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# lake powell research project bulletin

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a case analysis of  
policy implementation:  
the national environmental  
policy act of 1969

HANNA J. CORTNER

National Science Foundation  
Research Applied to National Needs

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LAKE POWELL RESEARCH PROJECT BULLETIN

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IN THE LAKE POWELL REGION

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A CASE ANALYSIS OF POLICY IMPLEMENTATION:  
THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

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Tucson, Arizona 85721

May 1975

## LAKE POWELL RESEARCH PROJECT

The Lake Powell Research Project (formally known as Collaborative Research on Assessment of Man's Activities in the Lake Powell Region) is a consortium of university groups funded by the Division of Advanced Environmental Research and Technology in RANN (Research Applied to National Needs) in the National Science Foundation.

Researchers in the consortium bring a wide range of expertise in natural and social sciences to bear on the general problem of the effects and ramifications of water resource management in the Lake Powell region. The region currently is experiencing converging demands for water and energy resource development, preservation of nationally unique scenic features, expansion of recreation facilities, and economic growth and modernization in previously isolated rural areas.

The Project comprises interdisciplinary studies centered on the following topics: (1) level and distribution of income and wealth generated by resources development; (2) institutional framework

for environmental assessment and planning; (3) institutional decision-making and resource allocation; (4) implications for federal Indian policies of accelerated economic development of the Navajo Indian Reservation; (5) impact of development on demographic structure; (6) consumptive water use in the Upper Colorado River Basin; (7) prediction of future significant changes in the Lake Powell ecosystem; (8) recreational carrying capacity and utilization of the Glen Canyon National Recreational Area; (9) impact of energy development around Lake Powell; and (10) consequences of variability in the lake level of Lake Powell.

One of the major missions of RANN projects is to communicate research results directly to user groups of the region, which include government agencies, Native American Tribes, legislative bodies, and interested civic groups. The Lake Powell Research Project Bulletins are intended to make timely research results readily accessible to user groups. The Bulletins supplement technical articles published by Project members in scholarly journals.

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## ABSTRACT

This Bulletin discusses several factors that affect the implementation of the National Environmental Policy Act (NEPA) of 1969. On the whole, compliance with NEPA on the part of federal agencies has been begrudging and less than complete. Barriers and restraints have also discouraged the Council on Environmental Quality, the Office of Management and Budget, congressional oversight committees, and private interest groups from taking a leading role in implementation of NEPA. A number of factors, however, including the frequent resort to litigation by environmental groups, have encouraged the federal courts to be aggressive participants. To the extent that implementation of NEPA requirements has been achieved, it has largely been achieved through judicial ac-

tivity. Nevertheless, judicial activism has serious limitations when it serves as the primary agent for the implementation of policy. In the case of NEPA, two limitations are already apparent. First, the emphasis by the courts on strict adherence by the agencies to the procedural requirements of NEPA has overproceduralized NEPA. Second, judicial reluctance to consider the substantive merits of agency decisions, or to enforce compliance with NEPA's substantive policy declarations, has permitted agencies to avoid substantive reform in their decision-making processes. As a result, this essay concludes that a significant gap exists between the statutory promise of NEPA and its actual policy performance.

## FOREWARD

The Political Science Subproject of the Lake Powell Research Project has been investigating how the requirement for preparation of environmental impact statements under the National Environmental Policy Act (NEPA) of 1969 has affected channels of communication in decision-making for management of energy resources in the Lake Powell region. As a prelude to research focused on the specific geographical region and the issue of energy development, the Subproject has surveyed the literature discussing NEPA's implementation. The bibliographic material provides the necessary background and framework for research on specific problems in the Lake Powell region.

The following essay is a by-product of the initial bibliographic search made by the Subproject. Drawing from the NEPA literature, the essay examines a number of

factors which have been identified as affecting the implementation of NEPA. In addition, some conclusions are presented about the impact of NEPA upon agency actions and the decision-making process. These conclusions will serve as some initial hypotheses for the specific study of decision-making concerning the energy resources of the Lake Powell region.

A large number of interest-group members and public officials have monitored the promise and progress of NEPA since its passage. We hope that argument and conclusions presented here will generate further questions and debate.

Helen Ingram  
Principal Investigator  
Political Science II Subproject

# A CASE ANALYSIS OF POLICY IMPLEMENTATION: THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

## INTRODUCTION

Policy adopted by the legislative branch is not self-executing. Administrators must apply policy to problem. In so doing they exercise discretion as to how and to what extent they fashion their actions to comply with the statutory provisions. The discretion exercised by administrators varies from policy to policy. For any particular policy, the availability and utilization of discretion is conditioned by internal agency factors and by external patterns of support and pressure. Because of these interactions in the administrative system during the implementation process, actual policy impacts may differ significantly from the legislative articulation of goals and objectives.<sup>1</sup> This essay summarizes a number of factors that affect the implementation of the National Environmental Policy Act (NEPA) of 1969.<sup>2</sup> The findings are synthesized from the literature on NEPA that treats the statute's impact upon environmental decisions and the process of decision-making.

Enactment of NEPA established a national policy on the environment. Recognizing the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," NEPA declares it the continuing policy of the national government "to create and maintain conditions under which man and nature can exist in productive harmony..."<sup>3</sup> The congressional sponsors of

NEPA believed it would supplement "existing, but narrow and fractionated, congressional declarations..."<sup>4</sup> and would provide a "more orderly, rational, and constructive Federal response to environmental decision-making."<sup>5</sup>

In addition to establishing a national environmental policy, the congressional sponsors wanted to reform administrative decision-making. They recognized that natural resource development decisions are often made solely on the basis of technical and economic considerations. Environmental factors receive short shrift during agency planning and decision-making. Accordingly, the sponsors designed NEPA to provide the federal agencies with the mandate and responsibility to consider the environmental consequences of their proposed actions.<sup>6</sup> The sponsors also recognized that the decision process is incremental, i.e., choices are made from a limited number of alternatives which differ only slightly from past decisions. They saw dangers in making natural resource decisions in "small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."<sup>7</sup> Acknowledging the need to "break the shackles of incremental policy-making in the management of the environment,"<sup>8</sup> they designed NEPA to create a decision-making mode which encourages consideration of a wide range of alternatives and their long-range environmental consequences.

But the sponsors of NEPA wanted the statute to be more than a mere declaration of vague and ignorable environmental goals and tenets of reform. They wanted to assure that the policy declarations would be "capable of being applied in action."<sup>9</sup> Hence, eight "action-forcing" provisions were included in Section 102(2) to spell

out how federal agencies would go about incorporating the mandates of the environmental policy into their decision-making. Of the eight provisions, the most important, controversial, and far-reaching has proven to be the environmental impact statement requirement contained in Section 102(2)(C).<sup>10</sup>

The NEPA literature surveyed suggests that on the whole the agencies have reluctantly and incompletely complied with NEPA's requirements. The literature also demonstrates that while there are barriers and restraints which discourage the Council on Environmental Quality (CEQ), the Office of Management and Budget (OMB), the Congress, and private interest groups from playing a significant and direct role in policing agency implementation, a number of incentives encourage the federal courts to assume an aggressive role. Nevertheless, as a tool for executing the general policy objectives and action-forcing provisions of NEPA, judicial activism has serious limitations. Taken together, the essay concludes, the interaction of these factors in NEPA's implementation system accounts for the gap between NEPA's statutory promise and its policy performance.

