

1974

The Council on Environmental Quality's Guidelines and Their Influence on the National Environment Policy Act

Herbert F. Stevens

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Herbert F. Stevens, *The Council on Environmental Quality's Guidelines and Their Influence on the National Environment Policy Act*, 23 Cath. U. L. Rev. 547 (1974).

Available at: <https://scholarship.law.edu/lawreview/vol23/iss3/6>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act

Since its enactment on January 1, 1970, the National Environmental Policy Act of 1969 (NEPA) has become the most written about and litigated statute in the field of environmental law. The Act, which requires all federal agencies to include consideration of the environment in their decision-making by the process of an environmental impact statement, has precipitated over 400 lawsuits¹ and has been the subject of a recent book and more than a score of articles.² These writings have concentrated on numerous court interpretations of NEPA which have ultimately been responsible for much of its implementation. However, the Council on Environmental Quality (CEQ), created by NEPA and consisting of a relatively small staff (about 50) in the Executive Office of the President, has also shared in this responsibility. CEQ, primarily an advisory group, writes an annual report, *Environmental Quality*. In addition, it is responsible for coordinating the environmental impact statement process and for assisting all the federal agencies in implementing this process. As part of this assistance and by the authorization of NEPA and Executive Order,³ CEQ has published "Guidelines on the Preparation of Environmental Impact Statements."⁴

These Guidelines have grown both in size and authority since the first interim version in April 1970. They were revised in April 1971 and in August 1973 and have emerged as the primary tool used by CEQ to encourage more effective compliance with NEPA throughout the executive branch. On a less formal basis CEQ has used memos to the agencies and has held staff consultations during the three-year period to encourage more thorough and more rapid compliance with NEPA.

1. COUNCIL ON ENVIRONMENTAL QUALITY, *ENVIRONMENTAL QUALITY—THE FOURTH ANNUAL REPORT* 237 (1973).

2. F. ANDERSON, *NEPA IN THE COURTS* (1973) (published by Resources for the Future, Washington, D.C.) [hereinafter cited as ANDERSON]. NEPA was also the subject of an unpublished dissertation by Richard L. Andrews, *Environmental Policy and Administrative Change, National Environmental Policy Act of 1969, 1970-71* (University of North Carolina, Chapel Hill, 1972, copy in Council on Environmental Quality library).

3. Exec. Order No. 11,514, 3 C.F.R. 285 (1973).

4. Council on Environmental Quality, *Guidelines*, 38 Fed. Reg. 20550 (1973) (the most recent Guidelines CEQ has issued) [hereinafter cited as *New Guidelines*].

This article will trace CEQ's implementation of NEPA by focusing on the CEQ Guidelines, and, additionally, the memos used by CEQ. The influence of these Guidelines on the interpretations of NEPA by the courts and the consequential reflection of these judicial decisions in subsequent Guidelines will be shown. Finally, the role which the Guidelines have played in the expansion of the statutory requirements of NEPA will be explored.

The National Environmental Policy Act of 1969

Before discussing the implementation of NEPA by CEQ, a very brief outline of the Act and its legislative history is necessary. It has been stated that NEPA has become "the major statutory lever for environmental quality in Federal Government actions."⁵ NEPA has this function because it attempts to impose a broad responsibility on federal agencies to take environmental values into account in their major planning and decision-making.

In creating NEPA, Congress first intended to enlarge the basic mandates of federal agencies by enactment of a national policy. Very simply, this policy proclaims that the federal government shall use all practicable means and measures to protect, preserve and enhance the environment, focusing on both the prevention of future environmental damage by the federal government and the duty to restore and rectify past environmental abuses. Thereafter Congress extended this declaration to establish specific action-forcing procedures for implementation of that policy because it was feared that the final bill would become an empty utterance unless the law could guarantee that federal agencies would follow this new policy. As part of this new procedure, section 102 (2) (C),⁶ specifically designed to be "action-forcing," emerged and soon became the heart of NEPA. This section requires all agencies to prepare, for every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement" of the environmental impacts of the proposed action or legislation. In addition to discussing the environmental impact, the statement must contain alternatives to the proposed action, any unavoidable adverse effects, the relationship between short-term uses and the maintenance of long-term productivity of the environment, and any ir-retrievable commitments of resources involved in the proposed action.

The impact statement enables federal officials to evaluate the environmental consequences of a proposed action and to consider these environ-

5. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—THE SECOND ANNUAL REPORT 158 (1971).

6. 42 U.S.C. § 4332 (1970) [hereinafter referred to by its more commonly known section 102(2)(C) P.L. No. 91-190 (1970)].

mental values in the final decision of adopting, discontinuing, or changing the project. In addition, the federal official responsible for the impact statement not only must consult with any other federal agency with expertise in the area, but also must make copies of the statement and the comments available to the President, CEQ, and the public. Finally, the official must see that the statement accompanies the proposal through the agency review process. The foregoing outline of section 102(2)(C) constitutes the total statutory requirement for an environmental statement. These few sentences have led to over 400 lawsuits which have either interpreted these requirements or forced compliance with them. The sparse and imprecise language has seemingly promoted an elaboration of details by the courts. In any event, the Guidelines have attempted to address this process of elaboration by explaining to the agencies and the courts the meaning of the statutory language, such as: "major federal actions," "significantly" affecting the environment, a "detailed statement," and "accompany the proposal through the existing agency review process." Moreover, the Guidelines have attempted to formulate a procedural scheme for the section 102 impact statement process, a task made difficult by the almost total absence of any statutory guidance. NEPA also provided for the gathering of information on environmental quality, the creation of CEQ and the publication of its annual report; but these provisions, unlike section 102, were implemented with a minimum of administrative difficulties. It has been the section 102 impact statement process which has consumed considerable time and has wrought profound changes in the federal bureaucracy. This has led to the growing importance of the CEQ Guidelines.

Executive Order No. 11,514

Upon its enactment on January 1, 1970, NEPA was widely acclaimed as the beginning of a new environmental decade. This event also represented the beginning of the executive branch's initiative in the area of environmental law and of its commitment to NEPA.⁷ On March 5, the President issued Executive Order No. 11,514 (hereafter referred to as Order) which directed implementation of NEPA by CEQ and other federal agencies.⁸ This Order was extremely important to the ultimate implementation of

7. Environmental initiatives were in the President's budget message of February 2, 1970 and on February 10 the President sent to Congress a special environmental message detailing a 37-point program of policies for federal action.

8. Exec. Order No. 11,514, *supra* note 3. Although Congress cannot delegate legislative power to the President, the power to make regulations and executive orders for the proper administration of the laws has been recognized and given effect by the courts. *United States v. The Three Friends*, 166 U.S. 1 (1897); *Jenkins v. Collard*, 145 U.S. 546 (1892).

NEPA in many respects, even though NEPA was designed to be "action-forcing" and self-implementing.⁹ The Order evidenced White House support for the law and also aided in the eventual court interpretations of NEPA by authorizing CEQ to issue "guidelines" to the federal agencies for the preparation of the detailed statements required by section 102(2)(C) of NEPA.¹⁰ This Order represents the only direct authority for CEQ's promulgation of its Guidelines, since neither NEPA itself nor any legislative history discussed CEQ's role as involving the issuance of Guidelines. It seems natural, of course, that since NEPA created CEQ, CEQ should oversee the implementation of NEPA by other agencies. However, NEPA, unlike most other acts creating federal agencies, did not specify that CEQ could make whatever rules and regulations were necessary to carry out its purposes. Instead it provided for a series of duties of CEQ, only one of which could apply to implementation of NEPA. CEQ is to "review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter . . . and to make recommendations to the President with respect thereto."¹¹ Obviously, the Guidelines, which are addressed to other federal agencies, are not recommendations to the President. It is unknown why NEPA itself did not give CEQ the authority to promulgate Guidelines on the implementation of section 102, but one inference might be that Congress actually thought, albeit naively, that the section 102 requirement would be self-effectuating despite its vague terms and lack of clear procedure, and despite the fact that mission oriented agencies might not comply willingly. This inference would be consistent with the fact that, until early court decisions such as *Calvert Cliffs' Coordinating Committee v. AEC*,¹² it was unclear to most of those who studied NEPA just how rigidly NEPA's procedural duties would be enforced and how expansive they would become.

