NEWS & ANALYSIS

ARTICLES

NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems

by Dinah Bear

Editors' Summary: Exactly 20 years ago this month, in February 1969, Senator Henry Jackson (D-Wash.) and Rep. John Dingell (D-Mich.) introduced draft legislation that led the way to the ultimate enactment of the National Environmental Policy Act. A product of the growing environmental consciousness of American society during the 1960s, NEPA was Congress' first modern environmental law, and it set the tone for the complex superstrucure of federal environmental law that was to follow. Even now, as NEPA approaches age 20, it stands out as probably the single most widely applicable federal environmental statute, and its visionary approach to environmental issues makes it as adaptable to the problems of 1989 as it was to the problems of 1969. In this Article the author, the General Counsel of the Council on Environmental Quality, outlines NEPA's purposes, scope, and implementation procedures. She describes current issues in NEPA practice and policy, and observes that NEPA has continuing vitality in the context of a new generation of environmental concerns that could only have been guessed at by its original supporters.

The National Environmental Policy Act (NEPA)[1] was the first of the major environmental laws enacted in the environmental decade of the 1970s, and its passage stimulated the type of citizen involvement and environmental litigation that has become characteristic of the environmental area as a whole. After 19 years of implementation, the law's influence remains strong at all levels of American government and in the international arena.

Even now, however, the potential importance of parts of NEPA remains generally unrecognized and unrealized, and the particulars of the environmental impact assessment process are often misunderstood. This Article will make some general observations about the statute, set forth the procedures for the conduct of environmental impact assessment under §102(2)(C) of NEPA, and discuss issues that need further attention.

Scope of the National Environmental Policy Act

The work of the 91st Congress in addressing the emerging concerns about environmental quality was encapsulated in NEPA.[2] The statute was rightfully viewed as the foundation for inserting consideration of environmental factors into federal decisionmaking and dramatically increasing both the availability of information to public citizens and the role of the judiciary in federal environmental decisions.

Ironically, however, the success of litigants suing to enforce the procedural provisions of NEPA has to some degree contributed to the identification of the law solely with the preparation of environmental impact statements. In fact, the statute is notable and unique in the environmental field for its depth and breadth. Both Congress' stated purposes in enacting NEPA and the "Declaration of National Environmental Policy" in the law should be reread in light of today's renewed interest in environmental challenges. The purposes of NEPA are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[3]

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1. NEPA was passed by Congress on December 22, 1969, and signed by President Nixon on January 1, 1970. Pub.L. 91-190, 42 U.S.C. §§4321-4347, ELR STAT. NEPA 001-006.

2. NEPA's legislative history is discussed in F. ANDERSON, NEPA IN THE COURTS 1-14 (1973), and ENVIRONMENTAL LAW INSTITUTE, LAW OF ENVIRONMENTAL PROTECTION §9.02[2] (1987).

3. NEPA §2, 42 U.S.C. §4321, ELR STAT. NEPA 003.

The "Declaration of National Environmental Policy" states that:

> The Congress . . . declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[4]

Far from addressing only administrative procedures, NEPA stresses that it is

> [T]he *continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—*
>
> (1) fulfill the responsibilities of each generation as *trustees* of the environment for succeeding generations;
> (2) assure for all Americans safe, *healthful,* productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports *diversity,* and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit *high standards of living* and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable *recycling* of depletable resources.[5]

It is impossible to think of any environmental issue of current concern—whether beaches blighted by medical wastes, alarming predictions of climate change, or decline of species and ecosystem diversity—that is not already encompassed by NEPA.

