particular, suggest how the courts may insist that agencies' compliance with these requirements be more than mere symbolic gestures of consideration for the environment.

I. THE NEPA

The NEPA, enacted January 1, 1970, declares that it is national policy (1) to encourage “productive and enjoyable harmony between man and his environment” and (2) “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the

2. Throughout this article, the word “environment” and its derivatives will often be unmodified. The reader should be able to understand from the context those instances in which it refers to the natural environment, and those in which it refers to a social environment.
health and welfare of man." Congress noted that each person should enjoy a healthful environment and stated that:

[It is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

The Act is a synthesis primarily of two measures, S. 1075 and H.R. 6750, considered in the 91st Congress. As originally introduced, both measures sought to establish an environmental advisory board in the Executive Office of the President and a national environmental policy, but neither included action-forcing provisions to insure that federal agencies would abide by the policy declaration. It was not until after the Senate hearings on S. 1075 that Senator Henry Jackson, Chairman of the Senate Interior Committee and S. 1075's author, amended his bill to include a number of significant action-forcing provisions that ultimately became Section 102 of the NEPA:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
(a) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
(b) identify and develop methods and procedures, in consultation with the Council on Environmental Quality . . . , which

will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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.

(d) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(g) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(h) assist the Council on Environmental Quality.

While the expression “to the fullest extent possible” modifies all these requirements, it is not to be used as an escape clause by reluctant agencies. The conferees’ report was quite clear in this regard:

[I]t is the intent of the conferees that the provision “to the fullest extent possible” shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language . . . is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section “to the fullest extent possible” under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. 8

Sections 104 and 105 of the NEPA indicate that the action-forcing obligations of Section 102 are to be treated as supplementary to existing authorizations—they are in no way regarded as affecting the specific

7. 42 U.S.C. § 4332(a-d, g, h).
statutory obligations of agencies to coordinate and consult with other agencies or to act or refrain from acting upon other agencies' recommendations or certifications. However, these sections are not to be abused so as to avoid compliance with the Act.\footnote{They are to be interpreted in the same manner as the phrase “to the fullest extent possible.” Id. at 10.}

Title II establishes the CEQ as an advisory board in the Executive Office of the President. The board is given the responsibility of assessing current and future environmental trends, developing national policies, assisting the President in preparing a yearly environmental report, and advising the President with respect to the compliance of existing federal programs and activities with the policies elaborated in Section 101 of the Act.

II. THE CEQ GUIDELINES

The CEQ was established by Executive Order, in accordance with the NEPA, on March 5, 1970.\footnote{Exec. Order No. 11514, 3 C.F.R. 531 (1971 Supp.).} Shortly thereafter, it issued interim guidelines\footnote{Issued April 30, 1970. 35 Fed. Reg. 7390. These have been replaced by a new set of guidelines, but the language pertinent to this discussion remains unchanged. See 36 Fed. Reg. 7724 (April 23, 1971).} elaborating on the environmental impact statement process stipulated in Section 102(2)(c). The regulations especially emphasize the importance of considering alternatives to proposed actions:

In particular, alternative actions that will minimize adverse impact should be explored and both the long- and short-range implications to man, his physical and social surroundings, and to nature, should be evaluated in order to avoid to the fullest extent practicable undesirable consequences for the environment.\footnote{Section 2. Id. at 7391.}

The guidelines also require agencies to establish in-house procedures for identifying those actions requiring statements, and suggest that agencies should interpret the statutory clause “major federal actions significantly affecting the quality of the human environment” with a view to the overall, cumulative impact of proposed programs.\footnote{Section 5(b). Id. at 7391.}

Section 7(a)(i) of the guidelines elaborates on the content requirements of the impact statement. Agencies should discuss

\begin{quote}
[t]he probable impact of the proposed action on the environment, including impact on ecological systems such as wild life, fish and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications, if any, of the action for population distri-
bution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question.\textsuperscript{14}

Section 7(a)(iii) reiterates the importance of discussing alternatives to proposed actions:

A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analyses of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.\textsuperscript{15}

Section 7(a)(vi) requires agencies, where appropriate, to discuss the problems and objections raised in the review process by other federal agencies and state and local entities.\textsuperscript{16} Whereas the NEPA had only envisioned one statement, the CEQ guidelines discuss two—a draft and a final. The draft is to be circulated for comment, while the final statement presumably discusses the solicited critiques.\textsuperscript{17}

Section 10 emphasizes the importance of inputting environmental considerations as early as possible to the agency decisionmaking process:

The principle to be applied is to obtain views of other agencies at the earliest feasible time in the development of program and project proposals . . . .

. . . . It is important that draft environmental statements be prepared and circulated for comment and furnished to the [CEQ] early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved.\textsuperscript{18}

Section 11 indicates that the NEPA should be applied to programs initiated prior to January 1, 1970. With respect to such projects,

\[w\]here it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.} at 7392.
  \item \textsuperscript{17} Section 10(b). \textit{Id.} at 7392.
  \item \textsuperscript{18} Sections 10(a) and 10(b). \textit{Id.} at 7392.
  \item \textsuperscript{19} \textit{Id.}
\end{itemize}
The directives to fully evaluate all alternatives, maximize interdisciplinary information input, and develop environmental analysis capabilities are all underscored by the legislative history of the NEPA. In introducing the bill to Congress, for example, Senator Jackson stated:

In the past, we have established costly programs without a clear enough perception of the objectives and goals we seek to attain.

We need to know what the risks are, and we need to know what options and alternatives are available in the development of our resources and in the administration of our environment. It is far cheaper in human, social, and economic terms, to anticipate these problems at an early stage and to find alternatives before they require the massive expenditures we are now obligated to make to control air, water, and oil pollution.

He had earlier stressed the need to overhaul the decisionmaking process in the introduction to a report to his committee on a national policy for the environment:

Throughout much of our history, the goal of managing the environment for the benefit of all citizens has often been overshadowed and obscured by the pursuit of narrower and more immediate economic goals.

This report proposes that the American people, the Congress, and the Administration break the shackles of incremental policymaking in the management of the environment.

A fuller description of this incremental policymaking, within the context of a broad discussion of administrative systems, will identify some of the principal limitations on comprehensive administrative reform for environmental ends.