### SECURING IMPLEMENTATION: AGENCY REACTIONS

The federal agencies' implementation of NEPA, and especially their response to the requirement in Section 102(2)(C) for the environmental impact statement (EIS), has been begrudging and less than complete. Evidence contained in General Accounting Office (GAO) reports, congressional hearings, and scholarly research supports this

rather pessimistic conclusion about NEPA's effectiveness during its first five years of existence.

At the request of the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant Marine and Fisheries Committee, the GAO reviewed the efforts of seven agencies and concluded that agency implementation was neither systematic nor uniform.<sup>11</sup> The agencies did not (1) complete the EIS in time to accompany proposals through all levels of agency review, (2) finish the EIS in time to be utilized during the early stages of decision-making, or (3) review the results of the environmental protection plans delineated in the EIS to see if they were effective and whether they materialized as anticipated.<sup>12</sup> Consequently, the EIS was not being utilized as an integral component of the agencies' decision-making processes. In a companion report, the GAO evaluated the adequacy of six selected 102 statements.<sup>13</sup> The GAO found that insufficient attention to (1) environmental impacts, (2) alternatives and their environmental impacts, and (3) the comments of reviewing agencies, limited the usefulness of the EIS in agency decision-making.<sup>14</sup>

The findings of the GAO have been substantiated by other studies. Leonard Ortolano and William Hill studied the first 234 EIS prepared by the Corps of Engineers and concluded that the statements were "less than adequate..."<sup>15</sup> A study team at the University of Colorado reviewed approximately 200 randomly selected impact statements and found that even when the statements stipulated adverse environmental effects, the agencies did not abandon any project nor make any major changes in the proposed plans. The team suspected that by the time the

statements were prepared, the projects had already reached the stage at which it was too difficult to modify or reverse plans.<sup>16</sup> After reviewing 1,282 EIS abstracts from 51 agencies, Gordon A. Enk concluded that the 102 statements were being utilized as project justifications, not as decision-making instruments.<sup>17</sup>

During congressional hearings, the agencies have repeatedly indicated their displeasure with the new demands being made of them. The agencies argue that NEPA's procedural mandates reduce the agencies' capacities to discharge their duties. While praising the goals and objectives of NEPA's policy declarations, they unhesitatingly point out areas in which actual conformance with NEPA requirements creates difficulties. They complain that NEPA's procedures are too costly, time-consuming, inflexible, cumbersome, and detailed. Compliance, the agencies posit, results in unreasonable and unnecessary delays. To alleviate these burdens, amendment is advocated. Excerpts of testimony of two agency heads during Senate hearings illustrate this response. Secretary of the Interior Rogers C. B. Morton indicated that while he was against any major substantive amendments which could alter the purposes of NEPA, he would encourage the Congress to address itself to NEPA's procedural and mechanical aspects.<sup>18</sup> The chairman of the Atomic Energy Commission (AEC), Dr. James Schlesinger, declared:

NEPA has resulted in the rapid infusion into the governmental decision process of the full range of environmental considerations. There is no question in my mind with regard to the desirability of this infusion, or that NEPA's impact has contributed to

improved decision-making overall. As far as the AEC is concerned, the interests of the environment have been well served by NEPA...<sup>19</sup>

Later Schlesinger noted that a "problem that has arisen...is the overproceduralization of NEPA, or rigid proceduralization."<sup>20</sup> The chairman then proceeded to specify a number of problems that the AEC had encountered as a consequence of the "misplaced concreteness of the environmental statement."<sup>21</sup> Asked if he were suggesting the possibility of amending legislation, Schlesinger replied, "Yes."<sup>22</sup> The procedural and mechanical aspects that Morton and Schlesinger found objectionable are the heart of NEPA--the action-forcing provisions of Section 102. As the testimony of the two administrators demonstrates, the agencies do not repudiate the innovative spirit of NEPA, only its letter.

Another way agencies circumvent implementation is by refusing to recognize the amount of change which NEPA mandates. NEPA is interpreted as requiring only minor adjustments in agency procedures. An official of the Department of Transportation (DOT), for example, testified during Senate hearings that NEPA imposes only a minor procedural requirement. NEPA, the official explained, does not represent a departure from the agency's previous responsibilities for and practices of considering environmental factors during decision-making.<sup>23</sup> Richard N. L. Andrews found that the Soil Conservation Service (SCS) made the same response to NEPA.<sup>24</sup> These perceptions and attitudes function to reduce the number of changes the agencies must make in response to the new law. They permit the continuation of the agencies' previous practices and policies.

Finally, limited agency perceptions about the functions of NEPA tend to narrow the range of behavior which constitutes compliance. The agencies view the EIS, for example, as an informational product. It is simply one among the many studies and compilations of data on various aspects of the proposed project. The EIS is not viewed as a decision document.<sup>25</sup> The preparation of the EIS is a discrete agency function, a necessary step before the agency can legally proceed. Thus interpreted, NEPA procedures do not compel reform in agency decision-making. Decisions made on the basis of environmental considerations are not required.

A number of analysts have looked within the decision-making process in order to explain why the agencies have been so reluctant to implement NEPA. Steven B. Fishman contends that established policies, procedures, programs, and philosophy limit agency responsiveness to any new environmental policy.<sup>26</sup> NEPA demands innovation, creativity, and adaptation, all of which involve the risk of failure. Since failure threatens achievement of a basic administrative goal (institutional survival) an agency will cling to the patterns which in the past have proven successful.<sup>27</sup> Hence, the agencies' public presentations will be praise for NEPA's policy goals, but the administrative reality will be one of least effort.<sup>28</sup>

Richard Liroff also points to the importance of institutional survival and organizational maintenance. He argues that in order to secure organizational well-being, each agency establishes predictable patterns of relationships with its clientele--a "negotiated environment."<sup>29</sup> An agency will not willingly engage in behavior which threatens to disrupt these ba-

sic institutional relationships. It prefers instead to exhibit behavior which reinforces and preserves its negotiated environment.

The quest for institutional survival is also linked to an agency's statutory mission as that mission is defined by Congress. An agency that successfully performs its mission can look forward to continuing and expanding support for its services. NEPA asks agencies to criticize their own programs and to evaluate and suggest alternatives outside their purview. It expects agencies to question the very missions that are the basis for their existence. For this reason, argues the chairman of the Administrative Conference of the United States, Roger C. Cramton, an agency's propensity to fulfill its mission will always prevail. To the extent "NEPA has an effect, it is on the details of the plant rather than on the fundamental question of do we have plants at all."<sup>30</sup> NEPA is unlikely either to reverse a project plan or to result in major modifications in agency programs even though they cause environmental disruption.

Like the foregoing authorities, Joseph Sax is pessimistic about NEPA's ability to promote environmentally innovative thinking. He sees the explanation for NEPA's failure in certain behavioral "rules of the game" that continue to operate in spite of NEPA's new procedural reforms.<sup>31</sup> According to Sax, the agency's operational responsibility makes it choose the certain solution over any risky unknown alternative. This solution is usually the one which offers the most certain opportunity for congressional funding. Agencies are politically sensitive, and therefore attempt to avoid alienation of friends and constituencies. A bureaucratic "adhesion syndrome" induces agencies

which may be involved in approving or reviewing another agency's proposal to give their support and assent. Finally, a "don't bite the hand that feeds you" maxim makes it highly likely that the solution preferred by the agency is one which will not be challenged by staff or hired professional consultants. Sax concludes that these behavioral institutional patterns "make clear that, as presently structured and enforced, NEPA will not lead to significant self-reform by agencies."<sup>32</sup>

Structural characteristics of a bureaucratic institution also affect the agencies' implementation of NEPA. In his comparison of the water resources development programs of the Corps of Engineers and the SCS, Andrews finds differences in the agencies' response to NEPA attributable, in part, to the internal differences in bureaucratic organization. The Corps, concludes Andrews, was initially more responsive to NEPA than to the SCS because "it is a larger agency with a more sophisticated staff; because the broader scope of its activities leaves more flexibility to change priorities without threat to its organizational survival; and because it builds larger projects whose budgets can more easily accommodate the expense of additional environmental studies."<sup>33</sup> Deficient in these organizational resources, the SCS's adaptation to the NEPA changes was more difficult and more restrained. Further, notes Andrews, the stronger vertical command and communications system of the Corps allows it to transfer more easily new mandates to the field and to review field compliance.