Many of these issues can be and are currently addressed in the context of the environmental impact assessment process. For example, the Council on Environmental Quality is planning to issue guidance on how federal agencies should incorporate consideration of global climate change impacts in environmental documents prepared under NEPA. Similarly, the Senate Environment and Public Works Committee recently noted that the responsibilities of the federal government under NEPA include biological diversity, and that, "conservation of biological diversity under NEPA should be inherent in all facets of the NEPA decision-making process."[6]

However, other sections of NEPA, besides the well-known environmental impact assessment requirements, should also be considered in light of current issues. Such sections include the mandate to federal agencies to utilize a systematic, interdisciplinary approach to integrating natural and social sciences and the environment design arts in planning and decisionmaking,[7] and the requirement to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment."[8]

The Environmental Impact Assessment Process Under NEPA

Background

As one means of implementing the goals of the Act's national environmental policy, Congress included the well-known §102(2)(C), directing all federal agencies to include, in proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a "detailed statement" by the responsible official.[9] The "detailed statement," now commonly referred to as an environmental impact statement (EIS), must, by law, include an analysis of:

> (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.[10]

Title II of NEPA created the Council on Environmental Quality (CEQ) in the Executive Office of the President, composed of three Members appointed by the President with the advice and consent of the Senate.[11] CEQ has a number of responsibilities, including preparation of an annual report on environmental quality, developing and recommending to the President national environmental policies, and documenting and defining environmental trends.[12]

CEQ Guidance and Regulations

Shortly after NEPA was signed into law, President Nixon issued Executive Order 11514 which, among other things, directed CEQ to issue guidelines on preparation of environmental impact statements.[13] Beginning in 1970, CEQ issued a series of these guidelines, which addressed the basic

4. NEPA §101(a), 42 U.S.C. §4331(a), ELR STAT. NEPA 003.
5. NEPA §101(b), 42 U.S.C. §4331(b), ELR STAT. NEPA 003 (emphasis added).
6. S. Rep. No. 100-502, 100th Cong., 2d Sess. 6 (1988).
7. NEPA §102(2)(A), 42 U.S.C. §4332(A), ELR STAT. NEPA 003.
8. NEPA §102(2)(F), 42 U.S.C. §4332(F), ELR STAT. NEPA 004.
9. 42 U.S.C.§4332(2)(C), ELR STAT. NEPA 003.
10. *Id.*
11. One Member is appointed Chairman by the President. NEPA §202, 42 U.S.C. §4342, ELR STAT. NEPA 005.
12. NEPA §204, 42 U.S.C. §4344, ELR STAT. NEPA 005. CEQ's various responsibilities, and those of the Office of Environmental Quality (OEQ—the legal entity created by the Environmental Quality Improvement Act of 1970) are, in some ways, as broad and all-encompassing as the scope of the declaration of national environmental policy. Both authorities have yet to be fully implemented. For CEQ and OEQ's authorities, see 42 U.S.C. §§4344 and 4372, ELR STAT. NEPA 005 and 013.
13. Exec. Order No. 11514, 3 C.F.R. §902 (1966-1970), ELR ADMIN. MAT. 45001. The directive to issue guidelines is found at §3(h). Executive Order 11514 was amended in 1977 by Executive Order 11991, 3 C.F.R. §123 (1977).

requirements of environmental impact assessment and administratively interpreted the thrust of the considerable case law that was occurring throughout the 1970s.[14]

While the guidelines were useful, the environmental impact assessment process, or "NEPA process," as it frequently is referred to in the federal establishment, acquired some unfortunate "barnacles" during the mid-1970s.[15] The most frequent complaints were the length of EISs and the delays that the NEPA process was perceived to cause in the decisionmaking process. Observers believed that the lack of uniformity throughout the government and uncertainty about what was required accounted to a large degree for these problems. Consequently, in 1977 President Carter issued Executive Order 11991, directing CEQ to issue binding regulations to federal agencies in an effort to make the process more uniform and efficient.[16] The regulations were to cover all procedural provisions of NEPA, and to include procedures for referral to CEQ of conflicts between agencies concerning the environmental impacts of proposed major federal actions.