NEPA's silence on the role of CEQ raises the question of how much weight is given to the CEQ Guidelines by the courts. CEQ's authority to implement NEPA and promulgate Guidelines is derived primarily from the Order and only inferentially from NEPA, since NEPA was designed to be self-effectuating.¹³ The courts which have considered the question have not been consistent in their view of CEQ's authority. On the one hand, some courts

9. "S. 1075 thus incorporates certain 'action-forcing' provisions and procedures." *Hearings on S. 1075, S. 237 and S. 1752 before the Senate Subcomm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. at 116 (1969).

10. Exec. Order No. 11,514, *supra* note 3, at section 3h.

11. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970) (emphasis added).

12. 449 F.2d 1109 (D.C. Cir. 1971); Holding of case discussed at text *infra* at note 56.

13. *Hearings on S. 1075, supra* note 9.

have given great weight to CEQ's determination of the importance of a proposed federal action.

Such an administrative interpretation can not be ignored except for the strongest reasons, particularly where . . . [the] interpretation . . . [is] a construction of a statute by the men charged with the responsibility of putting that statute into effect.¹⁴

This statement on CEQ's authority is not entirely accurate since, as noted above, NEPA was intended to be self-implementing. On the other hand, courts have also held that the CEQ Guidelines were "advisory only,"¹⁵ relying on *Greene County Planning Board v. FPC*.¹⁶ The *Greene County* holding, however, seems to equivocate on the weight to be given the Guidelines.

Although the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of environmental quality' . . . has misconstrued NEPA.¹⁷

This quote, like the one above from *Environmental Defense Fund v. Corps of Engineers*, is not wholly accurate, since it is not true that CEQ has "no authority to prescribe regulations" given the clear wording of the Order.¹⁸ There is as yet no clear resolution of the two approaches quoted above. However, it is at least clear that the Guidelines are frequently cited by courts as part of the authority for their holdings.¹⁹ Moreover, some courts do make actual use of the Guidelines in resolving NEPA issues.²⁰ This willingness of the courts to turn to the Guidelines for assistance demonstrates that the influence of the Guidelines on the courts, although limited, does exist.

In addition to giving CEQ the authority to issue Guidelines, the Order issued soon after the enactment of NEPA also gave CEQ the power not just

14. *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 744 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972); *accord*, *Environmental Defense Fund v. Tennessee Valley Authority*, 339 F. Supp. 806, 811 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

15. *Save Our Ten Acres v. Kreger*, 2 ELR 20305 (S.D. Ala. 1972), *aff'd in part, vacated in part*, 472 F.2d 463 (5th Cir. 1973); *Hanly v. Mitchell*, 2 ELR 20181 (S.D. N.Y. 1972), *aff'd in part and rev'd in part*, 460 F.2d 640 (2d Cir. 1972).

16. 455 F.2d 412 (2nd Cir.), *cert. denied*, 409 U.S. 849 (1972).

17. *Id.* at 421.

18. Exec. Order No. 11,514, *supra* note 3.

19. *See, e.g.*, *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109, 1113, 1115 (D.C. Cir. 1971); *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1177 (6th Cir. 1972); *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 296 (8th Cir. 1972).

20. *See, e.g.*, *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079,

to "review and appraise" the various federal agency programs, but also to coordinate all the federal programs related to environmental quality and to issue instructions to agencies as may be required to carry out CEQ's responsibilities under NEPA.²¹ This Order created a more powerful role for CEQ as the implementer of NEPA rather than as mere advisor to the President, as NEPA itself implied.

The Order also required public hearings on issues of environmental significance if appropriate, and required timely information, including obtaining the views of the public, in the impact statement process.²² These requirements aided the policy of NEPA, not clearly articulated but discussed in the legislative history, of increased public participation in federal decision-making, a theme increasingly emphasized in the Guidelines.²³ The addition of these requirements to the procedural duties of agencies provides the first clear example of how the policy and duties of NEPA have been expanded by the executive branch's initiative. This expansion appears repeatedly in the Guidelines issued by CEQ and overall represents an attempt to broaden the law.

Interim Guidelines

On April 30, 1970, just four months after NEPA became law, the first version of the CEQ Guidelines was promulgated (hereafter referred to as Interim Guidelines). These Interim Guidelines, like NEPA, left the responsibility for implementing NEPA to the agencies themselves. One possible reason for this, even in the face of agency recalcitrance, was that the variation among different agencies' procedures was too great for central procedure-making on an explicit scale. In addition, CEQ had just come into existence, and was still relatively weak and unsure of itself. Unlike those mission agencies which are created by forceful statutory language and which begin in a very strong and spirited manner, CEQ did not have a mission, but rather was created primarily to advise the President, initiate legislation, write an annual report, and receive other agencies' section 102 statements. However, the history of CEQ to date seems to indicate growing strength and authority in implementing NEPA.

Aside from elaborating on the statutory language dealing with the re-

1087-88, 1090 (D.C. Cir. 1973) (court also uses CEQ memorandum as part of its authority at 1090); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877, 879 (D. Ore. 1971); *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287, 294 (D.D.C. 1971).

21. Exec. Order No. 11,514, *supra* note 3, at section 3.

22. *Id.*

23. See, e.g., *New Guidelines* at section 9(d).

quired contents of the section 102 statement, CEQ's Interim Guidelines also defined for the agencies the key phrase of NEPA. Section 102 provided that all the statutory duties which federal agencies have under NEPA, including the preparation of the environmental impact statement, should be carried out "to the fullest extent possible."²⁴ The Interim Guidelines interpreted this phrase to mean that "each agency of the Federal Government shall comply with the requirement [of NEPA] unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible."²⁵ This language came out of the Conference on the House and Senate versions of NEPA, and was intended to be a compromise between Senator Jackson's desire to force full and vigorous compliance by the agencies and Congressman Aspinall's desire to leave the agencies' mandates alone.²⁶ The bill's managers in the House, however, adopted Jackson's view of the phrase, stating that the duties were to be complied with fully unless existing statutory law expressly prohibited compliance or made it impossible.²⁷ This interpretation adds the requirement of strict compliance with NEPA to the statutory mandate of each agency.

From this ambiguous legislative history, CEQ chose the broad interpretation of the House managers for the meaning of the phrase "to the fullest extent possible," ignoring the aspect of the compromise and Congressman Aspinall's views. This represents an expanded interpretation of NEPA because the phrase applies to the procedural duties of all the federal agencies and sets a high standard for the agencies' compliance. Furthermore, the courts have applied this requirement of strict compliance not only to the duties owed by the agencies in preparing a statement, but also to ensure that NEPA applies to the broadest range of federal actions in terms of environmental impact, including as many actions as possible which were in progress when NEPA was enacted.²⁸ This doctrine of strict compliance has emerged as one of the key concepts in NEPA's judicial interpretations.²⁹ This is at least partly due to the Council's definition of the phrase requiring a real change in the agencies' mandates, a definition partially supported by the legislative history but nowhere indicated in the Act. The court in *Calvert Cliffs'*, for example, cited the CEQ Guidelines along with the legislative

24. 42 U.S.C. § 4332 (1970).