Helen Ingram and Richard Liroff also emphasize the importance of an agency's communication system. Examining the effect NEPA procedures have had on altering

the channels of communication in environmental decision-making, Ingram enumerates and discusses a number of factors that affect what information is generated and transmitted to decision-makers and what information they actually take into consideration.<sup>34</sup> NEPA's new procedures, she concludes, have not been sufficient to alter the basic restraints which incremental decision-making imposes upon channels of communication. Liroff views the agency's basic organizational structure as a restricted communications system which discourages new patterns of information distribution and processing, and which reinforces the old habits of incremental decision-making.<sup>35</sup> Incremental decision-making, the two authors maintain, enables decision-makers to search for information which is consistent with their perceptions, attitudes, beliefs, and goals and to filter out information which is not.

The selective perception which incremental decision-making reinforces also affects the processing of information. It narrows the types and numbers of alternatives considered and the permissible range of choice. The ingredients necessary for the long range, full option, rational decision-making that NEPA reform requires are absent.

Both behavioral and structural institutional variables affect agency reactions to NEPA. In sum, these characteristics include: the bureaucratic organization's constricted communications structure, and the flow and utilization of information; the organization's basic quest for institutional survival; its statutory mission responsibilities and the financial incentives to perform that mandate; its negotiated accommodations with clientele groups; predictable support from staff, consultants, and sister agencies; and

structural organizational capabilities such as size, budget, and staff competencies. Although there may be variances among agencies, the agencies have generally been resistant to change.

## SECURING IMPLEMENTATION: THE ROLE OF EXTERNAL ACTORS AND ISSUES

Despite internal pressures discouraging agency implementation, actors and issues in the agencies' external environment can often affect the scope and direction of agency implementation. For assuring that NEPA's policy objectives and action-forcing procedures are implemented, congressional oversight committees, the courts, CEQ, OMB, and private-interest groups might be expected to play vigorous and aggressive roles. Yet, except for the courts, these political actors have not played an active role in NEPA's implementation.

The CEQ, established by NEPA's Title II, lacks both the statutory authority to enforce agency compliance and the inclination to forge an aggressive oversight role for itself. The CEQ, under Executive Order,<sup>36</sup> issues guidelines to federal agencies that define procedural compliance. The CEQ has been most effective in persuading agencies to adopt voluntarily its guidelines and in reviewing 102 statements in order to determine weaknesses in agency procedures. However, the CEQ's oversight role is limited because the CEQ does not have the authority to veto actions of agencies or to compel an agency to adopt its guidelines.<sup>37</sup> Unable to sanction the agencies for non-compliance, the CEQ,

notes Liroff, has tacitly relied upon environmental litigants and the courts to accomplish what it could not.<sup>38</sup>

Another area where the CEQ has been active is in its role as confidential adviser to the President. The CEQ influences the agencies to the extent it persuades the President to follow its advice.<sup>39</sup> However, Liroff argues, by foregoing close ties with the White House, the CEQ has had to forego strengthening its role as public ombudsman. Accordingly, it has refrained from publicly releasing comments on impact statements (except upon request), openly criticizing agency compliance, or engaging in public debate over any specific project.<sup>40</sup> Moreover, by choosing the role of presidential adviser, the CEQ is subject to changing policy direction and priorities in the White House. While the Nixon administration initially demonstrated a strong commitment to NEPA and environmental initiatives,<sup>41</sup> it later advocated a reversal in some environmental policies, a course now being adhered to by the Ford administration. Assuring an adequate and reliable supply of energy and promoting economic growth, it is argued, must have priority. With this shift in presidential thinking, the possibilities that the CEQ can exert a strong push for agency implementation of NEPA's environmental priorities have lessened.

During NEPA's formulative stages, there were indications that the OMB would play an important role in securing agency compliance. An enacted NEPA did not explicitly give OMB such authority. Nevertheless, since Section 102(2)(C) requires agencies to file EIS on "proposals for legislation" as well as "other major Federal actions," it was expected that OMB through its legislative clearance

authority to coordinate and scrutinize the agencies' legislative proposals would monitor agency compliance with the legislative proposal aspect of the 102 requirement. The OMB, however, has eschewed making NEPA environmental clearance part of its general clearance activities. Except for water resources projects, it has not required agencies to submit impact statements prior to obtaining legislative clearance. Very few EIS on legislative proposals have been filed.<sup>42</sup> Noting the absence of OMB supervision, the GAO concluded that the "agencies have little incentive to prepare such statements in order to receive OMB's legislative clearance."<sup>43</sup>

Messages from congressional oversight committees are conflicting. One of the sponsors of NEPA, Representative John Dingell (D., Michigan), has been an ardent supporter of NEPA, using his chairmanship of the Fisheries and Wildlife Subcommittee of the Merchant Marine and Fisheries Committee to monitor agency compliance. During oversight hearings held in 1970 and 1972, Dingell's subcommittee prodded the agencies to do more to comply fully with NEPA, and encouraged the CEQ to do more toward improving agency procedures.<sup>44</sup> The two GAO reports previously discussed were part of the efforts of the Dingell subcommittee to measure the extent to which the agencies were incorporating NEPA into their decision-making.

The aggressiveness of Dingell and his subcommittee, however, has been counterbalanced by other congressional committees. Members of the Senate Interior and Insular Affairs Committee, NEPA's parent committee in the Senate, have become increasingly concerned about court decisions requiring strict NEPA compliance. They have supported amendments and agency

exemptions. In 1972, for example, Senator Howard Baker (R., Tennessee) concluded oversight hearings which examined the impact of NEPA and NEPA-related court decisions upon federal regulatory and licensing activities. During the hearings Baker requested each federal agency to submit for the record a statement identifying "each specific proposed federal action (including the proposed issuance of a license or permit), if any, where, in the judgment of the cognizant agency, the action has been delayed unreasonably and solely because of NEPA and where, in the agency's judgment, the public interest would better have been served by something less than full compliance with NEPA."<sup>45</sup>

During 1972, congressional backlash reached a point where the environmentalists formed an ad hoc "Save NEPA" coalition to lobby against a spate of proposed NEPA amendments.<sup>46</sup> Representative Dingell conceded that NEPA had lost considerable congressional support. He asserted that if NEPA were presented anew, it could not pass Congress, and even if it did, Section 102 would not be included.<sup>47</sup> Dingell supported two bills affecting NEPA, claiming this support was a strategy to "ward off more substantive changes in the NEPA."<sup>48</sup> While NEPA was eventually saved from outright amendment, the Congress did partially exempt the EPA and the AEC from NEPA.