III. Administrative Systems

For analytical purposes, it is useful to treat government agencies as task-oriented complex open systems. This systems perspective is not only helpful in understanding administrative behavior in general, but is especially appropriate for the study of such behavior as it impacts on the


The key to comprehending man's place on Earth is to understand his impact on ecosystems—those sets of interrelationships linking organisms with one another and with their air, water, and soil environments. By focusing on the nature and amount of information on natural systems developed in environmentally impacting administrative decisions, it is possible to obtain some sense of the appropriateness of existing administrative structures on decisionmaking processes for making environmental choices.

Each agency can be viewed as a system of interrelated individual behaviors. The system exists within a particular social environment; from it, resources and information are drawn and demands are made. The resources, information and demands are processed by the agency and converted to outputs. These, in the form of regulations, grants, licenses or permits, are inputs to systems in the agency's environment. As such, they affect these other systems' outputs, which are the future demands on and resources available to the agency in question.

The passage of the NEPA can be seen as an attempt by Congress to maximize the input of environmental information to agency decision-making processes. But truly rational environmental decisions within agency systems will nevertheless rarely be made, for the conditions for rational choice are usually absent and the need to assure organizational survival discourages giving full weight to environmental factors.

**Rational Decisionmaking Within Agency Systems.** Presumably, for a rational decision to be made, a goal has to be clearly selected, all alternative means towards achieving the goal must be known, and all the consequences of each alternative means must be considered. But rationality is constrained by the organization's structure, which can be viewed as a restricted communications network. The web of chan-

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25. J. MARCH AND H. SIMON, *Organizations* 136 (1958). [Hereinafter cited as MARCH AND SIMON]. Theoretically, under the terms of the NEPA, no single transportation, energy, or land use decision can be made except within the context of national transportation, energy, or land use policies. Such policies would presumably focus on alternative means of maintaining environmental quality for a particular period of years while meeting transportation, energy, and land use needs. This view of the NEPA is underscored by the suit challenging the AEC's decision to request funds for a liquid metal fast breeder reactor program. See Scientists' Institute for Public Information v. A.E.C., Civil No. 1029-71 (D.D.C., filed May 25, 1971), 1 ELR 65153. No Section 102 statement was prepared before the request for funds was made. Presumably such a statement would have to discuss the comparative advantage of various energy policies, including one of discouraging increased energy demands.

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nels influences the distribution and condensation of information within the system. It affects as well the characteristics of information inputted from and outputted to the environment.\textsuperscript{27}

When a particular problem is posed, it will evoke a certain "response set" from a decisionmaker which enables him to define the situation the problem presents. This definition, according to the organization theorists James March and Herbert Simon, represents a "simplified, screened and biased model of the objective situation."\textsuperscript{28} Filtering will affect all the elements figuring in the decisionmaking process—knowledge or assumptions about future events, knowledge of sets of alternatives available for action, and knowledge of consequences attached to alternatives.\textsuperscript{29} Consequently, attention will be focused on certain content areas.\textsuperscript{30} Indeed, as the sociologist Phillip Selznick has noted, an organization may acquire a particular character-development of a distinctive competence or inadequacy to frame and execute specific policies, and embody, within its structure, selected values.\textsuperscript{31}

When an organization has been coping with one kind of problem over a long period of time, it is likely to evolve a complete, highly organized set of responses.\textsuperscript{32} For example, the Federal Power Commission had for years routinely approved hydroelectric power generation plants, assuming that such plants must be licensed to meet growing power demands. Court rulings in both \textit{Scenic Hudson Preservation Conference v. F.P.C.}\textsuperscript{33} and \textit{Udall v. F.P.C.}\textsuperscript{34} suggested that the Commission had routinely excluded ecological considerations in such decisionmaking.\textsuperscript{35}

Should the standard operating procedures be inadequate in organizational problem solving, search is begun for a new way of coping with a situation consistent with decisionmakers' goals. But the search process is itself biased, with perception of the environment and processing of communications from it reflecting variations in the training, experience, social location and goals of decisionmakers. With time and other re-

\textsuperscript{28} March and Simon supra note 25, at 154-155.
\textsuperscript{29} Id.
\textsuperscript{30} Katz and Kahn supra note 26, at 277.
\textsuperscript{31} P. Selznick, Leadership in Administration 36 \textit{et seq.} (1957). [Hereinafter cited as Selznick].
\textsuperscript{32} March and Simon supra note 25, at 141.
\textsuperscript{34} 387 U.S. 428 (1967).
\textsuperscript{35} There is little assurance that the first of the two court rulings has had much impact on the F.P.C., for the Commission has again granted a license to Consolidated Edison to construct the power plant. And again, the Scenic Hudson Preservation Conference has moved to challenge the license in court.
sources at a premium, they must often act on limited information. Decisions based on the limited evaluation of alternatives have come to be known as "satisficing" decisions, for unlike optimizing or rational decisions, they are not based on the full evaluation of all the consequences of all possible means of achieving an objective.

A similar conclusion concerning the bounded rationality of administrative decisionmaking derives from the "incrementalist" school of policy analysis. Administrative decisions are not perceived as rational, as based on a comparative analysis of all possible alternative actions and their consequences—they consist, rather, of a series of disjointed and incremental choices. According to this schema:

1. Each choice consists only of the comparison and evaluation of incremental (i.e. small) changes.
2. Consideration is given to but a limited number of policy alternatives.
3. Analysis is reconstructive; an impossible problem is not fruitlessly attacked, but is altered so as to make it manageable.
4. Analysis and evaluation are serial—the same problem is continually reattacked and the renewed attacks make less alarming the neglect of certain consequences at previous stages.
5. There is a remedial orientation; “public problem solving . . . is dominated less by aspiration toward a well-defined future state [than] by identified social ills that seem to call for remedy.”
6. Problem solving, in sum, is a series of successive approximations in defining and solving a problem.36

An interweaving of these theoretical constructs of satisficing and incremental decisionmaking suggests that it is possible for certain values to be excluded from the decisionmaking process if they are not shared by satisficing decisionmakers and those with whom they interact—for the alternatives which are apparent to decisionmakers are solely the product of their biased perception of the environment. Furthermore, the continued neglect of the same consequences over an extended period of time may systematically create situations which cannot be remedied; incremental decisionmaking as it relates to the environment cannot always compensate for opportunities lost and environments destroyed. In his introduction of S. 1075 to the Senate, it was precisely this remedial assumption which Senator Jackson attacked:

   Many of our approaches and programs have involved merely a cosmetic approach—clean-up, paint-up, and fix-up. The conditions we are dealing with, however, are not cured by cosmetology.37