25. COUNCIL ON ENVIRONMENTAL QUALITY, INTERIM GUIDELINES, section 4, April 30, 1970 (in ENVIRONMENTAL QUALITY—FIRST ANNUAL REPORT, Appendix G (1970)).

26. The conference Report stated that the phrase "qualified" NEPA duties, thus evidencing the compromise, see ANDERSON at 9.

27. 115 Cong. Rec. 39,703 (1969).

28. See ANDERSON, *supra* note 2, at 49; see also *e.g.*, *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971).

29. "The phrase 'to the fullest extent possible' has become the touchstone of NEPA interpretation." ANDERSON at 49.

history as authority for the requirement of strict compliance.³⁰ This holding strengthened the requirement of strict compliance in the Guidelines by making it a judicially enforceable standard. This broadening of NEPA will occur again in subsequent versions of the Guidelines.

The promulgation of the Interim Guidelines also resulted in the creation of a new concept by CEQ for agencies' section 102 procedures—the draft environmental impact statement. Interim Guideline 9(c) noted this procedure as an optional device, solely for the purpose of obtaining comments from other agencies which would then accompany the final environmental statement through the agency review process. The procedure of “draft” and “final” statements is not in NEPA, but arguably should have been, since for agencies to comment intelligently on a proposed action they should have a draft or preliminary copy of the statement of environmental impact. The Interim Guidelines went on to provide that *if* the draft statement is prepared by the agency, copies of it should be submitted to CEQ.³¹ Also, it was not required that the draft statement be made public. Only the final statement and comments thereon were to be made public, with the discretion on timing left solely to the agency. The Interim Guidelines thus treated the problem of public information and participation in a very cursory manner, without any idea of encouraging the public to participate in the impact statement process. The public, however, has benefited from the draft statement procedure. Coupled with later requirements of public disclosure, the draft statement has become the vehicle for increased public participation and litigation.

Congressional Oversight Hearings

In December 1970, Congressman Dingell's Subcommittee on Fish and Wildlife Conservation, which had managed the House version of NEPA, held nine days of legislative oversight hearings on NEPA's administration.³² The hearings came during the time in which CEQ had proposed revisions in its Guidelines and thus those hearings exerted a great deal of influence on the revised Guidelines of 1971. The most important issue discussed in the hearings was the timing of public disclosure of statements and comments. Since NEPA is silent on this issue, CEQ decided to leave this to the discretion of the agencies. The committee members argued to CEQ that a specific time

30. 449 F.2d 1109, 1115 (D.C. Cir. 1971).

31. *Interim Guidelines*, *supra* note 25, Section 10(b).

32. *Hearings on the Administration of NEPA before the Subcomm. on Fish and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2nd Sess. (1970). Oversight hearings are held to investigate the progress and problems of administrative agencies.

should be set for all agencies to make their impact statements public and threatened to legislate a time if CEQ would not do so administratively.³³ The committee supported their concern for full public disclosure by reiterating the Order's mandate to all federal agencies directing them to "ensure the fullest practicable provision of timely public information"³⁴ about programs with environmental significance.

Russell Train, Chairman of CEQ, agreed to take the responsibility for the change, preferring to accomplish this by the Revised Guidelines. The year before the hearings (1970) had given Congress experience with two controversial issues—the Supersonic Transport and the Defense Department's dumping of nerve gas in the ocean. Both of these were clear examples to Congress of how easily important environmental information could be suppressed in controversial cases in order to win the support of Congress. Undoubtedly the committee did not look forward to a repeat of such incidents. The resolution of the issue in the Revised Guidelines required that all the federal agencies make the final environmental statement available to the public at least 30 days, and the draft statement available, if prepared, at least 90 days, before any administrative action might be taken.³⁵

This new requirement has accomplished a number of important results. First, if a draft statement is prepared for a proposed action, as they are for most actions, they must be available for public and judicial review. The public can and has commented on the draft statement so as to produce an improved final statement, and if an agency has not in good faith examined the environmental impact, the public can use the draft statement to take the agency to court. This threat of litigation alone would provide some influence toward the preparation of a more thorough draft statement. Second, the 30-day period for public review of the final environmental statement ensures that the public will have time to bring suit against the agency if the statement is inadequate. In addition, it notifies the public of the proposed action before it actually starts. In this way, the public knows that the environmental statements and the bulldozers will not appear on the same day.

Thus, the new specific time periods represent a broadening of NEPA's requirements by the CEQ Guidelines. Ostensibly the expansion is internally consistent with the language of NEPA, since the law had stated a strong declaration of public policy which is fostered by these new requirements. It also seems consistent with the spirit of NEPA, as expressed in the congres-

33. *Id.* at Part 1, p. 67.

34. Exec. Order No. 11,514, *supra* note 3, at section 2(b).

35. Council on Environmental Quality, *Guidelines*, section 10(b), 36 Fed. Reg. 7724-29 (1971) [hereinafter cited as *Revised Guidelines*].

sional oversight hearings, that the Government should be made accountable to the people.

Revised Guidelines

As previously stated CEQ worked on the Revised Guidelines during the oversight hearings in December 1970. With input from the hearings and numerous comments from agencies and the public, the Revised Guidelines were promulgated on April 23, 1971, and contained a number of new requirements in addition to the new specific time periods for public disclosure. One of these new requirements was the timing of the agencies' assessments of the environmental impact for proposed actions. NEPA is silent on when the actual assessment is to be done.³⁶ Presumably, though, to be effective in preventing actions with very adverse environmental effects, it must come not only before the action, such as the construction of a dam, is begun, but more importantly, before the *decision to take such action* is made. The Interim Guidelines had merely stated that the assessment of environmental effects was to be done "before undertaking" the major federal actions.³⁷ It was possible under this meager requirement for an agency to decide to undertake a major federal project, for example, a reservoir and dam, and *then* prepare an impact statement, which might show major unforeseen adverse effects. The statement would thus be superfluous, since these effects would be ignored and the entire purpose of NEPA circumvented, all while still conforming to the language of the Act.

Fortunately, this loophole was closed by the Revised Guidelines.³⁸ Section 2 requires the agencies to "assess in detail the potential environmental impact" of proposed actions "as early as possible and in all cases prior to agency decision" concerning the action. Agencies cannot under this section decide first on an action and write the impact statement afterward. Rather, in conformance with the policy of NEPA, the environmental impact statement for a proposed project is to be considered by each agency before it makes its decision to go ahead on that project.

In a similar spirit the Revised Guidelines also emphasized for the first time the substantive duties of NEPA. In Section 1 of the Revised Guidelines it was stated that it is the objective of Section 102(2)(C) of NEPA, and of the Guidelines to "build into the agency decision-making process an

36. Section 102(2)(C) does state that copies of the environmental statement are to accompany the proposal through the existing agency review process. These review processes, however, are never defined and could take place either before the decision on a proposed action or merely before undertaking the action itself once the decision is made.

37. *Interim Guidelines*, *supra* note 25, section 2.

38. *Revised Guidelines*, section 2.

appropriate and careful consideration of the environmental aspects of proposed action."³⁹ This requirement of consideration of environmental impact is a substantive duty, as contrasted with the procedural preparation and circulation of an impact statement. Thus, according to this requirement, mere *pro forma* compliance with the procedural duties will not satisfy the requirements of NEPA. This concept of substantive duties has been discussed by other writers⁴⁰ and will not be dealt with here at length, but it should be noted that this concept existed prior to the decision in *Calvert Cliffs*,⁴¹ a frequently cited landmark case for NEPA. In a preliminary way, section 1 of the Revised Guidelines also addressed itself to that substantive duty of NEPA, more clearly articulated in *Calvert Cliffs*, to consider environmental values along with other traditional factors, such as economics, in the agency decision-making process.