In writing the new regulations, CEQ undertook an extensive effort to obtain and respond to the views of all parties, both public and private, that were affected or interested in the NEPA process. The regulations were written specifically to reduce the delay and paperwork associated with the NEPA process, while making the process more valuable to the decisionmaker. As promulgated in final form on November 29, 1978,[17] the regulations observed that:

> Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.[18]

To some unmeasurable but significant degree, the regulations have proven successful. Many (though by no means all) federal agencies have improved their compliance with procedural requirements of the statute. Litigation is decreasing.[19] During the review of federal regulations in the beginning years of President Reagan's administration, the NEPA regulations fared quite well: less than ten letters were received about them, and several of those letters urged their full implementation.[20] The regulations have been amended only once since their promulgation, to address the controversial "worst case analysis" regulation.[21]

Regulatory Structure

The CEQ regulations implementing the procedural provisions of NEPA apply to all federal agencies of the government, excluding Congress and any of its institutions, the judiciary, and the President, including the performance of staff functions for the President.[22] The CEQ regulations are generic in nature, and do not address the applicability of the various procedural requirements to specific agency actions. Instead, each federal department and agency is required to prepare its own NEPA procedures that address that agency's compliance in relation to its particular mission.[23] CEQ reviews and approves all agency procedures and amendments to those procedures.[24]

The agency procedures are required to establish specific criteria for and identification of three classes of actions: those that require preparation of an environmental impact statement; those that require preparation of an environmental assessment; and those that are categorically excluded from further NEPA review. Additionally, agencies are required to address NEPA compliance for actions initiated outside of the federal government that require federal approval, the introduction of supplemental EISs into the administrative record, the integration of NEPA analysis into the agency decisionmaking process, and to name a contact office for further information or documents prepared under NEPA.[25]

14. Interim guidelines were issued on April 30, 1970. 35 Fed. Reg. 7391 (1970), 1 ELR 46001 (1971). Although very brief, the guidelines focused on certain themes that CEQ has consistently addressed throughout the development of the NEPA process. For example, a rigorous exploration and objective evaluation of alternative actions was required. Federal decisionmakers were reminded that cumulative impacts of many small projects must be considered.

    The interim guidelines were finalized and published a year later, with some additional sections such as provisions for state and local review and emergency actions. 36 Fed. Reg. 7724 (1971).

    In 1973, CEQ revised the guidelines and, for the first time, published them in the Code of Federal Regulations. 40 C.F.R. §1500 (1973), 9 ELR 46003 (1979). In response to comments on the draft guidelines, CEQ lengthened the comment period for the draft EIS to 45 days, required agencies to publish their NEPA procedures in the Federal Register, required agencies to develop an early notice system for informing the public of a decision to prepare an EIS, and issued guidance on making environmental data available to the public. In response to case law, CEQ addressed the use of a programmatic EIS and the limitation on action by applicants while the NEPA review was in progress. The new guidelines also emphasized the need to begin preparation of impact statements at an early point in the decisionmaking process and addressed the question of supplementing an EIS.

15. For a detailed discussion of the factors that led to the development of binding regulations, see Yost, *Streamlining NEPA—An Environmental Success Story*, 9 B.C. ENVTL. AFF. L. REV. 507 (1981-82). *See also* Council on Environmental Quality, *Environmental Impact Statements: An Analysis of Six Years Experience by Seventy Federal Agencies* (1976); Liebesman, *The Council on Environmental Quality's Regulations To Implement the National Environmental Policy Act—Will They Further NEPA's Substantive Mandate?*, 10 ELR 50039 (1980); Caldwell, *Is NEPA Inherently Self-Defeating?*, 9 ELR 50001 (1979).

16. Exec. Order No. 11991, 3 C.F.R. §123 (1977), amending Exec. Order No. 11514, *supra* n.13. The directive to issue regulations is found at §3(h).

17. 40 C.F.R. §§1500-1508 (1978)

18. 40 C.F.R. §1500.1(c).

19. The rather notable decline in litigation based upon NEPA is partly, but not wholly, attributable to improved compliance. Another factor has been the decrease in the number of "major" federal actions funded by Congress. CEQ statistics, based on annual surveys of all federal agencies, show a low of 71 cases with NEPA causes of action filed in 1986, as contrasted with 189 cases in 1974.

20. Review by the Vice President's Task Force on Regulatory Relief, 1981. (*see, e.g.*, response from National League of Cities to the Vice President's request for specific recommendations, May 14, 1981).