37. Cited in Senate Hearings, supra note 21, at 27.
And the Senate report on S. 1075 added:

The longer we delay meeting our environmental responsibilities, the longer the growing list of interest charges in environmental deterioration will run. The cost of getting on to a sound basis for the future will never again be less than it is today.38

As previously noted, the NEPA and the guidelines can be seen as efforts to overcome the ecological shortcomings of incremental agency decisionmaking by requiring exposure of proposed projects to a multiplicity of perspectives. With many reviewers of varied backgrounds evaluating a project, it would be hoped that all its environmental ramifications would be elucidated. Unfortunately, most reviews will be cursory at best. First, project reviews necessarily compete for reviewing agencies' scarce time and resources with other demands of more critical importance. Second, because of the vagueness of the NEPA and the CEQ guidelines, reviewing agencies often lack substantive criteria on which to base analyses. Therefore, they often are not able to critically evaluate a project in a well-ordered, comprehensive manner. Third and lastly, overly severe criticism of others' actions may produce undesired reciprocal criticism of a reviewing agency's own pet projects.

Negotiated Environments and Organizational Maintenance. An agency's decision to abstain from criticism is one of a number of alternative strategies available to it. Through selection of an appropriate strategy, an agency will seek a "negotiated environment"39—a set of highly predictable interrelationships which serve to reduce in number and buffer unexpected threats to organizational well-being. This quest for self-preservation and organizational maintenance requires development of a favorable balance of constituencies.40 Organizational goals must be manipulated41—agencies must "discover, identify, or manufacture suitable combinations of means and ends to yield effective incentives for the constituents [they desire]."42 Organizations will emphasize scoring well on those criteria most visible to important elements in their environment. When they cannot hope to show improvement on all, they seek to emphasize those of interest to elements on which they are most dependent.43 Thus, for example, if an agency's survival is dependent

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39. Cygert and March supra note 27, at 102, 119.
42. Holden, supra note 40, at 943.
43. Thompson supra note 24, at 90. As open systems, agencies are dependent upon inputs from their environments. The composition of the environments, the location within them of particular capacities, will determine upon whom, in particular, each agency is dependent.
more on its contributions to economic development than on its role in preserving the environment, it could be expected that it would not take the latter role very seriously.

Organization theorists' outlines of organizational systems and their environments dovetail with political scientists' descriptions of administrative, congressional and interest group behavior: Interest groups and congressional committees can be seen as "significant actors" within each agency's environment whose demands and support are very influential in agency decisionmaking. In the example below of the Army Corps of Engineers, the coincidence of organizational maintenance requirements with clientele and congressional demands makes for a mutually supportive negotiated environment for all concerned.44

The Corps has a substantial civil works program designed principally to improve navigation and flood control. It is in the Corps' organizational self-interest to encourage requests for and approval of river and harbor projects. Most congressmen, particularly in election years, like to have public works projects approved for their district. The short-term economic benefits are usually quite high, with substantial employment provided for those in the construction trades. In the long-run, navigational improvement and flood control contribute to industrial and commercial development.

Projects are not approved by Congress on an individual basis, but in one package, the Omnibus River and Harbor and Flood Control Bill. Since each individual congressman wishes to see his project approved, even if its supporting benefit-cost analysis45 is of dubious validity, he will of course not seriously challenge questionable projects of others. Moreover, since a congressman may want a project in the future, he


45. Benefit-cost analysis is the primary economic tool for making public investment decisions. Its rationale is quite simple—for each dollar invested more than one dollar should be gained. The method becomes controversial when the estimated magnitude of particular costs and benefits is challenged or when it is felt that certain factors have been unjustly excluded from calculations. Benefit-cost analysis is most useful when dealing with relatively simple, closed systems and with easily quantifiable benefits and costs. Consequently, its validity is questionable when it is applied to projects having substantial ecological impact—impact on highly complex, open systems. Furthermore, analyses often implicitly incorporate an analysis of political costs and benefits. See sources cited supra note 44; B. Hannon and J. Cannon, The Corps Out-Engineered, and T.H. Watkins, Crisis on the Eel in THE POLITICS OF ECOSUICIDE (L.L. Roos, ed., 1971); FLORIDA DEFENDERS OF THE ENVIRONMENT, ENVIRONMENTAL IMPACT OF THE CROSS-FLORIDA BARGE CANAL WITH SPECIAL EMPHASIS ON THE OKLAWAHA REGIONAL ECOSYSTEM (1970).
would not wish to alienate the Corps by questioning its calculations, for it would be the Corps which would undertake feasibility studies establishing the viability of the future project.

Even where the congressman himself does not perceive the need for a project, such may be seen by local industrial and transportation interests, especially if they have close social connections with the Corps. One vehicle for these ties is the Water Resources Congress, whose more than seven thousand members include congressmen, army engineers, and contractors. Affiliated with the Water Resources Congress are fifty state groups, water and land development associations, and local government agencies.

Individuals or groups can ask elected representatives to obtain project feasibility studies from the Corps. Little effort is required on the part of the legislator to request such studies, which mark the beginning of yet additional study-authorization-funding cycles. While the Corps will not return favorable reports in all instances, the non-critical legislative approval procedure certainly permits the endorsement of environmentally marginal projects—the full evaluation of ecological costs is not encouraged, their calculation merely reducing the projected economic viability of any project. Hence, the Corps' finely negotiated social environment, which assures its institutional survival, may wreak havoc on the natural environment.

The civil works program, while satisfying the Corps' needs, has been a threat to other agencies. The Small Watershed Program of the Soil Conservation Service, originated in 1954, provides an example of how a program can be designed to protect one agency's clientele relationships from disruption by a second. The watershed program is a public works endeavor, on a smaller scale than the Corps', designed to prevent floods and to maintain basic soil productivity. Two students of the S.C.S.'s growth and development, R. Burnell Held and Marion Clawson, have noted that the genesis of the program lay in the increasingly active rivalry between the S.C.S. and the Corps, between 1944 and 1954, over development of upstream areas. The conflict was dampened with passage of the Watershed Protection and Flood Prevention Act of 1954, which enabled the S.C.S. to develop watershed projects for smaller watersheds while reserving larger watersheds for the Corps. The political ramifications of the S.C.S. program have been described as follows:

The program has also made sense for SCS, given the political milieu in which it has had to operate. The agency could hardly expect the support of farmers in its struggles against Corps encroach-
ment into rural areas, when the Corps could offer so much more favorable terms. In self-defense, therefore, SCS embraced the small watersheds idea. But it was perhaps more than a defense weapon; it also enabled SCS to build support among farmers for the whole range of conservation programs.