Another committee hostile to NEPA is the Subcommittee on Agriculture, Environmental and Consumer Protection of the House Appropriations Committee chaired by Representative Jamie Whitten (D., Mississippi), who is well-known for his opposition to environmental protection legislation and programs.<sup>49</sup> The Whitten subcommittee controls the purse strings of the EPA and the CEQ, and both agencies

must carefully tailor their actions to please their funding source. The administrator of the EPA, Russell Train, for example, acknowledged that Whitten was the primary influence behind his decision to reverse the EPA's position that since it is an environmental regulatory agency it is not required to file 102 statements on the impact of its activities on the environment.<sup>50</sup> Whitten's pressures can be interpreted as a move to undermine both the EPA and NEPA. Whitten's action demonstrated how the congressional appropriations process affects the implementation of policy. It also implied to the agencies that congressmen who control the purse strings of EPA and CEQ are not apt to use their influence to push for more stringent NEPA implementation.

Finally, the congressional oversight committees of many agencies are more concerned about the agencies' performance of their mission than about their compliance with NEPA. As Cramton noted, "other congressional committees are pushing agencies to pursue their specific missions, and Congress is appropriating large sums of money for those missions to be carried out."<sup>51</sup> Regardless of the potential environmental damage, an agency is more likely to be responsive to its own oversight committee than to NEPA's oversight committees.

A few voices in Congress urge a stronger compliance effort from the agencies. Other sectors of Congress, however, are beginning to accede to agency demands and to support lessening the burdens of NEPA. Finding a considerable measure of support in Congress for something less than full NEPA compliance, the agencies do not have to be totally responsive to

the pleadings of the Dingell subcommittee for improvements in implementation.

A less-than-unified body of public opinion supportive of environmental protection also enables the agencies to ease up on their application of NEPA. In the late 1960s the environmental crisis was a dominant public issue. NEPA symbolized the growing public recognition that environmental quality was a public problem requiring governmental action. Shortly after the enactment of NEPA, however, the environmental crisis began to give way to the energy and inflation crises. The energy issue, for example, has precipitated charges that NEPA is responsible for delaying vitally needed energy projects. Modifications in environmental protection legislation, including NEPA, are more frequently and forcibly being espoused as necessary preventive action to assure that future energy demands will be satisfied. The levels of support that NEPA's clientele (environmentally concerned citizens and groups) have been able to muster are slowly eroding. In this climate of uncertain and changing public opinion, the agencies appear hopeful of finding public acquiescence, if not support, as they resist fully embracing environmental values and continue to advance projects which are environmentally disruptive.

The economically based interest groups (miners, farmers and ranchers, loggers, utilities, and business groups) have not been ardent supporters of NEPA. Many of their activities depend upon the federal government for grants, contracts, permits, and licenses, which are now the "major federal actions" that are subject to NEPA's scrutiny. The economically based interest groups do not like the obstacles

NEPA places in their path.<sup>52</sup> These interest groups are the agencies' clientele, integral components of the agencies' negotiated environments. They have made access to the agencies routine, and agencies often seek out their help. They exert considerable influence in agency decision-making,<sup>53</sup> and their opposition to NEPA contributes to and reinforces the agencies' unhappiness with NEPA.

Environmentalists, on the other hand, often are not part of the agencies' negotiated environment. Environmentalists often articulate policy demands directly contrary to the agencies' missions, and they sometimes advocate actions which threaten the agencies' institutional survival. Administrators do not as a general rule seek their counsel. Access is not routine. Their demands and support do not carry the same weight with decision-makers.<sup>54</sup> Hence, their encouragement and support for an aggressive implementation effort, especially in the absence of support and in the presence of opposition by other salient actors in the agencies' external environment, largely go unheeded. Unable to persuade directly decision-makers to comply with NEPA, the environmentalists litigate. In this respect, the environmentalists are like many other groups who "depend upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged--that is, they cannot attain their goals in the electoral process, within elected political institutions, or in the bureaucracy. To succeed in the pursuit of their goals they are almost compelled to resort to litigation."<sup>55</sup> And, in the case of NEPA, the courts in turn are interposing their authority, and are protecting and advancing the interests of the environmentalists.

## SECURING IMPLEMENTATION: FACTORS ENCOURAGING JUDICIAL ACTIVISM

Several factors have encouraged the courts to take a leading role in implementation of NEPA. The first is the ambiguous, indeterminate language of the Act. Judge Feinberg noted that NEPA is a "statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing."<sup>56</sup> Uncertainties in statutory construction usually present many litigable issues, and NEPA has more than its share of indefinite language. One analyst writes, "By declaring the national environmental policy in broad and general terms that invite interpretational dispute, NEPA is fashioned in a manner calculated to breed litigation."<sup>57</sup>

As statutory construction cases arrive at the courts, the courts usually use two approaches to settle the disputes.<sup>58</sup> The first approach, "argument via plain meaning," focuses upon the literal meaning of the statute, while the second approach, "argument via legislative history," looks beyond what the law says to determine what its framers meant. In NEPA's case, the "plain meaning" is not readily apparent. Consequently, the first adjudicatory approach offers little assistance, nor does the approach through legislative history.

NEPA passed Congress without accumulating the extensive legislative record one would expect from such a landmark piece of legislation.<sup>59</sup> Section 102, for example, was not added until the Senate Bill was being readied to be sent to conference. At the request of Senator Henry M. Jackson (D., Washington), two Senate Interior and Insular Affairs Committee staff members, counsel William J. Van

Ness, Jr., and professional staff member Daniel A. Dreyfus, drafted the initial version of Section 102. Dreyfus noted that "there wasn't much wrangling in the [conference] committee" over the language of Section 102, and although the staff attempted to generate public interest in the provisions, there was a "gross lack of appreciation for the significance of that language."<sup>60</sup> Floor debate in each house on the conference report was minimal, and the report was passed by a simple voice vote. Most importantly, little was said about how NEPA's action-forcing provisions were to be enforced.<sup>61</sup> Dreyfus discussed the difficulties of determining the congressional intent in a National Journal interview. The Journal reports:

"The trouble is," said Dreyfus, "when you say, 'What was the congressional intent?', no one of the 535 Members of Congress has more right than any other to say what it meant."

Dreyfus said that since he has no vote, his opinion counts for even less. But he said he had expected the environmental-impact statements of federal agencies to be brief, general statements averaging about two pages in length.<sup>62</sup>

The overall paucity and inconclusiveness of data on congressional intent, interpretation, and enforcement expectations is a second factor which encourages the courts to imprint NEPA with their own interpretations.

Unassisted and unrestrained by either NEPA's language or its history, the courts have considerable interpretive latitude. The inapplicability of the traditional judicial standards, in cases involving statutory construction, grants the courts an extra measure of discretion to be applied in NEPA cases. However, judicial discretion can operate in both directions. The courts can refuse to recognize a justici-

able issue, they can throw the problem back to the agencies for resolution, or they can narrowly construe the statute. Over the past five years the courts have rejected these options, choosing instead to plan an aggressive role by entertaining challenges to agency interpretation of the statute and recognizing that NEPA contains a broad range of judicially enforceable duties. Frederick Anderson suggests why the courts choose to pursue the latter course. According to Anderson, the "courts' leading role in requiring compliance with NEPA may be traced in large measure to their current willingness to review all agency action more closely than they did only a few years ago."<sup>63</sup> Judicial receptivity to NEPA can consequently be viewed as part of a general evolutionary trend in judicial decision-making. In accepting NEPA cases and in reviewing the appropriateness of agency action in regard to NEPA, the courts are not engaging in unprecedented behavior. The expanding role of the courts in judicial review is a third factor which enables them to assume an active role in NEPA implementation.