The Revised Guidelines included other less major changes. First, agencies must consult with CEQ in establishing their own NEPA procedures, and these procedures should identify the points in the agency review process at which consultation with other agencies occurs and statements are made available to the public.⁴² Although each agency was free to choose what procedural route it would follow, the requirement to establish written procedures served to make the agency accountable for choosing some reasonable route. Second, the Environmental Protection Agency (EPA) must comment on all environmental statements by other agencies whenever issues within their authority are involved, such as air or water quality, pesticides, or radiation.⁴³ This requirement, which implements section 309 of the Clean Air Act,⁴⁴ results in better quality impact statements because of EPA's expertise in these areas. Third, NEPA applies to future major federal actions having a significant effect on the environment even though they are continuations of projects initiated before NEPA became law.⁴⁵ This requirement addresses the so-called "retroactivity problem" of NEPA about which court decisions were in conflict. Some early court decisions held that if a major project began before January 1, 1970, or if the federal government made the critical decision before then, as with federally-

39. *Id.* at section 1.

40. Comment, *The Role of the Courts Under the National Environmental Policy Act*, 23 CATH. U.L. REV. 300 (1973); R. Arnold, *The Substantive Right to Environmental Quality under the National Environmental Policy Act*, 3 ELR 50028 (1973).

41. 449 F.2d 1109 (D.C. Cir. 1971). The court cites section 1 of the revised Guidelines at 1113 as part of its authority for the requirement of consideration of environmental impact.

42. *Revised Guidelines*, section 3(a), 3(b).

43. *Id.* at section 8.

44. 42 U.S.C. 1857 (1970).

45. *Revised Guidelines*, section 11.

aided highways, NEPA did not apply and no impact statement was necessary even though much construction still remained to be done, which might cause damage to the environment.⁴⁶ The Revised Guidelines' interpretation of NEPA, however, stressed not what kind or how much action had already been taken, but what action remained to be taken. Section 11 emphasized that,

Where 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.⁴⁷

Since the Revised Guidelines were promulgated there has been judicial acceptance of CEQ's position,⁴⁸ although the "retroactivity" issue will diminish in importance as those projects started before 1970 are completed.

Among all the many improvements in the Revised Guidelines, there was one notable mistake. This mistake grew out of CEQ's negotiations with the Federal Power Commission (FPC) on that agency's section 102 procedure. In its regulatory capacity the FPC licenses power plants and transmission lines to be built by public or private utilities. NEPA requires that these licensing proceedings, which have such a significant impact on the environment, must comply with the section 102 statement process. In these proceedings the FPC allowed the utility company to prepare the draft environmental statement on its intended project which was then circulated to the other agencies and the public. CEQ, in its discussions with the FPC on its NEPA procedures, took the position that such a practice was not compliance with NEPA because NEPA required that the statements circulated for comment to the other federal agencies be prepared by the agency responsible for the proposed action.⁴⁹ CEQ also felt that if the FPC did not itself prepare a statement, there was no way of knowing whether the environmental statement adequately discussed the impact or all the alternatives to the proposed action.⁵⁰

46. See, e.g., *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd*, 454 F.2d 613 (3rd Cir. 1971); *Arlington Coalition on Transportation v. Volpe*, 332 F. Supp. 1218 (E.D. Va. 1971), *rev'd*, 458 F.2d 1323 (4th Cir. 1972); *Brooks v. Volpe*, 319 F. Supp. 90, 329 F. Supp. 118 (W.D. Wash. 1970, 1971), *rev'd*, 460 F.2d 1193 (9th Cir. 1972).

47. *Revised Guidelines*, section 11.

48. See, e.g., *Arlington Coalition v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972); *Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971) (court quotes section 11 of the revised Guidelines at 1121).

49. Section 102(2)(C) "all agencies of the Federal Government shall . . . include in every recommendation . . . a detailed statement by the responsible official." (emphasis added).

50. Memorandum from Timothy Atkeson, General Counsel of CEQ, to Gordon

The FPC never accepted CEQ's contentions and insisted that it could rely on a draft statement prepared by the applicant utility. In a gesture of accommodation, CEQ inserted a phrase in its Revised Guidelines allowing the FPC to continue this practice, even though CEQ disagreed with the FPC position. Section 7 stated that a Federal agency should consult with and get the comments of other federal agencies on the basis of "(i) a draft environmental statement for which it takes responsibility, or (ii) comparable information . . ."⁵¹

Notwithstanding the Revised Guidelines' clause above, the FPC practice was challenged in court in *Greene County Planning Board v. FPC*.⁵² The subject of the litigation was an impact statement prepared by the Power Authority of the State of New York (PASNY) on a 35-mile-long transmission line near Albany, New York. The United States Court of Appeals for the Second Circuit decided that the FPC had to prepare its own draft environmental statement. The court noted that statements prepared by applicants are likely to be "self-serving." This observation was certainly borne out by PASNY's impact statement, which described the 35 mile long, 150 foot wide corridor as not having "any significant adverse impact on the environment."⁵³ While this litigation was in progress, CEQ advised the FPC that it would lose in the court suit. When the FPC appealed the Second Circuit decision, the Supreme Court denied certiorari, leaving the Second Circuit decision in *Greene County* as a notable court interpretation of the federal agencies' responsibilities under NEPA.⁵⁴

CEQ Memos

During the two-year period between the Revised Guidelines and the New Guidelines of August 1973, there was much judicial interpretation of NEPA. At the same time CEQ proceeded to implement NEPA by meeting individually with the agencies to assure their compliance and by issuing numerous memos to the agency NEPA liaisons (over ten were issued in the first year after the Revised Guidelines). These alternately served to prod, inform and threaten the other federal agencies into stricter and more spirited compliance with NEPA.⁵⁵

Gooch, General Counsel of the Federal Power Commission, November 9, 1970. Atkeson added that the decision in *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), had reversed an FPC licensing decision largely because the FPC had not fulfilled its obligations under the Federal Power Act to evaluate alternative site locations.

51. *Revised Guidelines*, section 7.

52. 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

53. *Id.* at 420.

54. See, ANDERSON at 186-96.

55. See, e.g., Memorandum from Russell Train, Chairman of CEQ, to the Heads of

Three months after the Revised Guidelines were issued, Timothy Atkeson, General Counsel of CEQ, sent out a memo which did not deal specifically with implementation of the Guidelines (as had all the prior memos from CEQ), but instead discussed a far-reaching NEPA case, *Calvert Cliffs' Coordinating Committee v. AEC*;⁵⁶ the first and most famous United States Court of Appeals decision construing NEPA. The case involved the Atomic Energy Commission's (AEC) approval of an atomic plant at Calvert Cliffs. The plaintiffs in the case charged that the AEC regulations and procedures implementing NEPA failed to meet NEPA's requirements. The court agreed and held that the AEC had failed to comply with NEPA's procedural obligations by, among other errors *one*, failing or refusing to review in a hearing the nonradiological environmental factors if these were already reviewed by state agencies, unless these factors were affirmatively raised by outside parties or staff members; and *two*, refusing to consider modifications in the plans for those plants which were granted construction permits but not operating licenses.⁵⁷

The General Counsel's memo, while discussing the court's holding and its implications for all of the federal agencies (not confined to the AEC), emphasized the standard of strict compliance which the court held NEPA to require. According to the court, the phrase "to the fullest extent possible" meant that agencies must comply with NEPA except in the presence of a clear conflict of *statutory* authority.⁵⁸ As discussed previously,⁵⁹ this standard set out in the Revised Guidelines has been applied by other courts to a wide range of NEPA procedural duties and thus represents a strict and judicially enforceable standard. In its interpretation of the "fullest extent possible" phrase, the *Calvert Cliffs'* court cited both the legislative history and the language of the Guidelines on the phrase as support for its holding.⁶⁰ In effect, the General Counsel's memo demonstrated to all the federal agencies that the requirements and interpretations of the CEQ Guidelines would be enforced by the courts, and that agencies would do well to heed them. In addition, the sheer fact of judicial review of agency actions under NEPA was shown to the federal agencies by CEQ in the memo, thus putting the agencies on notice that the same thing could happen to them as had happened

all Federal Agencies (September 23, 1971); *see also*, November 2, 1971 memorandum, *infra* note 63.