Though one may criticize the Small Watershed Program in general, one must also admit that it was generally no worse, and in some respects was better, than the flood prevention programs of the Corps of Engineers. As long as the latter exist, SCS and its supporters must seek to gain something equally good for their program; no political realist could expect anything else. 46

The emphasis on public works by the S.C.S. has, until recently, met largely with the same uncritical approval from Congress that greets Corps programs. While satisfying the needs of local economic interests and congressmen and helping the S.C.S. in achieving its goal of organization maintenance, it has also caused widespread environmental disruption. 47

These case studies empirically illustrate the importance of the quest for a negotiated environment. In attempting to assess the likelihood of future agency compliance with the NEPA's demand for ecologically innovative decisionmaking, the need for organization survival and the preservation of clientele relationships cannot be neglected. The NEPA, by requiring wide consultation and explicit consideration of hitherto neglected or underassessed environmental impacts, is a fundamental challenge to the comradely relationships that are the bedrock of agencies' negotiated environments. By requiring inter-agency consultation and a complete record of alternatives considered and environmental impacts weighed, the NEPA places the burden of proof on an agency to show that it has fully weighed all the environmental impacts of an action and that it has rigorously evaluated a multiplicity of alternatives. The standard operating procedures, the terms of reference which were the basis of past administrative decisionmaking, are no longer adequate, according to the NEPA, if they fail to include a thorough environmental evaluation. But because thorough studies may challenge the wisdom of many projects hitherto not subject to rigorous explicit environmental evaluation mandated by law, it is quite questionable whether agencies will, in good faith, conduct investigations which may threaten their welfare; the enjoining of several Corps of Engineers projects is

instructive in this regard.\textsuperscript{48} Even the requirement that analyses be filed with the CEQ, in the Executive Office of the President, provides little incentive for recalcitrant agencies. As the discussion below will indicate, the CEQ is ill-prepared to play the role of environmental ombudsman.

IV. THE CEQ

Title II of the NEPA is the synthesis of several proposals considered by Congress for an environmental advisory board. Since prior to congressional hearings on the subject, the President had established an inter-agency cabinet committee on the environment,\textsuperscript{49} the administration opposed the congressional proposals for a full-time advisory board, independent of the Cabinet and patterned after the Council of Economic Advisors.\textsuperscript{50}

The hearings revealed, however, that a CEQ in the form presently established would have decided advantages over an inter-agency council. Most importantly, it would have greater independence from congressional and clientele demands; it would be free to produce more telling critiques of agency policies. Moreover, while a norm of reciprocal non-criticism might exist in conferences of officials having vested program interests to protect, the CEQ would have no such restraining "territorial imperative"\textsuperscript{51}—while inter-agency meetings would tend to reach agreements based on a least common denominator solution, the CEQ would hopefully be a catalyst for substantial administrative change.\textsuperscript{52} Its potentially unpopular and controversial role was noted in the congressional hearings by the political scientist Lynton Caldwell, who noted that its members ought to be "exceptionally free from political ambition," for effective service on the Council would probably preclude subsequent election to public office.\textsuperscript{53}

The legislative history of the NEPA strongly underscores the primary role of the CEQ as confidential advisor to the President:

The Board's recommendations to the President are for his use alone, and his actions on their recommendations will depend on the


\textsuperscript{50} \textit{Id.} at 120.

\textsuperscript{51} The phrase "territorial imperative" is Stewart Udall's, \textit{id.} at 142.

\textsuperscript{52} \textit{Id.} at 120.

\textsuperscript{53} \textit{Id.} at 132.
confidence he places in the judgment of the persons he nominates to membership on the Board.\textsuperscript{54}

Yet there was some anxiety expressed that not having fixed terms for the advisors would hinder their frankness. Representative Henry Reuss proposed, for example, that members be selected for six year terms, for "there might be times in which the members of the Council should be insulated from Presidential pressure so they can speak up if they must . . ."\textsuperscript{55} As such a provision was not enacted, it must be acknowledged that the feared constraints on the Council's freedom to speak may well exist. As the Council of Economic Advisors does not publicly criticize executive economic programs,\textsuperscript{56} so too must it be assumed that the CEQ observes discreet public silence when it disagrees with executive policy.

Furthermore, the legislative history of the NEPA also supports the view that a project-by-project review and commentary by the Council is not implied by the Act:

[It is intended that the Board will periodically examine the general direction and impact of Federal programs in relation to environmental trends and problems and recommend general changes in direction or supplementation of such programs when they appear to be appropriate.

It is not the Committee's intent that the Board be involved in the day-to-day decisionmaking processes of the Federal Government . . . .\textsuperscript{57}

But this view is perhaps compromised by additional remarks directing the Council to publicly discuss environmental issues. The Interior Committee noted the on-going controversy concerning pesticide usage, remarking that the extent of the dangers from pesticides was often minimized or denied by government agencies despite competent scientists' warnings to the contrary. In a muddied environmental debate of this kind, the CEQ would hopefully present a clear, balanced analysis of the issues:

It is the committee's strong view that there needs to be some one place in government to which the public and the news media may turn for authoritative and objective information on particular environmental problems . . . . The Board could provide a useful and needed public function by reviewing all of the facts and furnishing competent judgment and advice on problems of this nature.\textsuperscript{58}

\textsuperscript{54} See S. Rep. 91-296, supra note 20, at 25.
\textsuperscript{55} Senate Hearings, supra note 21, at 66-67.
\textsuperscript{56} See C. Silverman, The President's Economic Advisors (1959); R. Cantembery, The President's Council of Economic Advisors (1961); E. Flash, Economic Advice and Presidential Leadership (1963).
\textsuperscript{57} See S. Rep. 91-296, supra note 20, at 25.
\textsuperscript{58} Id. at 24.
It follows, therefore, that if an executive agency provides an inadequate explanation of a pesticide licensing or spraying program in an environmental impact statement, the public could expect the CEQ to fully describe the program's true ecological costs.

A number of constraints operate however to restrain the Council from public ombudsmanlike activity. First, in indulging in public debate over specific projects, it violates its mandate to be confidential advisor to the President. Even though the citations above suggest that it may have two roles to play, its assumption of the public role may severely jeopardize its effectiveness in White House councils, staff meetings, and at the Office of Management and Budget. Second, the CEQ operates on a very small budget and has but eighteen professional staffers. Of these eighteen, only six comprise the federal impact evaluation staff. Since the Council receives approximately three hundred statements per month, and it has not hired any omniscient philosopher kings, it is difficult for it to rigorously evaluate the adequacy of all statements. Agencies know that in the average case they will not hear from the CEQ at all.