Fourth, NEPA itself expands the content of the law which the courts can apply to agency behavior. The foremost authority on administrative law, Kenneth Culp Davis, summarizes the changes:

NEPA calls into play many basic principles of administrative law. It does not break or bend any of them, but, like a magnet, it applies a new force. NEPA teaches a good lesson about delegation. It seems to make reviewable some action that would be unreviewable without NEPA. It introduces an unfamiliar problem about scope of review. Some administrative action that has never been subject to a requirement of a statement of findings and reasons is pulled into that requirement, and some information must be disclosed under NEPA that is exempt from required disclosure under

the Information Act. NEPA provides new testing for emerging ideas about fair informal procedure and for the most difficult portion of the problem of requirement of opportunity to be heard.<sup>64</sup>

Section 102's action-forcing provisions apply the new force. Congress' directive that "to the fullest extent possible"<sup>65</sup> the agencies should perform the duties NEPA outlined, expands the permissible area of judicial review. Those requirements go beyond the traditional requirements of administrative law which govern judicial access to decision-making by agencies. To this extent "administrative law under NEPA often differs from administrative law without NEPA."<sup>66</sup> Within these broadened parameters of administrative law, judges can justify increasing the points of entry for litigants to challenge agency action.

Finally, courts cannot unilaterally seek to implement the law. Cases and controversies must be brought to the courts. Individuals and groups must be willing and have sufficient resources to engage in litigation. NEPA does not lack litigants to enforce it. Werner Grunbaum found that NEPA has accounted for approximately 47 percent of the environmental litigation in district courts from 1967 through 1973, and 39 percent of the environmental litigation in the appeals courts.<sup>67</sup> Because of agency unresponsiveness, environmentalists have been compelled to pursue their policy goals in the judicial system. They have been successful 50 percent of the time in the district courts and 45 percent of the time on appeal.<sup>68</sup> Their successes then breed more litigation. When the threat of suit is not sufficient to gain agency compliance, or compliance with a previous ruling is less than desired, the environmentalists may return to court. Even if the litigation process only suc-

ceeds in delaying a proposed project, the environmentalists still have scored a partial victory. Delay and the litigation proceedings force governmental officials to take a closer look at the environmental ramifications of the proposed federal action. Litigation spawned by NEPA illustrates why environmentalists, like other disadvantaged groups, favor litigation as a tactic to influence governmental decision-making.<sup>69</sup> Litigation more than any other tactic achieves the desired results. Thus, NEPA's encouragement of judicial activism can be viewed as the function of the environmentalists' repeated and successful use of the courts as a method to gain access to and exert influence in administrative decision-making.

In summary, an ambiguous statute which invites interpretive litigation, a scanty legislative history, the general tendency of the courts to expand judicial review, the law-expansive character of NEPA's principal provisions, and a constant supply of litigants, all combine to create an atmosphere conducive to judicial activism in NEPA's implementation.

The influence and results of judicial activism can be seen in a number of areas. Because the brunt of litigation has focused upon the EIS requirement, the courts play an important role in EIS formulation and review. The courts enforce agency compliance with CEQ guidelines. They have been called upon to resolve the issues surrounding the application of the EIS requirement and, once applicability is determined, the issues surrounding the actual preparation of the statement. These issues include: (1) whether a "major federal action" is involved; (2) whether the action will "significantly affect" the environment; (3) which agency should file the EIS; (4) when the statement must

be filed; (5) who must prepare the statement; and (6) what the statement must contain.<sup>70</sup> Judicial decisions on these questions have made the courts important promulgators of guidelines and criteria for EIS preparation and review.<sup>71</sup>

To date, the thrust of judicial activity has been to force compliance with NEPA's procedural duties. A long-standing rule of judicial review is that review is foreclosed when "agency action is committed to agency discretion by law."<sup>72</sup> Consequently, courts are reluctant to rule on the substantive merits of an agency's decision. During review, the courts tend to focus on whether the decision was made in accordance with the procedures prescribed by law. The courts seldom challenge the outcome of the decision if it is made in accordance with prescribed procedures, unless there is a persuasive showing that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>73</sup>

However, several courts have moved beyond the recognition of judicially enforceable procedural duties to declare that NEPA establishes judicially enforceable substantive rights. In the Sierra Club v. Froehlke (the Trinity River-Wallisville Dam) decision,<sup>74</sup> for example, the court applied NEPA to each step of the Corps of Engineers' decision-making process. This case, declares Anderson, may "point the way toward an eventual synthesis of NEPA's substantive and procedural provisions..."<sup>75</sup> On the whole, however, the courts have shied away from substantive review of agency decisions in NEPA cases. The argument that NEPA imposes no substantive rights still holds sway.<sup>76</sup>

NEPA has created new points of access to agency decision-making for environmen-

tal groups and citizens. Use of these access points has given the groups a greater opportunity to be heard, and to obtain review of agency decision-making. In short, asserts Liroff, through citizen suits "ecology groups have become significant actors in the agencies' environments."<sup>77</sup>

The courts have given NEPA and its principal action-forcing provisions meaning, substance, and vitality. Judicial policy-making has made NEPA more than a vague policy declaration. The courts have said whether NEPA applies and, if so, when. Courts have also played the predominant role in enforcing procedural compliance with the requirement for the 102 statement. They have formulated criteria for EIS preparation and have evaluated the adequacy of completed statements. The question of whether judicial activism is limited to procedural matters or whether it extends to assuring implementation of NEPA's substantive policy goals and objectives has been debated, and some support has been found for the latter position. Fears of being enjoined have compelled the agencies to implement NEPA. Hence, it is not surprising that many associate NEPA and Section 102 successes with the successes of litigation. Throughout the EIS literature, the conclusion is clear: to the extent implementation of NEPA requirements has been achieved, it has largely been achieved by judicial activity. Judicial policy-making has extended NEPA's meaning "beyond anybody's wildest dreams."<sup>78</sup>

#### PROBLEMS ASSOCIATED WITH JUDICIAL ACTIVISM AS THE PRIMARY INSTRUMENT FOR POLICY IMPLEMENTATION

The courts exhibit serious disabilities when they serve as the primary agent

for securing implementation. First, courts can be overruled. They can be overruled by congressional amendment. In response to Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission,<sup>79</sup> Izaak Walton League v. Schlesinger (Quad Cities),<sup>80</sup> and Kalur v. Resor,<sup>81</sup> Congress partially exempted two agencies (the EPA and AEC) from NEPA. One project, the Trans-Alaskan oil pipeline, has also been exempted from further NEPA review. Many other amendments have also been introduced which, if enacted, would either directly or implicitly amend NEPA. Some amendments would directly reverse judicial decisions; others would exclude certain categories of activities from NEPA or would establish moratoria for urgent governmental projects.<sup>82</sup>

Lower federal courts can also be overruled by the Supreme Court. The Supreme Court has heard relatively few NEPA cases and none that it has heard have construed NEPA in any significant way. The possibility exists that a whole line of lower court decisions can be overturned or severely modified by Supreme Court action.

Moreover, the lower courts can overrule themselves. Courts are sensitive to the political climate in which they operate. While in the short run they may render decisions counter to the prevailing political climate, in the long run their policies must reflect the opinions of the law-making majority.<sup>83</sup> Mounting criticisms of judicial interpretations and growing discontent in the legislative and executive branches with the results of NEPA requirements are signals read by the courts. As the criticisms increase in number and intensity, the courts may begin to reverse decisions. They may reverse

outright or they may alter previous decisions by making subtle distinctions and modifications in a new line of cases.