56. Memorandum from Timothy Atkeson, General Counsel of CEQ, to all federal agency NEPA liasons, July 30, 1971, on "Decision of D.C. Circuit in *Calvert Cliffs'* case . . .". For a discussion of *Calvert Cliffs'* and citations to the many articles analyzing the case, *see* ANDERSON at 247.

57. 449 F.2d at 1120, 1123, 1127.

58. *Id.* at 1115.

59. *See* text *supra* at note 28.

60. 449 F.2d at 1115.

to the AEC in *Calvert Cliffs*'.

The memo also emphasized that part of the court's opinion which found that the section 102 process required a balancing of the economic and environmental costs and benefits.⁶¹ Since the statutory language did not itself require the balancing, the court reached its conclusion by reasoning that because NEPA demanded that environmental values be considered in the decision process, that consideration means an explicit weighing of these environmental values against the commonly used economic values. This judicial reading of NEPA, although perfectly sound as a practical application of NEPA's directives on administrative procedure, certainly represented an extension of NEPA duties beyond their original understanding. The holding also extended the Revised Guidelines's emphasis, noted above, on "an appropriate and careful consideration of the environmental aspects of proposed action" being built into the decision process.⁶² The Revised Guidelines gave more attention than NEPA did to imposing substantive duties, but even they were surpassed in this by *Calvert Cliffs*' which required an *explicit* balancing of economic and environmental factors in the impact statement. When this is realized, the fact that CEQ discussed this holding in its memo to all the federal agencies becomes very significant. It indicates that CEQ tacitly endorsed the holding as the correct interpretation of NEPA's substantive duties, even though it went beyond the Revised Guidelines' requirements, and said as much to the agencies. The agencies were being forewarned by CEQ that they must comply with this new standard, since it would be enforced by other courts, although, as stated before, CEQ was powerless to *force* compliance. Moreover, this endorsement also urged the agencies not to interpret NEPA *or* the CEQ Guidelines in a "crabbed fashion," to use the words of the *Calvert Cliffs*' opinion. Rather, they should endeavor to conform to the spirit of the Act and to comply beyond the literal words of NEPA and the Guidelines.

Interpretive Memos

Not long after the memo on *Calvert Cliffs*', and after a few memos reminding agencies to update their own NEPA procedures (one of which threatened recalcitrant agencies with "unfavorable Congressional and public comment and possible legal difficulties"),⁶³ the General Counsel of CEQ again

61. *Id.* at 1123. NEPA mandates a "rather finely tuned and systematic balancing analysis" in each case. *Id.*

62. *Revised Guidelines*, section 1; *see note 39 supra*.

63. Memorandum from Russell E. Train, Chairman, Council on Environmental Quality to Heads of all Federal Agencies, November 2, 1971, re "Final Reminder on Issuance of Revised Agency Procedures Implementing Environment Impact Analysis Requirements of NEPA."

issued a memo dealing with significant court interpretations of NEPA.⁶⁴ This memo discussed the following five issues from important NEPA cases, including extracts from *Calvert Cliffs*':

1. Interpretation of NEPA as an environmental full disclosure law in *Environmental Defense Fund v. Corps of Engineers*.⁶⁵

Congress by enacting NEPA intended to make agency decision-making more responsible and more responsive. The section 102 statement was intended to alert the public and the President to "all known *possible* environmental consequences of proposed agency action."⁶⁶ This broadens the responsibility of the agency to include all of the potential environmental impacts and not merely those major or undisputed effects.

2. The need to treat in the section 102 statement the "full range of responsible opinion" in *Committee for Nuclear Responsibility v. Seaborg*.⁶⁷

In the Cannikin nuclear test in Alaska, some scientists, both within and without the federal government, contended that the nuclear blast would pose a substantial danger of earthquakes. In the AEC's opinion, however, there was no significant danger and they had therefore not included the opposing viewpoint in the impact statement. The court held that this omission did not sufficiently comply with NEPA, stating that its function was not to rule on the merits of the competing scientific opinions, but that the court must assure that the statement sets forth the opposing scientific views.⁶⁸ The statement cannot, therefore, completely omit any reference whatever to the existence of responsible scientific opinions on the adverse environmental effects.

Seaborg reinforces the "full disclosure" aspect of NEPA required by *Environmental Defense Fund v. Corps of Engineers* and is analogous to the disclosure in registration required by the Securities Act of 1933. Corporations must reveal factors adverse to their image of profitability so that the public can make financially responsible decisions on their stock. Similarly, by including those responsible scientific views in opposition to the opinions held by those preparing the statement, the agency decision-maker, or ultimately the President, can make environmentally responsible decisions on the proposed project. In addition, the court held that this full disclosure meant including in the impact statement any reports of other

64. Memorandum from Timothy Atkeson, General Counsel, CEQ to Agency NEPA liaisons, December 3, 1971, re "Extracts from Important Court Decisions Interpreting NEPA."

65. 325 F. Supp. 749 (E.D. Ark. 1971).

66. *Id.* at 759 (Emphasis in original).

67. 463 F.2d 783, 787 (D.C. Cir. 1971).

68. *Id.* at 787.

federal agencies which might oppose the Cannikin test because of potential harm to the environment, which plaintiffs alleged existed. This holding helps to prevent the suppression of unfavorable government reports so that the public and Congress are not misled by the release of only favorable reports on a project by the executive branch.

3. NEPA requires the inclusion of economic data in the environmental statements. *Environmental Defense Fund v. Corps of Engineers*.⁶⁹

NEPA states in section 102(2)(B) that environmental factors should be given "appropriate consideration in decision making along with economic and technical considerations."⁷⁰ The court felt that the best way to enforce this general policy addressed to the agencies (but separate from the impact statement) was to require that any economic claims or benefits accruing be discussed in the environmental impact statement, along with any critical analysis of these economic claims by those *opposing* the project (full disclosure again). It could be argued that the congressional purpose behind putting that statement into NEPA was merely to assure that environmental factors be taken into account, with the implicit recognition that economic and technical factors were already receiving sufficient attention by the agencies. Nevertheless, the court took the words of policy in section 102(2)(B) and applied them with vigor to the section 102(2)(C) impact statement. The result, although possibly not what Congress had intended, converts the impact statement into a complete decision-making document.⁷¹

4. Agency initiative under NEPA.

In *Environmental Defense Fund v. Hardin*⁷² the court held that NEPA required each agency to research the environmental impact. The environmental statement should reflect a diligent research effort of a broad interdisciplinary scope to expose the potential environmental impact of a project. In *Calvert Cliffs'* the court held that NEPA imposed a duty to consider less damaging alternatives.⁷³ Their consideration "must be more than a *pro forma* ritual" and must include alternatives to the proposed action which would avoid some or all of the environmental costs.⁷⁴

Calvert Cliffs' also held that the agency's responsibility is "not simply to sit back, like an umpire, and resolve adversary contentions at the hearing

69. 325 F. Supp. 749 (E.D. Ark. 1971).