The important function of the CEQ is not so much its review of individual projects as its shaping of new legislation and its promulgation of broad policy proposals. Its main focus is not on "school-marming" the agencies, as one CEQ official put it, but on persuading the Congress to take significant legislative action to influence agency rules. Such a legislative focus is evident from the President's 1971 environmental program, which includes recommendations for a national land use policy, a power plant siting law, and comprehensive improvement in pesticide control authority.

Because its project evaluation takes place in private within the executive branch, the Council's impact on individual projects of questionable value is not totally clear. In the resolution of executive conflict, the environmental costs and benefits are weighed together with economic and political costs and benefits. In those instances where the non-environmental considerations tip the balance in favor of an ecologically questionable project, it is plausible that the courts will see fit to intervene in the administrative decisionmaking process.

59. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY (2nd annual report) at 359 (1971).
60. Interview with the author, October 14, 1971.
V. THE ROLE OF THE COURTS

It would be foolhardy to suggest that no decisionmaking reforms have derived from passage of the NEPA. But for all the reasons previously discussed, it would be equally absurd to suggest that administrative compliance has been, and can be expected to be, total. It cannot be forgotten, certainly, that successful litigation to assure agency compliance with previous, more delimited statements of environmental policy has pre-dated the NEPA by at least five years. In fact, in most of the recent lawsuits in which the NEPA itself was cited, it was invoked along with a large number of previously enacted statutes.

The role of the courts can be evaluated within a systems framework. Most importantly, the adversary process permits the rigorous evaluation of decisionmaking processes—agencies' development, communication, and evaluation of information. In addition, the availability of judicial relief promotes the inputting of environmental information to the administrative decisionmaking process—environmental groups know that the concerns they voice can only be ignored by agencies at the risk of suit. While agencies still have to anticipate the sanctions of congressional committees and clientele groups, their weight must be balanced against the legal sanctions that may be obtained by environmentalists. The ecology groups have become, in short, significant actors in the agencies' environments. The CEQ itself has recognized the importance of their legal actions:

[C]itizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation.

Two recent court decisions, *Environmental Defense Fund, Inc. v. U.S. Army Corps of Engineers* and *Calvert Cliffs' Coordinating Com-

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64. *Environmental Quality* supra note 59, at 155-156.

65. *Supra* note 3.
mittee v. Atomic Energy Commission," suggest that the courts can demand more than mere symbolic administrative compliance with the NEPA requirements. Agency procedures will have to be designed to assure maximum input of environmental information, and inputted data will have to be weighed in a non-arbitrary, non-capricious manner.

Obtaining Judicial Review: A Slight Digression. To use the courts, citizens must overcome various obstacles to judicial intervention in administrative action. First, it must be demonstrated that the case has been brought before the proper court. Second, it must be shown that the litigation is timely and that all administrative remedies have been exhausted.

Third, a decision must be reviewable. Section 704 of the Administrative Procedure Act (hereafter the A.P.A.) declares that:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

The Supreme Court, in Abbot Laboratories v. Gardner, held that courts should restrict access to A.P.A.-permitted judicial review "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." In Citizens' Committee for the Hudson Valley v. Volpe, the Second Circuit ruled that:

There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of "a broad spectrum of administrative actions," including those made reviewable by specific statutes without adequate review provisions as well as those for which no review is available under any other statute.

Fourth, and most importantly, plaintiffs must have standing to sue.

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66. Supra note 4.

67. For example, in responding to a suit challenging Tennessee Valley Authority contracts for strip-mined coal, the T.V.A. insists that the suit should not have been brought in the Southern District of New York. See, Natural Resources Defense Council, Inc. v. T.V.A., Civil No. 71-919 (S.D.N.Y., filed March 2, 1971).

68. In two challenges to the A.E.C.'s exclusion from hearings of evidence on non-radiological thermal pollution, courts ruled that the A.E.C.'s actions did not represent "final agency action." See, Thermal Ecology Must be Preserved v. A.E.C. 433 F.2d 524 (D.C. Cir. 1970) and Lloyd Harbor Study Group v. Seaborg, Civil No. 70-1253 (E.D.N.Y., filed April 2, 1971), 1 E.L.R. 20188. In Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971), part of the Sierra Club's case was dismissed because the organization had not used all administrative remedies available to it.


71. 425 F.2d 97, 102 (2nd Cir., 1970) (emphasis added).

72. For an oft-cited discussion of the standing question see Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970). In addition to meeting the require-
Significant changes in the traditional concept of standing have been a major factor in the plethora of environmental cases reaching the courts in recent years. *Scenic Hudson Preservation Conference v. F.P.C.* is the leading case cited in the literature on the liberalized rules of standing. In allowing this legal challenge to F.P.C. licensing of a power project, the court indicated that it was not necessary for a group to demonstrate economic injury in order to be granted standing:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspect of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be aggrieved parties under §313(b) [of the Federal Power Act].

Standing has also been granted to groups adjudged “aggrieved” under section 702 of the A.P.A. In *Road Review League, Town of Bedford v. Boyd*, the district court, after citing sections of the Federal Highway Act to the effect that administrative decisions must weigh the impact of roads on parks and historic sites, ruled that such laws, under the principles of *Scenic Hudson*, were sufficient to manifest Congressional intent that conservation groups would be considered aggrieved by agency action allegedly disregarding their interests. The court saw no difference in the meaning of “aggrieved” in the A.P.A. from its meaning in the Federal Power Act. This view was reinforced in the district court decision in *Citizens' Committee for the Hudson Valley v. Volpe*:

The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.

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73. Supra note 33.
74. Supra note 33, 354 F.2d 608 at 616, 1 ELR 20292 at 20294.
75. 5 U.S.C. § 702. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."
77. 23 U.S.C. § 134, 138; 23 C.F.R. § 1.6(a).
The most recent Supreme Court decision applicable to the standing question is *Association of Data Processing Service Organizations, Inc. v. Camp*, in which the Court pronounced two criteria which plaintiffs must meet to obtain standing:

[W]hether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.

[W]hether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

Under the criteria established in *Data Processing, Scenic Hudson*, and other decisions, environmental groups have successfully obtained standing to sue in the Second, Fourth, and District of Columbia Circuits. In the Ninth Circuit, however, the court has twice denied standing to national or local environmental groups. In *Alameda Conservation Association v. California*, the court commented:

The Association does not assert that any of its rights or properties are being infringed or threatened.