21. 40 C.F.R. §1502.22. *See generally* the preamble at 51 Fed. Reg. 15619 (1986), ELR ADMIN. MAT. 35038.

22. 40 C.F.R. §1508.12. By virtue of a delegation provision under §104(h) of the Housing and Community Development Act of 1974, the federal agency designation also applies to state and local governments and Indian tribes that are the recipients of funds under the Community Development Block Grant and the Urban Development Action Grant programs.

23. 40 C.F.R. §1507.3. Implementing agency regulations are listed at ELR ADMIN. MAT. 46001.

24. 40 C.F.R. §1507.3(a).

25. 40 C.F.R. §1507.3(b).

Categorical Exclusions

"Categorical exclusions" refer to acts falling within a predesignated category of actions that do not individually or cumulatively have a significant effect on the human environment.[26] Thus, no documentation of environmental analysis is required. Agencies may list either very specific actions, or a broader class of actions with criteria and examples for guidance. However, federal officials must be alert to extraordinary circumstances[27] in which a normally excluded action may have a significant environmental effect. A categorical exclusion is *not* an exemption from compliance with NEPA, but merely an administrative tool to avoid paperwork for those actions without significant environmental effects.

Environmental Assessmenets

An environmental assessment (EA) is supposed to be a concise public document[28] that may be prepared to achieve any of the following purposes: to provide sufficient evidence and analysis for determining whether to prepare an EIS; to aid an agency's compliance with NEPA when no EIS is necessary; and to facilitate preparation of an EIS if one is necessary. An EA should include a brief discussion of the need for the proposal, of alternatives as required by NEPA §102(2)(E),[29] and of the environmental impacts of the proposed action and alternatives. It should list agencies and persons consulted.[30] An EA is followed by one of two conclusions: either a Finding of No Significant Impact (FONSI) or a decision to prepare an EIS. A FONSI briefly presents the reasons why an action, not otherwise categorically excluded, will not have a significant effect on the human environment. It may include a summary of the EA, or simply be attached to the EA.[31] Neither EAs nor FONSIs are filed in a central location (unlike EISs, which are filed with the Office of Federal Activities in the Environmental Protection Agency). However, they are public documents, and the agency responsible for their preparation must involve the public in an appropriate manner.[32]

Agencies have discretion in selecting the appropriate level of public circulation of EAs and FONSIs, but there are two circumstances in which an agency is required to make a FONSI available for public review for 30 days. The first situation is when the proposed action is, or is closely similar to, an action which normally requires an EIS; the second case arises if the nature of the proposed action is without precedent in the agency's experience.[33]

While the EA and FONSI process is a valuable and even essential tool, it has been subjected, far too often, to two types of abuse. On the one hand, some compliance has reduced the EA analysis to a one-page form that is so cursory that it is questionable whether the underlying decision about whether to prepare an EIS is sound. On the other hand, an EA all too frequently takes on the look, feel, and form of an EIS, complete with the same qualitative contents and volume and weight. There can be several reasons for this, but certainly one unfortunate rationale has been to avoid as much public involvement as an EIS would stimulate, while being prepared to turn the EA into an EIS rapidly if a court would so order. Agency officials thinking of that approach would be far better advised to simply proceed with circulation of the document as an EIS.

Environmental Impact Statements

The primary purpose of an EIS is to serve as an action-forcing device to ensure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the federal government. It must provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment. In preparing EISs, *agencies should focus on significant environmental issues and alternatives and reduce paperwork and the accumulation of extraneous background data.* Texts should be concise, clear, and to the point, and should be supported by evidence that the agency has made the necessary environmental analyses. An EIS is *more* than a disclosure document; it should be used by federal officials to plan actions and make decisions.