70. 42 U.S.C. 4332(2)(B) (1970).

71. Some environmentalists have urged that the impact statement should not lose its environmental focus for fear that environmental considerations will be submerged by the traditionally more important economic and technical factors.

72. 325 F. Supp. 1401 (D.D.C. 1971).

73. *Calvert Cliffs' Co-ordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

74. *Id.* at 1128.

stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process. . . ."⁷⁵ This conclusion especially applies to agencies like the AEC or the FPC which depend on private parties to request agency licensing for proposed projects. The agencies must take the initiative in considering environmental factors and not depend solely on the private party's conclusions.

5. The test applied by the courts in reviewing agencies' 102 determinations.

In *Calvert Cliffs'* the court set down a dual standard of review. First, as to procedural duties, such as preparation of the impact statement, hearings and comments, the court said that if the agency's decision was reached without individualized consideration of environmental factors, conducted fully and in good faith, it is the responsibility of the courts to reverse the decision.⁷⁶ Second, as to substantive duties (actual consideration of environmental values, the validity of a particular decision to continue with a project in the face of environmental costs), the court said that it must uphold a decision on its merits "unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."⁷⁷ Both of these standards have been much quoted and followed by other courts, despite the fact that the second criterion is dictum only. Moreover, these standards of review hold the agencies to very strict compliance. This is especially true when read in conjunction with the holding in *Ely v. Velde*,⁷⁸ also abstracted in the CEQ memo, that the agencies must not only observe the procedural requirements of NEPA, but that they must also "make a sufficiently detailed disclosure so that in the event of a later challenge to the agency's procedure, the courts will not be left to guess whether the requirements of . . . NEPA have been obeyed."⁷⁹ The holding of *Ely v. Velde* puts the burden on the agency, not the plaintiff, to provide an adequate record for review if challenged. It seems that the holdings of *Calvert Cliffs'* and *Ely v. Velde*, when read together, impose full responsibility on each agency not only to make its ultimate decision in good faith and after careful weighing of the merits, but also to demonstrate this good faith to a reviewing court by a record available to the public.

By discussing and publicizing this standard of judicial review to the agencies

75. *Id.* at 1119. Similar language was addressed to the Federal Power Commission five years before NEPA was enacted in *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2nd Cir. 1965).

76. 449 F.2d at 1115.

77. *Id.*

78. 321 F. Supp. 1088 (E.D. Va.), *rev'd*, 451 F.2d 1130 (4th Cir. 1971).

79. 451 F.2d at 1138.

in its memo, CEQ essentially reiterates an implied judicial warning to each agency that it must comply fully with NEPA or face a reversed decision or a long delay. This threat of judicial review offers the most effective avenue for CEQ to exert its limited influence on the federal agencies' implementation of NEPA since, as stated before, CEQ is powerless to force compliance by the agencies.

Another more subtle result of CEQ's discussion of the judicial standard of review emerges from the context in which it is found. The context is not as an isolated warning which merely urges the agencies to comply with NEPA. Instead, CEQ coupled this strict standard of review with the expanded and broadened interpretations of NEPA in those court decisions which they chose to include in their memos. In this fashion the standard (or threat) of review applies to all the new judicial requirements in NEPA. Thus, by emphasizing the issue of reviewability of agency decisions along with the issue of the agencies' responsibility to take the initiative in considering environmental values, CEQ suggests to the agencies that they take a more expansive view of their duties under NEPA, and at the same time forewarns them that this expansive view will be enforced by the courts.

The last major memo by CEQ on NEPA came in May 1972, over a year after the Revised Guidelines.⁸⁰ Up until the summer of 1973, the memo was the primary addendum to the Revised Guidelines to which the agencies and courts could look for guidance. In August 1973 New Guidelines were issued. This memo gave additional notice to the agencies by first discussing the old and some new interpretations of NEPA which the courts had adopted, and then by spelling out in ten explicit recommendations the new duties of the agencies. The ten recommendations put the judicial holdings construing NEPA into an administrative context to simplify compliance by the agencies, thus aiding the difficult task of implementation. In addition, CEQ attempted to influence the agencies by combining the court interpretations of NEPA with its recommendations on agency procedure. Each court decision, of course, only concentrated on a few of the major issues involved in NEPA so that, standing alone, its impact was limited to those issues. Moreover, in the more than 200 lawsuits brought in NEPA's first two years of existence, many were contradictory and inconsistent.⁸¹ CEQ, however, could pick the best opinion for each

80. May 16, 1972, Memorandum from Timothy Atkeson, General Counsel, CEQ to Agency NEPA Liasons re: "Recommendations for Improving Agency NEPA Procedures". (1972 Memorandum).

81. Compare *e.g.*, *Bucklein v. Volpe*, 1 ELR 20043, 20044 (N.D. Cal. 1970): NEPA "would not seem to create any rights or impose any duties of which a court can take cognizance."; with *Texas Committee on Natural Resources v. United States*, 2 ELR

issue and could ignore those court decisions which held NEPA to the narrow, crabbed interpretation *Calvert Cliffs'* decried.⁸²

By choosing the more expansive interpretation of NEPA as the basis for its recommendations, CEQ achieved a more consistent and substantially broader view of NEPA than even the best of the court decisions, which necessarily focused on particular issues. This view can then be enforced in future suits after having CEQ's imprimatur put upon it by plaintiffs citing the public CEQ memo to the agencies on NEPA interpretation. This approach was used successfully in *Scientists' Institute for Public Information, Inc. v. AEC* where the court discussed and relied on a recommendation from the May 1972, memo.⁸³ In addition, since most of these recommendations would later find their way into the new CEQ Guidelines, they would have even stronger force and authority as the administrative interpretation of NEPA.

Probably the most important recommendation made in the May 1972, memo was an elaboration of the former "balancing" requirement. When adverse environmental impacts are involved in a proposed action, the impact statement should indicate what other interests will justify these effects, for example economic cost-benefit analysis and national security.⁸⁴ In this recommendation, CEQ embraced the explicit balancing policy adopted by the court in *Environmental Defense Fund, Inc. v. Corps of Engineers*.⁸⁵ The General Counsel acknowledged in the memo that NEPA itself does not specify whether or not the impact statement should detail this balancing of environmental and economic considerations. However, the General Counsel did note a statement by Senator Jackson contained in the legislative history, which in effect stated that the section 102 procedure would ensure that any adverse environmental effects "which cannot be avoided are justified by some other *stated* consideration of national policy,"⁸⁶ to support the recommendation. Additionally, the decisions in *Calvert Cliffs'* and *Natural Re-*

20574, 20575 (W.D. Tex. 1970): "It is hard to imagine a clearer or stronger mandate to the Courts"; also compare *Jicarilla Apache Tribe of Indians v. Morton*, 2 ELR 20287 (D. Ariz. 1972) (NEPA cannot be applied retroactively where the agency has initiated its review processes of the proposal prior to January 1, 1970) with *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1970-71) (NEPA applies even though project plans had not only been reviewed by the agency but also had been partially implemented).

82. See, e.g., *Bucklein v. Volpe*, 1 ELR 20043 (N.D. Cal. 1970), on the issue of judicial review. *Bucklein* was ignored in favor of *Calvert Cliffs'* in CEQ's July 30, 1971, memo, *supra* note 56.

83. 481 F.2d 1079, 1087-90 (D.C. Cir. 1973).

84. May 16, 1972 Memorandum, *supra* note 80, at 3.

85. 325 F. Supp. 749 (E.D. Ark. 1971); see text accompanying note 69, *supra*.

86. 115 CONG. REC. 29055 (1969) (statement of Senator Jackson) (emphasis added), cited in May 16, 1972 Memorandum, *supra* note 80, at 4.