Standing is not established by suit initiated by this association merely because it has as one of its purposes the protection of the "public interest" in the waters of the San Francisco Bay. Although recent decisions have considerably broadened the concept of standing, we do not find that they go this far.

Similarly, the court decided in the Mineral King case, *Sierra Club v. Hickel*:

We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them.

As the latter case has been docketed for review by the Supreme Court, a new decision on standing, focused particularly on environmental cases, can be expected shortly.

collection of project impacts on, among other things, fish, natural resources, and recreational opportunities.

80. Id. at 152, 153.
82. 1 ELR 20097 at 20098, 2 ERC 1175 (9th Cir., Jan. 19, 1971).
The Gilham Dam Case. The district court decision in the Gilham Dam case sets a precedent for the rigorous evaluation by the courts of the adequacy of environmental impact statements; a thorough discussion of alternatives, benefits and costs is expected. In the words of the court:

At the very least, NEPA is an environmental full disclosure law.

The "detailed statement"... should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known possible environmental consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the § 102 statement should set forth these contentions and opinions, even if the responsive agency finds no merit in them whatsoever... The record should be complete. Then, if the decisionmakers choose to ignore such factors, they will be doing so with their eyes wide open.84

The Gilham Dam project had been authorized by Congress in 1958 and construction had begun in 1963. While two-thirds of the money for the project had been expended, construction had not begun on the dam itself, one of six proposed by the Corps for the region. Were the others to be completed, the Cossatot River, on which the dam was to be built, would be the last major free-flowing stream in the area.

The Environmental Defense Fund, with several other groups as co-plaintiffs, filed suit to enjoin further work on the dam. Among the laws cited as providing the basis for complaint were the NEPA, the Fish and Wildlife Coordination Act of 1934,85 the Wild and Scenic Rivers Act,86 and the fifth, ninth and fourteenth amendments to the Constitution. The court dismissed all but the NEPA as bases for action. The environmental groups were granted standing, with the court citing Data Processing, Scenic Hudson, Citizens' Committee for the Hudson Valley and other cases as precedents.

The decision was contained in a series of five memoranda issued over a period of four months. While no impact statement had been released prior to the court action, one was issued just after the suit was filed, on October 5, 1970, and a revised version was released on January 22, 1971. The court found both quite insufficient. It noted in particular that the statements did not adequately set forth all the environmental im-

84. 325 F. Supp. 728 at 759.
85. 16 U.S.C. § 661 et seq.
86. 16 U.S.C. § 1271 et seq.
pacts, all the adverse environmental effects, or all the irreversible and irretrievable commitments of resources engendered in the proposed action. Among the specific details lacking were (1) the "identification of existing 'food chains' in the area and a discussion of their importance and the effects of impoundment thereon,"87 and (2) a discussion of the effects of flow level fluctuations and impoundment on biological productivity and stability, on shoreline vegetation, and on quantities of downstream alluvial deposits. The court noted the plaintiffs' substantial evidence that the project would result in a downstream ecosystem that would be less diverse and less stable than that of the undisturbed stream.

The court was especially concerned with the lack of discussion of alternatives to the dam, particularly that of not disturbing the stream:

The most glaring deficiency . . . is the failure to set forth and fully describe the alternative of leaving the Cossatot alone. Furthermore, the statement does not adequately consider non-structural alternatives for flood control, such as flood plain management . . ., private or publicly subsidized insurance, or outright acquisition of the fee title to the land in the flood plain.88

The court could well have added that most of these alternatives, by their non-structural character, would not require Corps activity, and therefore were not in the organizational interest of the Corps to discuss.

The court noted, moreover, that it did not appear that methods and procedures had been developed by the Corps, in consultation with the CEQ, to assign a value to the Cossatot as a free-flowing stream, though testimony by an expert witness for the Environmental Defense Fund had suggested that such a valuation was possible. The court observed, furthermore, that there was an abundance of flat water (i.e. lake) recreation in the area, and that to continue the Cossatot as a free-flowing stream would be to retain some variety in the water and recreational resources of the region.89

The court stated that it was Congress' responsibility to monitor the validity of project benefit-cost analyses. It noted that the methods of calculating benefits and costs are "innumerable" and "esoteric," and that it did not believe it should substitute its judgment for Congress'.90 Similarly, in response to the plaintiffs' apparent complaint that the

87. 325 F. Supp. 728 at 748.
88. Id. at 761.
89. This would be supportive of the substantive NEPA goal of maintaining "wherever possible, an environment which supports diversity and variety of individual choice." 42 U.S.C. § 4331(4).
90. 325 F. Supp. 728 at 740.
Corps purported to justify the project by including purposes not contained in the original congressional authorization. The court indicated that it is solely Congress' prerogative to determine if a project is proceeding in accordance with its desires. These statements are reflective of the traditional philosophy of judicial restraint and as such, ignore the question of whether the Congress will indeed be moved to closely examine the changing justifications for previously authorized projects. Though not wishing to involve itself in benefit-cost evaluation, the court moved to assure that Congress, its acritical proclivities notwithstanding, would be provided with alternative views of the Corps' accounting practices. After describing one alternative analysis in particular, it stated that "... a critical analysis of defendants' economic claims by those opposing the project ... should be included in any complete impact statement."

The court noted again the exclusion of the "no dam alternative" when discussing the Corps' claims for water quality benefits. This section of the opinion is worth quoting in full, for it describes an incremental reasoning process which excludes a number of possible future alternatives:

It will be recalled that both impact statements claimed benefits for the project from "enhanced water quality" or "water quality control." Since the Cossatot in its present free-flowing state appears to be of very high quality, pure, and substantially free of pollution, the Court had some difficulty in understanding the defendants' position. It appears that the reasoning is as follows: After the construction of the dam, defendants believe that there will be increased economic and industrial development, with resulting population growth, especially in the area below the dam. This growth and development will, based on past experience, result in the pollution of the river in the future. Therefore, the dam is designed to store a certain quantity of water which may later be released to dilute the pollution and thereby enhance the water quality. This is the same type of "bootstrap" argument which the defendants use in one of their claims for flood control benefits: The dam will result in new economic and industrial development and population growth, which obviously will result in the construction of many new structures in the present flood plain, the value of which structures will then be protected from flood by the dam. Although the reasoning is circular, it is not without merit. It appears to the Court that the defendants are correct in believing that if the dam is constructed, then there will be increased eco-

91. Benefits can be inflated by changing or adding purposes.
92. 325 F. Supp. 728 at 754-755.
93. Id. at 761.
nomic and industrial development below the dam and, as a consequence, increased pollution and increased construction. But the Court does not believe that a proper claim for water quality benefits resulting from the dam can be made without at the same time including some statement with regard to the water quality "costs" which would result from the destruction of the Cossatot as a free-flowing stream.\textsuperscript{94}

Note that if the Corps were to advocate flood plain zoning in conjunction with dam construction, it might not be able to claim benefits for reduced flood damage. But, then, costs might exceed benefits and remove any economic legitimacy the project might have.\textsuperscript{95} Moreover, once zoning was considered in conjunction with the dam, it would follow logically that zoning alone might reduce damage without the added cost of destroying the Cossatot.