The threshold requirement for preparation of an EIS is, of course, the statutory threshold of a "major federal action significantly affecting the quality of the human environment."[34] As interpreted by the CEQ regulations and case law, "major federal actions" include a wide range of actions, certainly much more than the construction projects most commonly associated with NEPA compliance. For example, "actions" include adoption of rules, regulations, and interpretations of policy under the Administrative Procedure Act (APA), legislative proposals, treaties and international conventions or agreements, and adoption of programs.[35] Actions include circumstances where the responsible official fails to act and that failure to act is reviewable by courts or administrative tribunals under the APA or other applicable law as agency action.[36] The

26. 40 C.F.R. §1508.4.

27. Agencies must provide for the possibility of extraordinary circumstances in which a normally excluded action may have a significant environmental effect in their own NEPA procedures. 40 C.F.R. §1508.4. CEQ encourages agencies to identify criteria for possible extraordinary circumstances in those procedures. The presence of an endangered species, an impact on critical habitat, a significant impact on bottomland hardwoods, or a major impact on a historic site, for example, could trigger the requirement to prepare an EIS for an action that would normally fall under a categorical exclusion. See, for example, the U.S. Forest Service's NEPA procedures at 50 Fed. Reg. 26078 (1985).

28. CEQ's recommended length is 10 to 15 pages. *See*, Question 36a, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026, 18036, ELR ADMIN. MAT. 35020, 35029. *See also* Sierra Club v. Marsh, 769 F.2d 868, 15 ELR 20911 (1st Cir. 1985), discussing the appropriate uses of EAs and how overly lengthy EAs often signal an inappropriate use of the document.

29. Section 102(2)(E) requires federal agencies to, "Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. §4332(2)(E).

30. 40 C.F.R. §1508.9.

31. *See* 40 C.F.R. §§1500.3, 1500.5(1), 1501.4(e), 1504.(q), 1508.13.

32. 40 C.F.R. §1506.6.

33. 40 C.F.R. §1501.4(e)(2)(i) and (ii).

34. NEPA §102(2)(C), 42 U.S.C. §4332(2)(c); ELR STAT. NEPA 003. The statutory term is amplified in the regulations. *See* 40 C.F.R. §1502.3.

35. 40 C.F.R. §1508.18(b).

36. 40 C.F.R. §1508.18.

only items specifically excluded as "actions" under NEPA are judicial or administrative enforcement actions (both civil and criminal) and funding assistance solely in the form of general revenue sharing funds distributed under the State and Local Financial Assistance Act of 1971, with no federal agency control over the subsequent use of such funds.[37]

The question of what is "significant," thus making EIS preparation necessary, has often been a difficult one. In fact, disagreement about whether a proposed action has "significant effects" has been the most frequent reason for NEPA litigation over the past 19 years.[38] CEQ's regulations do not define which particular federal actions are "significant" for purposes of NEPA; rather, they provide a discussion of the factors that should be considered by each agency when drafting their own NEPA procedures and when considering proposed actions. The regulations emphasize the need to consider "significantly" in terms of both context and intensity.[39] "Context" means that the significance of the proposed action must be analyzed in relation to the societal and environmental framework in which the action would occur. Factors to be considered in evaluating "intensity" include the degree to which the proposed action affects public health and safety, unique characteristics of the geographic area involved, the degree of controversy about the environmental impacts, the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks, the precedential value of the action, the presence of cumulative effects, the possible effects on historic, scientific, or cultural resources, the degree to which the action may adversely affect an endangered or threatened species or its habitat, and whether the proposed action would be a violation of a federal, state, or local law.[40] One frequently overlooked point is that the NEPA standard of significance applies to both *beneficial and adverse* impacts.[41]

Few federal courts have attempted to formulate a definition of the phrase "significantly affecting" that goes beyond the factual circumstances of a particular case. Instead, a review of the cases shows that almost all have been decided by the court determining whether the evidence in a given case pointed to the presence of potentially significant environmental effects and then deciding whether the agency's decision not to prepare an EIS was reasonable under the circumstances. Generally, however, the courts have rejected specific size or monetary factors as a guide to determining the significance of an action.[42] Courts are also increasingly concerned with adequate consideration of cumulative and indirect effects.[43] Although social and economic impacts alone do *not* trigger the requirement to prepare an EIS under NEPA, the courts have required the inclusion of such impacts once the threshold requirement for preparation of an EIS has been reached.[44]