*sources Defense Council, Inc. (NRDC) v. Morton*⁸⁷ seemed to favor an explicit balancing policy, lending even more support for the recommendation.

Rather than merely citing and repeating these holdings on balancing, the General Counsel in his memo went further to elaborate on how detailed this balancing was to be.⁸⁸ This elaboration is important in context (although not judicially enforceable as are the holdings), because it at least addresses the potential danger of requiring economic data in the environmental impact statement. The danger arises from the agencies' expertise in the economic area. Allowing them to go into detailed and complex cost-benefit analysis, at which they are extremely adept, could result in a complete overshadowing of the discussion on adverse environmental effects. The memo recognized this danger and provided that balancing "does not mean that the statement may be used as a promotional document in favor of the proposal, at the expense of a thorough and rigorous analysis of environmental risks. . . ."⁸⁹ In addition, since a detailed discussion of subjects like economics or foreign relations could require as much space as the environmental analysis, this would destroy the focus of the section 102 statement and undercut the purpose of NEPA. Therefore,

[w]hat is necessary is a succinct explanation of the factors to be balanced in reaching a decision, thus alerting the agency decision-maker, as well as the President, the Congress, and the public to the nature of the interests that are being served at the expense of environmental values.⁹⁰

Similar language can also be found in the New Guidelines at section 8(a)(8) on the "Content of Environmental Statements."⁹¹ Section 8(a)(8) also provides that the environmental statement "should also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action . . . that would avoid some or all of the adverse environmental effects."⁹² This section, therefore, not only codified the recommendation in the May 1972, memo but also added new language to ensure that all reasonable efforts are made, and demonstrated in the statement, to consider less environmentally damaging ways of achieving the same economic benefits from a project. Interestingly, section 8(a)(8) was not inserted into the New Guidelines in the proposed version which came out in May 1973, but was put into the final version

87. 449 F.2d 1109, 1114 (D.C. Cir. 1971); 458 F.2d 827, 833 (D.C. Cir. 1972).

88. May 16, 1972 Memorandum, *supra* note 80, at 5, 6.

89. *Id.*

90. *Id.*

91. *New Guidelines*, *supra* note 4. The New Guidelines, unlike the old, are codified in the Code of Federal Regulations, a mark of somewhat greater authority.

92. *Id.*

because of comments from interested parties.⁹³ This comment process by which CEQ made changes between the proposed and final versions of the New Guidelines demonstrates the importance of public response to the section 102 process, for numerous improvements between the two versions were suggested by those commenting on the proposed New Guidelines.⁹⁴

Another important recommendation in the May 1972, memo, taken from the holding of *Natural Resources Defense Council, Inc. v. Morton*,⁹⁵ was that agencies should discuss all reasonable alternatives and their environmental impacts in the section 102 statement, including those not within the authority of the agency.⁹⁶ The court in that case required the Department of the Interior, which had proposed an offshore oil lease program, to consider alternatives such as a decreasing of oil import quotas, a matter clearly not within Interior's authority. The court reasoned that since the oil lease was one part of a broad coordinated plan by the President to meet our energy needs, the range of alternatives to be considered was also broader than the oil lease proposed. A broad impact statement could have been prepared on the entire executive initiative, but failing this, the court said the responsibility fell on the Interior Department to prepare one as the first agency to act.⁹⁷ CEQ recommended that agencies adopt this policy as a general rule, including the discussing of alternatives such as taking no action, or actions of a significantly different nature with different environmental impacts (for example fossil fuel versus nuclear power plant).⁹⁸ By recommending this policy as a general rule, CEQ again broadly interpreted the basic holding of *NRDC v. Morton*, since this holding could be construed narrowly in future litigation to refer only to similar fact situations where an agency's actions are part of a broad scale executive initiative such as in the energy or transportation areas. CEQ, however, endorsed the holding as a general rule applicable to all agency actions, forcing all agencies to consider the broader perspective and implications of their actions. This requirement is explicitly codified in the New Guidelines, so that if they are followed, the holding of *NRDC v. Morton* will have wide-ranging applicability.⁹⁹

One recommendation which was conceived solely by the General Coun-

93. See, e.g., Letter from Phil Soper, CEQ staff to CEQ General Counsel, June 21, 1973 (suggestions for change in final Guidelines).

94. See, e.g., *New Guidelines*, section 9(d) and 6(d)(2), both sections put in as a result of public comment on the proposed Guidelines.

95. 458 F.2d 827 (D.C. Cir. 1972).

96. *Id.* at 835; see May 16, 1972 Memorandum, *supra* note 80 at 10.

97. 458 F.2d at 835.

98. May 16, 1972 Memorandum, *supra* note 80, at 10.

99. *New Guidelines*, section 8(a)(4) provides that the content of the impact statement is to include "alternatives to the proposed action, including, where relevant, those not within the existing authority of the responsible agency."

sel's office at CEQ and which did not arise from any court decision was that agencies should devise an appropriate "early warning system" to announce the decision to prepare an impact statement "as soon as practicable after that decision is made."¹⁰⁰ This recommendation is derived from another CEQ creation—the draft environmental statement. In order that the draft statement (which was instituted to satisfy the requirement in NEPA for prior consultation) be as complete as possible, CEQ recommended that each agency notify other agencies and the public of the decision to prepare one. In this way, hopefully, information necessary for a complete draft statement would be forthcoming from the agencies and the public. In addition, the public environmental groups such as the Environmental Defense Fund or the Natural Resources Defense Council are now ready to comment on copies of the draft statement as soon as it is available, thus speeding up the commenting process. This recommendation became a requirement in the New Guidelines.¹⁰¹ Moreover, as a result of comments received,¹⁰² the final version of the New Guidelines contained the requirement that in certain circumstances, when agencies decide that an environmental statement is not necessary for a particular project, they should prepare a publicly available record briefly stating the decision and reasons for that decision.¹⁰³ Both of these requirements contribute further to the policy of insuring timely public information on agencies' environmental decision-making.

The last new major recommendation in the memo (some of the recommendations merely reiterated the holdings of cases discussed above) was that agencies should consider using broad program statements instead of small individual statements in assessing the environmental effects of a number of separate actions on a given geographical area or the overall impact of a large scale program such as the development of geothermal energy.¹⁰⁴ This recommendation partly expands on the *NRDC v. Morton*¹⁰⁵ holding on broad energy alternatives, but is primarily a new concept introduced by CEQ. The concept, if fully implemented, will have a very significant effect on all new research developments sponsored by the federal government and should foster the technology assessment so necessary in today's technologically dependent society. As the Council emphasized in its memo, preparation of

100. May 16, 1972 Memorandum, *supra* note 80, at 12.

101. *New Guidelines*, section 6(e).

102. *See, e.g.*, letter from group of five environmental organizations, Natural Resources Defense Council, National Wildlife Federation, Environmental Defense Fund, Sierra Club, and National Parks and Conservation Association, to CEQ on comments to Guidelines, June 25, 1973, at A 7.

103. *New Guidelines*, section 6(e).

104. May 16, 1972 memo, *supra* note 80, at 17.

105. *See* text accompanying *supra* note 30.

these program statements should supplement the preparation of subsequent statements on major federal actions "wherever such actions have significant environmental impacts that were not fully evaluated in the program statement."¹⁰⁶ This condition would occur in long-term federal programs with periods of many years between initial decisions on the program and subsequent actions. CEQ designed the recommended program statement to avoid duplicative considerations of basic policy questions, while insuring consideration of cumulative impacts that might be slighted in a solely case-by-case analysis of the major federal actions. The concept of the program statement, if recognized and adopted by the federal agencies, thus represents a major contribution by CEQ under NEPA to the improvement of federal decision-making.