Furthermore, claims for water quality benefits from low-flow augmentation\textsuperscript{96} are questionable in the absence of a demonstration that such augmentation will be necessary. If alternative means of pollution control, such as secondary or tertiary treatment or recycling, are imposed on industries locating in the area,\textsuperscript{97} perhaps no such augmentation would be required. In short, the Corps had mentioned some, but not all, of the possible future alternatives and consequences. It is not surprising that those selectively included in the statement were supportive of the Corps' dam effort.

The court also dealt with the general question of applying the NEPA to on-going projects—those originated before the Act's passage.\textsuperscript{98} While not suggesting that the status of the work should be ignored in determining whether to proceed with the project, the court added, in words sure to be cited in many future decisions:

\begin{quote}
[The court] \textit{is} suggesting that the degree of completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA. . . . \textit{[A]}s the Court interprets NEPA, the Congress of the United States is intent upon requiring the agencies of the United States government . . . to objectively evaluate all of their projects, regardless
\end{quote}

\textsuperscript{94} \textit{Id.}
\textsuperscript{95} If costs exceed benefits, Congress will not approve a project.
\textsuperscript{96} Low flow augmentation refers to the seasonal release of impounded water when river levels are low. Such augmentation helps dilute the constant amount of polluting effluent entering a stream.
\textsuperscript{97} Requiring industries and towns to treat their own waste would be consonant with the generally accepted economic principle that those responsible for creating pollutants should shoulder the burden of their treatment, thereby reducing their cost to society.
\textsuperscript{98} \textit{See} discussion \textit{infra} p. 46.
of how much money has already been spent thereon and regardless of the degree of completion of the work.99

The Gilham Dam decision was one of the first extensive court discussions of an impact statement's contents. It demonstrates that the many consequences of an action ignored in agency decisionmaking systems can be identified and evaluated through the judicial adversary process. The court's continual references to the plaintiffs' expert testimony on ecosystem stability and diversity suggest that we can expect increased judicial use of thorough analyses of the natural systems consequences of agency actions.

Though it is unfortunate that the costs of assuring more rational environmental decisionmaking have to be borne by aggrieved environmental litigants, the marshalling of expert testimony on ecosystems, on benefits and costs, and on non-structural alternatives to agency projects should hopefully encourage agencies to avoid legal challenges by conducting thorough analyses themselves. While forcing Congress to weigh identified ecological costs is another matter entirely, at the administrative level there can be no excuse for a decision based on review of unjustly few alternatives. No longer is it legitimate for a statement to be merely a rationalization for a particular action. The level of satisficing behavior will have to be raised to the point where ecological impacts are routinely considered and critically weighed.

The Calvert Cliffs Case. Agency behavior within a particular structure of formal decisionmaking requirements was challenged in the Gilham Dam case. In the Calvert Cliffs case, in contrast, formal decisionmaking rules themselves were disputed. At issue were four sections of the AEC guidelines implementing the NEPA.100 The four guidelines actually served to exempt whole classes of agency action from the NEPA requirements.101 They were blatant violations of the letter and spirit of the law—they limited the number of on-going projects to which the Act applied and ignored the requirement that environmental factors be considered throughout the entire decisionmaking process.102

101. Before passage of the NEPA, the A.E.C. had successfully argued that it was not required to consider broad environmental impacts, though it recognized a mandate to consider the specific radiological hazards caused by its actions. State of New Hampshire v. A.E.C., 406 F.2d 170 (1st Cir. 1969), cert. denied, 395 U.S. 962 (1969).
102. The digest of the decision, 1 ELR 20346 at 20346, describes the rules and the court's findings concerning them:

(1) the AEC's refusal to independently review the nonradiological environmental impact of nuclear power plant operations upon which state or other federal agencies have already passed conflicts with NEPA's mandate to
Their mere promulgation itself illustrates the CEQ's inability to ensure that all agencies fully implement the Act.

The court's decision often reads like the sarcastic scolding of a naughty child by its father:

The period of the rules' gestation does not indicate overenthusiasm on the Commission's part.

...We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102(2)(C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity—mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? . . . NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy.103

The court emphasized that the NEPA's procedural guidelines "establish a strict standard of compliance" and are non-discretionary:

[All] of these Section 102 duties are qualified by the phrase "to the fullest extent possible." We must stress as forcefully as possible that this language does not provide an escape hatch for foot-dragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger.104

It was reiterated that there could be little excuse for non-compliance with the NEPA:

[The] Section 102 duties are not inherently flexible. . . . Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.105 [The] Commission's [action] seems based upon what it believes to be a pressing national power crisis. . . . Whether or not the spectre of a national power crisis is as real as the Commission ap-

the relevant agency to assess the complete environmental costs of its action on a case-by-case basis; (2) the AEC's failure to require hearing board review of nonradiological environmental factors unless affirmatively raised by outside parties or staff members violates the Commission's affirmative duty to consider environmental values at every stage of the decision-making process; (3) the AEC's refusal to consider nonradiological environmental factors at hearings officially noticed before March 4, 1971 violates NEPA's mandate that such factors be taken into account by each agency to the fullest extent possible from the time the act went into effect on January 1, 1970; (4) the AEC's refusal to consider alteration of plans, backfitting or construction halts for nuclear facilities which were granted construction permits prior to the effective date of NEPA but for which operating licenses have not yet been granted, so as to allow for interim modifications of these facilities consonant with environmental values, is inconsistent with the Commission's duty to fully consider action which will avoid environmental degradation.