Second, administrative agencies soon learn to accommodate the courts. As Martin Shapiro notes, agencies are adept in "cultivating consensus by throwing issues up to the courts in forms and degrees that will elicit judicial approval or at least acquiescence. In short, the agencies know what will play in court and what won't."<sup>84</sup> NEPA contains new and innovative policy and procedures. For the first five years, the agencies have had a difficult time adjusting to NEPA. However, there is no reason to expect that the agencies are not learning the procedural rules of the game and will soon know which impact statements and agency procedures will be accepted in court and which will not. The agencies will learn not to press claims which disturb the traditional harmonious relationship, described by Shapiro, which exists between the administrative agencies and the courts.

Third, the standards and procedural rules governing access to the courts function more to the advantage of the agencies than to the environmental litigants. According to Donald Large, administrative unresponsiveness to environmental claims, combined with the restrictions on the use of the courts before, during, and after the administrative process, form a closed system of law.<sup>85</sup> When a claim is brought before a court, disputes over issues, such as standing to sue, sovereign immunity to suit, reviewability by the court, and exhaustion of administrative remedies, consume much of the court's attention. These threshold technicalities must be decided before the court reaches the merits

of the case. If an agency can win just one of these skirmishes over procedural issues, the case is dismissed. Consequently, laments Large, for "every reported case discussing the merits of an environmental problem, there are 10 decided on a threshold technicality."<sup>86</sup> While NEPA has somewhat mitigated the procedural burdens which environmental litigants must overcome, formidable hurdles still exist in utilization of the legal process.

Finally, and related to the second and third factors, judicial attitudes and behavior operate as a mechanism to protect commercial, industrial, and agency interests. Data in Grunbaum's study of judicial attitudes in environmental quality cases show that judges tend to view environmental problems within an economic framework.<sup>87</sup> Grunbaum also found that judges tend to support the agencies that are defending their projects against environmentalists' assaults.<sup>88</sup> These economic and agency proclivities put individuals and environmental groups at a disadvantage even in the courtroom, when they try to press environmental claims.

While the foregoing factors pose potential threats for debilitating NEPA's implementation, two limitations of judicial activism are already manifest. First, judicial activism has overproceduralized NEPA. Agency reaction to judicial activism has been to add more paper to EIS statements. The agencies are finding that a longer, data-crammed 102 statement can meet the courts' tests for adequacy. The 102 statement is dangerously close to resembling a "paper monster,"<sup>89</sup> and it is a long way from being a brief two pages. As the EIS drowns in a sea of minutiae, its usefulness as a public information document diminishes. Individuals and citizen groups lack the time and re-

sources to digest or review adequately a multi-volumed 102 statement. A survey of the member organizations of the Natural Resources Council, for example, showed that none of the organizations had sufficient staff, expertise, or time to review specific impact statements.<sup>90</sup>

Judicial proceduralization has also made the agency's identification and evaluation of environmental impacts a discrete process associated with the 102 statement. It has encouraged the agencies to view the EIS as a court exhibit. The statement must convince a court that environmental factors have received consideration by the agency and that the environmental consequences have been fully disclosed. A broader assessment process which is mandated by NEPA has not been developed. Some scholars maintain that if identification and evaluation of environmental consequences are to be truly effective, environmental assessment must be interwoven throughout the entire thinking and planning process.<sup>91</sup> As long as the courts focus upon assessment as it is presented in the 102 statement, the agencies are unlikely to feel compelled to perceive assessment techniques and data as integral parts of the entire decision-making process. Rather than serving as "candid assessments of alternatives," the EIS will remain an "end-of-the-pipe" project justification.<sup>92</sup>

Second, judicial activism is limited to procedural implementation. Because judicial activism does not extend to NEPA's substantive policy, court-ordered implementation is incomplete implementation. Defenders of judicial activism can no doubt argue that any agency forced to go through the formalities of procedural compliance eventually accustoms itself to those changes and adopts them as part of

the institution's behavior patterns. However, new procedures and rules within the decision-making process need not necessarily change attitudes or behavior if the decision outcome can remain the same. Indeed, Sax labels the "emphasis on the redemptive quality of procedural reform... nine parts myth and one part coconut oil."<sup>93</sup> The ultimate success of NEPA rests upon implementation and acceptance of its substantive environmental goals and objectives. NEPA must affect change in the agencies' decision outcomes. Decisions must be made with a view toward creating and maintaining a better environment. Yet, it is in the very area of substantive implementation and review of decision outcomes that the courts generally practice judicial restraint.

## CONCLUSION

The implementation of policy is mainly a function performed by administrators. However, other political actors--legislators, private interest groups, the President, and judges--may be involved. This Bulletin has focused upon the interactions of these political actors in the implementation of a single policy, the National Environmental Policy Act of 1969.

When a new policy does not demand changes in an agency's established structural and behavioral characteristics, implementation is apt to be facilitated. NEPA, however, demands change. Basically, administrators are being asked to execute a statute to which they are finding it difficult to accommodate. Like most decision-making reforms, NEPA inevitably requires modifications in a number of variables which are rooted in the organization's basic structure and its established patterns of action. To achieve effective implementation of NEPA's reforms, agencies

would have to become committed to innovative behavior and would have to make alterations in their internal value configurations. Such behavior is too risky for the agencies, and resistance and opposition are the safer course. While agencies outwardly proclaim compliance, their actions demonstrate otherwise.

The originators of policy usually have a stake in seeing the realization of articulated policy goals and objectives. Since NEPA's policy was the initiative of Congress, the Congress could thus be expected to play a strong oversight role. However, NEPA's law-making majority quickly disintegrated as court decisions showed the legislators the real significance of the language they had approved. Congressional pressures for improvements in agency implementation efforts have been counteracted by congressional acquiescence to and approbation of less-than-full agency compliance. The agencies also have little fear that retaliation for non-compliance will come from the President, the CEQ, or the OMB. The CEQ lacks viable enforcement authority. It has defined its mission so that active involvement in agency affairs is discouraged. The OMB has chosen not to utilize its legislative clearance responsibilities to require agencies to submit 102 statements on legislative proposals. Presidential policy priorities increasingly place energy and economic considerations above environmental considerations.

Agency propensities not to push NEPA's implementation have been curtailed by the courts. The courts have been active participants in NEPA's implementation; they have punished agency non-compliance by enjoining agency actions. The scope and degree of the agencies' implementation activities are due largely to the activism of the courts.

The level of court activity in NEPA has gone beyond what might normally be expected in policy implementation. There are, however, serious limitations associated with judicial activism when it functions as the predominant external force directing implementation. In NEPA's case, over-emphasis on procedure has caused the agencies to become chiefly concerned with the preparation of a judicially adequate EIS. The merits of the impact statement, its utility as a public information document, and its utilization as a planning and decision tool have been lesser considerations.

Judicial restraint in the area of substantive implementation, combined with an absence of pressures from other political actors, have given administrators a great deal of discretion to apply to the substantive aspect of implementation. The agencies have exercised this discretion to avoid substantive reform in agency decision-making and decision outcomes. Consequently, after five years, NEPA, as a vehicle for creating and maintaining environmental integrity and reform of environmental decision-making, has had only a modicum of success.

## ACKNOWLEDGMENT

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## FOOTNOTES

[Ed. Note: The following examples are provided to explain some of the abbreviations found in the footnotes.