On June 12, 1973, the first appellate court opinion on the application of NEPA to government research and development programs was given by the United States Court of Appeals for the District of Columbia Circuit in *Scientists' Institute for Public Information (SIPI) v. AEC*.¹⁰⁷ The court was asked in that case to determine the applicability of NEPA to the AEC's research and development program for the Liquid Metal Fast Breeder Reactor, a large and complex program for which CEQ's broad program statement would be particularly appropriate. The AEC contended that NEPA required the preparation of impact statements only for individual facilities of the program, and not for the entire research and development program itself. The court, however, decided that the policy of NEPA¹⁰⁸ required an environmental impact statement on the entire program, and cited the CEQ memorandum recommendation on broad program statements as part of the authority for its holding.¹⁰⁹ The case should provide primary authority in this hitherto unresolved area of NEPA, and, as was evident from the court's opinion, it should apply to a wide range of federally supported technology development programs in addition to the breeder reactor.

The New Guidelines incorporated the holding of *SIPI v. AEC* in a long section directly following its provision—also put into the Guidelines from the memo—on broad program statements.¹¹⁰ The section states that agencies engaging in major technology research and development programs should formulate procedures for determining when a program statement is required.

106. May 16, 1972 memo, *supra* note 80, at 18.

107. 481 F.2d 1079 (D.C. Cir. 1973).

108. NEPA, section 101(a), 42 U.S.C. 4331 states "The Congress recognizes the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of . . . new and expanding technological advances. . . ."

109. 481 F.2d at 1090.

110. *New Guidelines* at 6(d)(1) and (2).

As to the timing of these statements, the section provides in language similar to the court opinion that:

Statements must be written late enough in the development process to contain meaningful information but early enough so that this information can practically serve as an input in the decision-making process.¹¹¹

The Guidelines then go on to elaborate the factors involved in any determination to prepare a program statement and also the content of that prepared statement.

The foregoing process by which the concept of technological development and program statements is now required of all agencies in their compliance with the law, notwithstanding that it is nowhere found in the statutory language in NEPA, underlines the interesting chronology of the Act's expansion into new areas. The holding of *NRDC v. Morton* in early 1972 discussed the need to consider a broad range of alternatives whenever the proposed action is an integral part of a broad federal program. Then, in May 1972, CEQ recommended to agencies that in certain situations broad program statements would be appropriate in order to properly assess the full scope of the environmental impact. This recommendation drew on the ideas of *NRDC v. Morton* and made them applicable to a wider range of agency actions. This recommendation in turn served as one of the bases for the court's holding in *SIPI v. AEC* that in large technology development programs, broad program statements are required under NEPA in addition to subsequent individual statements. Finally, the holding of *SIPI v. AEC* was codified in the CEQ Guidelines, thus transforming a policy concept into a new legal requirement. The process resembles a feedback loop whereby a new position taken by CEQ induces a corresponding change in the court decisions, which in turn produces a further change in the CEQ interpretation of NEPA. This process has taken place throughout the three years of NEPA's life.¹¹² Moreover, without ever appearing on the surface of the Guidelines, this relationship between CEQ and the courts has been an intimate part of the process of NEPA's growth.

New Guidelines

The New Guidelines issued in August 1973 substantially changed the revised

111. *Id.* at 6(d)(2). For a discussion of the program statement and its importance, see ANDERSON at 290.

112. See, e.g., explicit balancing requirement of May 16, 1972 memo, see text accompanying notes 85-93 *supra*; and emphasis in *Revised Guidelines* on public information (section 10(b)), emphasized in *Calvert Cliffs'*, and then reemphasized more explicitly in *New Guidelines* (section 9(d)).

Guidelines. In terms of pages alone it had doubled in size. Yet, much of the New Guidelines was not really new, having been introduced by CEQ in its memos to other agencies, as previously discussed. The CEQ recommendations, incorporated into the New Guidelines, include the explicit balancing in the impact statement of environmental and economic factors,¹¹³ the emphasis on NEPA's substantive policy requirements,¹¹⁴ increased public participation in the 102 process,¹¹⁵ the *required*, not optional draft statement,¹¹⁶ the duty to include responsible opposing viewpoints,¹¹⁷ and the broad program statements.¹¹⁸

Of the provisions which were actually new in the New Guidelines, the most important were probably the following:

1. For those legislative proposals of environmental significance, the Guidelines provided that agencies should prepare impact statements on the proposals before submission to the Office of Management and Budget for clearance.¹¹⁹ This reiterates the statutory requirement of NEPA which had not been emphasized as strongly in prior Guidelines.¹²⁰ These legislative impact statements could be of major importance in giving Congress a clearer insight into potential environmental problems before it passes legislation.

2. Agencies should consider in their environmental statements the impact of the proposed action on energy conservation.¹²¹

3. "The procedures established by these guidelines are designed to encourage public participation in the impact statement process at the earliest possible time."¹²² This hortatory language was put in largely at the request of those environmental groups that sought to involve the public in commenting on agencies' draft statements.

4. The draft statement is not only required, but it also must "fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements. . . ."¹²³ The purpose of this provision was to improve the quality of all impact statements by making the draft statement more complete.

5. The Council deleted the provision allowing the FPC to rely on appli-

113. *New Guidelines* at section 8(a)(8).

114. *Id.* at 2(b), 1(a).

115. *Id.* at 9(d), 6(e).

116. *Id.* at 7(a).

117. *Id.* at 10(a).

118. *Id.* at 6(d).

119. *Id.* at 12(a).

120. NEPA, section 102(2)(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. . . ."

121. *New Guidelines* at 8(a)(iii).

122. *Id.* at 9(d).

123. *Id.* at 7(a).

cant's impact statements which was overturned in *Greene County v. FPC*.¹²⁴ The new Guidelines also provided that an agency "should make its own evaluation of the environmental issues and take responsibility for the scope and content of draft and final environmental statements,"¹²⁵ thus implementing the holding of *Greene County* and insuring that statements are more complete and less self-serving.

Conclusion

An examination of the history of the CEQ Guidelines and some of the more important court decisions interpreting NEPA demonstrates that the Guidelines are no ordinary set of administrative regulations. As an administrative determination of NEPA, they are not simply parallel to and separate from the judicial interpretations of NEPA, but are instead a kind of hybrid creation—an administrative-judicial gloss on the statutory language of NEPA. Given the advisory position of CEQ with respect to the implementation of NEPA, as contrasted with the position of those mission agencies of the federal government, the Guidelines draw their strength from their consolidation of important cases under NEPA, *i.e.* a codification of judicial interpretation. This strength is seen in the influence which the Guidelines have exerted in past NEPA cases in various areas of statutory interpretation. Thus, CEQ has exerted its influence over other, far larger federal agencies by its ability to first influence the courts. However, the overall influence to date has been limited. Although some courts have cited the CEQ Guidelines or memorandum recommendations for support, they have never explicitly directed agencies to follow the Guidelines, nor have they clearly identified the weight which an agency should attach to the Guidelines.

Thus, CEQ by a process of consolidation of cases, combined with its own initiative, has supplemented NEPA's requirements in order to fulfill the legislative purposes behind NEPA. Through its Guidelines it has clarified and detailed the procedure which federal agencies should follow in complying with NEPA. Unfortunately, the true potential of CEQ in affecting major changes in agency-NEPA procedures has never been fully utilized. However, the court holdings to date and the CEQ Guidelines have transformed NEPA from a simple mechanism for implementing congressional policy into a strong mandate for environmentally responsible federal decision-making.

Herbert F. Stevens

124. See text accompanying note 52, *supra*.

125. *New Guidelines* at 7(c).