103. 1 ELR at 20349, 20350.
104. Id. at 20348.
105. Id. at 20349.
parently believes, it must not be used to create a blackout of environmental consideration in the agency review process.\textsuperscript{106}

The decision here, as in the \textit{Gilham Dam} case, noted the importance of preparing detailed studies of impacts and alternatives so that outside observers could independently evaluate the environmental considerations:

\begin{quote}
[B]y compelling a formal “detailed” statement and a description of alternatives, NEPA provides evidence that the mandated decisionmaking process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own.\textsuperscript{107}
\end{quote}

NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a pro forma ritual. Clearly, it is pointless to “consider” environmental costs without also seriously considering action to avoid them.\textsuperscript{108}

The court made additional incisive comments regarding the importance of careful, critical analysis at all stages of the decisionmaking process. These comments moved an attorney for the plaintiffs to suggest that the “... language couldn’t have been better if the environmentalists had written the opinion themselves.”\textsuperscript{109} The AEC chose not to appeal.\textsuperscript{110}

Other Cases. Though the decisions in \textit{Environmental Defense Fund v. Corps of Engineers} and \textit{Calvert Cliffs' Coordinating Committee v. AEC} demand strict agency compliance with the NEPA, no generalizations concerning judicial interpretation of the Act can be made absent consideration of other NEPA cases. First, for example, it is still unclear to what extent the NEPA will be applied to ongoing projects. The District of Columbia District Court enjoined the Corps of Engineers' partially completed Cross-Florida barge canal,\textsuperscript{111} on which construction

\begin{flushleft}
\textsuperscript{106} \textit{Id.} at 20352-20353. \\
\textsuperscript{107} \textit{Id.} at 20348. \\
\textsuperscript{108} \textit{Id.} at 20356. \\
\textsuperscript{109} 3 \textsc{National Journal} 1925 (1971). In a statement to the nuclear industry three months after the decision, Dr. James Schlesinger, the new Chairman of the A.E.C., noted that from its inception the Commission had fostered and protected the industry, but that it was now time for the industry to solve its own problems. The \textit{New York Times} reported the speech in an article headlined, “AEC Shifts Role to Protect Public Interest.” (October 21, 1971, at 1, 23). \\
\end{flushleft}
began in 1964 (pre-NEPA), and the Arizona District Court enjoined a channel clearing project for which construction contracts were let in 1970 (post-NEPA).\textsuperscript{112} By way of contrast, the Oregon District Court decided that, since preliminary location decisions were made in 1967, the NEPA was not applicable to a power line project for which construction contracts were let during 1970!\textsuperscript{113} In sum, there is still considerable confusion as to when, in a sequence of decisions, implementation of the NEPA will be required by the courts.

Second, from the environmentalists’ perspective, much NEPA-based litigation has not been as successful as might have been hoped. The Supreme Court, and the District of Columbia Circuit and District Courts refused to enjoin the AEC’s project Cannikin, despite evidence that the applicable impact statement may have been quite insufficient.\textsuperscript{114} Also, the District of Columbia Circuit and District Courts refused to enjoin Army dumping of nerve gas into the sea,\textsuperscript{115} and the latter court upheld the adequacy of an Agriculture Department statement justifying a controversial pesticide-spraying program.\textsuperscript{116}

The vagaries of enforcement notwithstanding, a review of recent NEPA cases serves to suggest the range of agency decisions having environmental implications.\textsuperscript{117} While judicial review has been sought in the traditional controversies over dams,\textsuperscript{118} roads,\textsuperscript{119} and use of the na-

\begin{itemize}
\item[114.] The Court of Appeals, in particular, noted, “We are left with difficult questions about the validity of the A.E.C.’s environmental statement.” Committee for Nuclear Responsibility v. Seaborg, 3 ERC 1256 (D.C. Cir. Nov. 3, 1971).
\item[116.] Russell Train, Chairman of the CEQ, implicitly suggests in the following remark that all federal actions impact on the environment:
\begin{quote}
[I] don’t believe it will ever be possible to put all environmental responsibilities of the Federal Government into one agency. I believe that the... Ash Council [decided] that such an objective would be impossible because you would end up with all functions of the Federal Government in one department. \textit{Hearings on Environmental Data Bank before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries,} 91st Cong., 2nd Sess., at 148 (1970).
\end{quote}
\end{itemize}
tional forests,\textsuperscript{120} the courts have also been used to challenge funding of a prison facility by the Law Enforcement Assistance Administration,\textsuperscript{121} funding of an apartment building by the Department of Housing and Urban Development,\textsuperscript{122} and funding of a sewage treatment plant by the Environmental Protection Agency.\textsuperscript{123} Also, under the NEPA, oil company subsidiaries have challenged federal termination of helium production contracts,\textsuperscript{124} and detergent manufacturers have protested promulgation of federal phosphate detergent labeling standards.\textsuperscript{125}

\section*{VI. CONCLUSIONS}

The sheer diversity of the NEPA cases indicates the large number of agency decisionmaking systems to which the Act can be held applicable—yet it is still too soon to render a general verdict on the NEPA's administrative and judicial implementation. Administrative compliance with the act is influenced by agency structures, values, and maintenance requirements. The CEQ may sometimes overcome administrative reticence, but it is difficult to obtain a precise measure of its success. While two cases demonstrate how the courts can vigorously enforce the Act, a brief overview of other NEPA cases suggests that judicial relief will not be unhesitatingly granted.

Because of aggressive citizen initiatives, agencies will, hopefully, compile more complete records of their projects' environmental implications. In those instances where ecological consequences have been exhaustively researched, and are expected to be grave and extensive, perhaps agencies will reconsider committing themselves to a projected course of action. But if environmental ends are continually subordinated to other ends, then the next generation will have, if nothing else, a highly detailed record of how this generation systematically ravaged the environment.

\textsuperscript{122} Goose Hollow v. Romney, Civil No. 71-528, 3 ERC 1087 (D. Ore., filed Sept. 9, 1971).
\textsuperscript{123} Gibson v. Ruckelshaus, Civil No. 5255, 1 ELR 20337 (E.D. Tex., filed March 1, 1971).
\textsuperscript{125} Lever Bros. Co. v. F.T.C., 2 ERC 1648, 1 ELR 20185 (D. Me. 1971). The district court denied an injunction. The manufacturers then moved for an injunction pending appeal which was denied by a single judge in the First Circuit Court of Appeals, 2 ERC 1651, 1 ELR 20328 (1st Cir., Apr. 20, 1971). The appeal was apparently dropped before hearing by the full court.