42 U.S.C. 4321 = Title 42, United States Code, Section 4321

supra = refers to source mentioned previously in footnotes

Hanley v. Mitchell, 460F. 2d 640, 642 (1972) = the case of Hanley versus Mitchell, Volume 460, Federal Reporter, second series, page 640, quote at page 642, case decided in 1972

409 US 99 (1972) = Volume 409, United States Reports, page 99, case decided in 1972

359 F. Supp. 1289 (1973) = Volume 359, Federal Supplement, page 1289, case decided in 1973)

1. Jeffrey L. Pressman and Aaron Wildavsky, Implementation: How Great Expectations in Washington Are Dashed in Oakland, Or, Why It's Amazing That Federal Programs Work At All... (Berkeley: University of California Press, 1973); and Helen M. Ingram, "Policy Implementation Through Bargaining: The Impact of Federal Grants-in-Aid," unpublished paper presented at the Annual Meeting of the Western Political Science Association, Denver, Colorado, April 4-6, 1974.
2. 42 U.S.C. 4321. Hereinafter cited as NEPA.
3. Ibid.
4. United States Senate, Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969, Senate Report No. 91-296, 91st Congress, First Session, July 9, 1969, p. 9.
5. Ibid.
6. Ibid., p. 14.
7. Senate Report No. 91-296, supra note 4, pp. 5-6.

8. Statement of Senator Henry M. Jackson, 115 Congressional Record (October 8, 1969), p. 29069.
9. Senate Report No. 91-296, supra note 4, p. 9.
10. Section 102 (2)(C) directs all federal agencies to:  
 "(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. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes."
11. Comptroller General, Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969, Report to the Subcommittee on Fisheries and Wildlife Conservation of the House of Representatives, Committee on Merchant Marine and Fisheries (Washington, D.C.: GAO, May 18, 1972).
12. Ibid., pp. 13-21.
13. Comptroller General, Adequacy of Selected Environmental Impact Statements Prepared Under the National Environmental Policy Act of 1969, Report to the Subcommittee on Fisheries and Wildlife Conservation of the House of Representatives, Committee on Merchant Marine and Fisheries (Washington, D.C.: GAO, November 27, 1972).
14. Ibid., p. 8.
15. Leonard Ortolano and William W. Hill, An Analysis of Environmental Statements of Corps of Engineers' Water Projects (Springfield, Virginia: U.S. Department of Commerce, Technical Information Service, June 1972), p. 110.
16. Frank Kreith, "Lack of Impact," 15 Environment (January/February 1973), p. 30.
17. Gordon A. Enk, Beyond NEPA - Criteria for Environmental Impact Review (Rensselaerville, New York: The Institute on Man and Science, May 1973), p. 22.
18. United States Senate, Committee on Public Works and Committee on Interior and Insular Affairs, National Environmental Policy Act, Joint Hearings, 92nd Congress, Second Session, March 1, 7, 8, and 9, 1972, p. 544.
19. Ibid., p. 86.
20. Ibid., p. 97.
21. Ibid., p. 99.
22. Ibid., p. 105.
23. Statement of James D. Braman in United States Senate, Subcommittee on Roads of the Committee on Public Works, National Environmental Policy Act Relative to Highways, Hearings, 91st Congress, Second Session, August 25, 1970, p. 2, reported in Steven B. Fishman, "A Preliminary Assessment of the National Environmental Policy Act of 1969," Urban Law Annual (1973), p. 215.
24. Richard N. L. Andrews, "Agency Response to NEPA: A Comparison and Implications," unpublished manuscript, July, 1973, p. 3.

25. Donald E. Lawyer, "The U.S. Army Corps of Engineers," in Robert B. Ditton and Thomas L. Goodale, editors, Environmental Impact Analysis: Philosophy and Methods (Madison, Wisconsin: University of Wisconsin Sea Grant Program, 1972), p. 54.
26. Fishman, supra note 23, p. 238.
27. Ibid., pp. 237-238.
28. Ibid., p. 239, citing Victor A. Thompson, "Bureaucracy in a Democratic Society," in Roscoe Martin, editor, Public Administration and Democracy: Essays in Honor of Paul H. Appleby (New York: Syracuse University Press, 1965), p. 205.
29. Richard Alan Liroff, "Administrative, Judicial and Natural Systems: Agency Response to the National Environmental Policy Act of 1969," 3 Loyola University Law Journal (Winter 1972) pp. 29-33.
30. Senate Joint Hearings, supra note 18, p. 397.
31. Joseph L. Sax, "The (Unhappy) Truth About NEPA," 26 Oklahoma Law Review (May 1973), pp. 239-248.
32. Ibid., p. 245 (emphasis his).
33. Andrews, supra note 24, p. 16.
34. Helen M. Ingram, "Information Channels and Environmental Decision-Making," 13 Natural Resources Journal (January 1973), pp. 150-169.
35. Liroff, supra note 29, pp. 26-29.
36. Protection and Enhancement of Environmental Quality, Executive Order No. 11514, Section 3 (h), 35 Federal Register, (March 5, 1970), pp. 4247.
37. Richard Liroff, "The Council on Environmental Quality," 3 Environmental Law Reporter (August 1973), pp. 50051-50070; Frederick R. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act (Baltimore: The Johns Hopkins Press for Resources for the Future, Inc., 1973), pp. 12-13; and Richard N.L. Andrews, "The Council on Environmental Quality: An Evaluation," 27 Journal of Soil and Water Conservation (January/February 1972), pp. 8-11.
38. Ibid., Liroff, p. 50052.
39. Ibid., Andrews, p. 9.
40. Ibid., Liroff.
41. Ibid., Andrews, pp. 8-9.
42. Ibid., Anderson, pp. 11-13, 125-133; and Comptroller General, supra note 11, pp. 51-55.
43. Ibid., Comptroller General, p. 55.
44. United States House of Representatives, Subcommittee on Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries, Administration of the National Environmental Policy Act, Hearings, 91st Congress, Second Session, December 7, 8, 9, 10, 11, 16, 18, 21, and 22, 1970, Part I and Part II; and Administration of the National Environmental Policy Act, House Report No. 92-316, 92nd Congress, First Session, June 29, 1971; and Administration of the National Environmental Policy Act--1972, Hearings and Appendix, 92nd Congress, Second Session, February 17, 25, and May 24, 1972.
45. Senate Joint Hearings, supra note 18, p. 573.
46. Claude E. Barfield, "Environmental Report/Exemptions from NEPA Requirements Sought for Nuclear Plants, Pollution Permits," 4 National Journal (June 17, 1972), pp. 1025-34. For other discussions of the backlash see: Robert Gillette, "National Environmental Policy Act: Signs of Backlash Are Evident," 176 Science (April 7, 1972), pp. 30-33; and Marvin Zeldin, "Will Success Spoil NEPA?" 74 Audubon (July 1972), pp. 105-111.
47. Ibid., Zeldin, p. 108.
48. Ibid., Barfield, p. 1025.
49. Liroff, supra note 37, pp. 50059-50060.
50. The New York Times, April 11, 1974, p. C 19.
51. Senate Joint Hearings, supra note 18, p. 399.
52. See for example, the testimony of George C. Freeman and William F. Kennedy in Senate Joint Hearings, supra note 18, pp. 481-509; 467-473.
53. For discussions of the access and influence of the large economic interest groups see: David B. Truman, The Governmental Process (New York: Alfred A. Knopf, 1955); and Harmon

- Zeigler, Interest Groups in American Society (Englewood Cliffs, New Jersey: Prentice Hall Publishing Company, 1964).
54. A substantial body of literature also supports the conclusion that access for all groups is not institutionalized, and that not all groups are represented or exert influence in the agencies' decision-making processes. See for example: Theodore J. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority (New York: W. W. Norton and Company, Inc., 1969); and E. E. Schattschneider, The Semi-Sovereign People (New York: Holt, Rinehart and Winston, 1960). On the access difficulties of environmental groups see: Donald Large, "Is Anybody Listening? The Problem of Access in Environmental Litigation," 1972 Wisconsin Law Review (No. 1, 1972), pp. 62-113; and Hanna J. Cortner, "Disadvantaged Groups in an Energy-Environment Conflict: The Southwest Power Controversy," unpublished Ph.D dissertation, Tucson, University of Arizona, 1973.
  55. Richard C. Cortner, The Apportionment Cases (New York: W.W. Norton and Company, Inc., 1972), p. 263.
  56. Hanley v. Mitchell, 460 F. 2d 640,642 (1972); certiorari denied, 409 US 99 (1972).
  57. Scott C. Whitney, "The Case for Creating a Special Environmental Court System," 14 William and Mary Law Review (Spring 1973), p. 489.
  58. The two approaches are described in Harold J. Spaeth, An Introduction to Supreme Court Decision Making, revised edition (San Francisco: Chandler Publishing Company, 1972), pp. 54-56.
  59. NEPA's legislative history is contained in House Reports No. 91-378, part 2, accompanying House of Representatives Bill Number 12549 (Comeries) and 91-765 (Committee of Conference); Senate Report No. 91-296 (Committee on Interior and Insular Affairs); and 115 Congressional Record (1969): July 10, considered and passed Senate; September 23, considered and passed House, amended, in lieu of House of Representatives Bill Number 12549; October 8, Senate disagreed to House amendments, agreed to conference; December 20, Senate agreed to conference report; December 22, House agreed to conference report.
  60. Claude E. Barfield and Richard Corrigan, "Environment Report/White House Seeks to Restrict Scope of Environment Law," 4 National Journal (February 26, 1972), p. 338.
  61. Anderson, supra note 37, p.11; N.C. Yost, "Implementing NEPA," 3 Southwestern Law Review (Spring 1971), pp. 88-123.
  62. Barfield and Corrigan, supra note 60, p. 340.
  63. Anderson, supra note 37, p. 15.
  64. Kenneth Culp Davis, Administrative Law: Cases - Text - Problems, fifth edition (St. Paul: West Publishing Company, 1973), p. 587.
  65. NEPA.
  66. Davis, supra note 64, p. xiii.
  67. Werner F. Grunbaum, "Judicial Attitudes Toward Environmental Quality in the Federal and State Courts," unpublished paper presented at the Annual Meeting of the American Political Science Association, Chicago, August 29-September 2, 1974, p. 10. The percentage of NEPA cases is particularly significant since Grunbaum's sample extends to cases decided three years prior to NEPA's effective date.
  68. Ibid.
  69. The efficacy of litigation as a means to obtain environmental goals is advocated in Joseph Sax, Defending the Environment: A Strategy for Citizen Action (New York: Alfred A. Knopf, 1971).
  70. James J. Seeley, "The National Environmental Policy Act: A Guideline for Compliance," 26 Vanderbilt Law Review (March 1973), pp. 295-325. See also: Anderson, supra note 37; Fishman, supra note 23; David T. Greis, "The Environmental Impact Statement: A Small Step Instead of a Giant Leap," 5 Urban Lawyer (Spring 1973), pp. 264-303; Robert M. Lynch, "Complying with NEPA: The Tortuous Path to an Adequate Environmental Impact Statement," 14 Arizona Law Review (No. 4, 1972), pp. 717-745.
  71. Enk, supra note 17, for example, synthesizes CEQ, agency, and court guidelines to outline the procedural criteria for EIS preparation and review. See also: Esther Roditti Schachter, "Standards for Evaluating a NEPA Environmental Statement," 90 Public

- Utilities Fortnightly (August 31, 1972), pp. 29-32. Both of these Works demonstrate the importance of judicial input into EIS formulation and evaluation procedures.
72. Administrative Procedure Act, 5 U.S.C. 1001.
  73. Section 706(2)(A) of the Administrative Procedure Act.
  74. 359 F. Supp. 1289 (1973).
  75. Anderson, supra note 37, p. ix.
  76. See for example: Richard S. Arnold, "The Substantive Right to Environmental Quality Under the National Environmental Policy Act," 3 Environmental Law Reporter (June 1973), pp. 50028-50043; James E. Harris, "The National Environmental Policy Act of 1969: A Step in the Right Direction," 26 Arkansas Law Review (Summer 1972), pp. 209-224; and Senator Edmund S. Muskie and Eliot R. Cutler, "A National Environmental Policy: Now you See It, Now You Don't," 25 Maine Law Review (1973), pp. 163-192.
  77. Liroff, supra note 29, p. 36. On the importance of NEPA's citizen suits for improving access to agency decision-making see also: Council on Environmental Quality, Environmental Quality, Third Annual Report (Washington, D.C.: Government Printing Office, August 1972), pp. 248-255; and Roger C. Cramton and Richard K. Berg, "On Leading a Horse to Water: NEPA and the Federal Bureaucracy," 71 Michigan Law Review (January 1973), pp. 514-517.
  78. Barfield and Corrigan, supra note 60, p. 340.
  79. Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F. 2d 1109 (1971); certiorari denied, 404 US 942 (1972).
  80. Izaak Walton League v. Schlesinger, 337 F. Supp. 287 (1971).
  81. Kalur v. Resor, 335 F. Supp. 1 (1971).
  82. United States Senate, Committee on Interior and Insular Affairs, National Environmental Policy Act of 1969: An Analysis of Proposed Legislative Modifications, Report prepared by the Environmental Policy Division, Congressional Research Service, Library of Congress, 93rd Congress, First Session, June, 1973, p. 2.
  83. Henry J. Abraham, The Judiciary: The Supreme Court in the Governmental Process, second edition (Boston: Allyn and Bacon, 1969), pp. 116-117.
  84. Martin Shapiro, The Supreme Court and Administrative Agencies (New York: The Free Press, 1968), p. 267.
  85. Large, supra note 54, p. 66.
  86. Ibid., p. 110.
  87. Grunbaum, supra note 67, p. 8.
  88. Ibid., pp. 12-14.
  89. Characterization of NEPA by John A. Carver, Jr., Federal Power Commission, quoted by Gillette, supra note 46, p. 30.
  90. Natural Resources Council data reported in Ingram supra note 34, pp. 167-168.
  91. Richard N. L. Andrews, "A Philosophy of Environmental Impact Assessment," Barry R. Flamm, "A Philosophy of Environmental Impact Assessment: Toward Choice Among Alternatives," and James J. Jordan, "A Philosophy of Environmental Impact Assessment: Some Considerations for Implementation," all in 28 Journal of Soil and Water Conservation (September/October 1973), pp. 197-207.
  92. Ibid., Andrews, pp. 200-201.
  93. Sax, supra note 31, p. 239.

## GLOSSARY

AEC	Atomic Energy Commission
CEQ	Council on Environmental Quality
EIS	Environmental Impact Statement
GAO	General Accounting Office
NEPA	National Environmental Policy Act of 1969
OMB	Office of Management and Budget
SCS	Soil Conservation Service



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