Two types of EISs that have received less attention than the typical project-specific EIS are the programmatic EIS and the legislative EIS. Programmatic EISs must be prepared prior to an agency's decision regarding a major program, plan, or policy with significant environmental impacts. It may be broad in scope, followed by site-specific EISs or EAs prepared at subsequent stages. The process of preparing a broad statement and subsequent, more narrowly focused NEPA documents is referred to as tiering.[45]

Legislative EISs meet the statutory requirement for a "detailed statement on proposals for legislation which would significantly affect the quality of the human environment."[46] Although there are some modifications, the procedures for preparation of legislative EISs are similar to EISs prepared for proposals for executive branch action.[47]

Once the decision is made to prepare an EIS of any type, the proponent federal agency publishes a Notice of Intent (NOI) in the Federal Register. The NOI should describe the proposed action and possible alternatives, the agency's intent to prepare an EIS, the agency's proposed scoping process, and any planned scoping meetings and the name and address of a contact person in the agency.[48]

The agency must then engage in the "scoping process," a process to determine the scope of issues to be addressed in the EIS and for identifying the significant issues related to a proposed action. Scoping may or may not include meetings, but the process should involve interested parties at all levels of government, and all interested private citizens and organizations. Scoping is also the appropriate point to allocate responsibilities among lead and cooperating agencies,[49] identify other environmental requirements

37. 40 C.F.R. §1508.18(a).

38. NEPA litigation statistics and a discussion of significant NEPA case law can be found in the NEPA chapter of each Annual Report on Environmental Quality, published by CEQ. For cumulative NEPA litigation statistics, reflecting litigation from 1974-1985, see CEQ, *Environmental Quality* [17th Annual Report] 241 (1986).

To avoid the problem of defining significance, some countries and institutions have promulgated binding lists of specific projects that are subject to environmental impact assessment procedures. *See, e.g.*, "On Implementation of Environmental Impact Assessment," Cabinet Decision, August 28, 1984 (Japan); Council of the European Communities, "Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment," June 27, 1985.

39. 40 C.F.R. §1508.27(a) and (b).

40. 40 C.F.R. §1508.27(b)(1)-(10).

41. 40 C.F.R. §1508.27(b)(1). *See also* National Wildlife Federation v. Marsh, 751 F.2d 767, 14 ELR 20172 (11th Cir. 1983); Environmental Defense Fund v. Marsh, 651 F.2d 983, 11 ELR 21012 (5th Cir. 1981). The only exception to this is the analysis required under 40 C.F.R. 1502.22 (incomplete and unavailable information in an EIS), which has always been framed in terms of "adverse impacts." That regulation, however, applies once the decision to prepare an EIS has already been made.

42. *Compare, e.g.*, the decisions in Forty-Seventh Street Improvement Ass'n. v. Volpe, 3 ELR 20162 (D. Colo. 1973) (one-mile stretch of highway caused sufficient environmental impact to require preparation of an EIS) *with* James v. Tennessee Valley Authority, 538 F. Supp. 704, 12 ELR 21076 (E.D. Tenn. 1982) (TVA was not required to prepare an EIS before granting a permit for the construction of an inland coal-loading port even though the agency's own NEPA regulations indicated that port projects normally required an EIS).

43. *See, e.g.*, Fritiofson v. Alexander, 772 F.2d 1225, 15 ELR 21070 (5th Cir. 1985); Conner v. Burford, 605 F. Supp. 107, 15 ELR 20608 (D. Mont. 1985).

44. 40 C.F.R. §1508.14; Hanly v. Mitchell, 460 F.2d 640, 2 ELR 20216 (2d Cir. 1972), and 471 F.2d 823, 2 ELR 20717 (2d Cir. 1972) (*sub. nom.* Hanly v. Kleindienst).

45. 40 C.F.R. §§1502.20, 1508.28. For CEQ guidance on programmatic EISs and the tiering concept, see "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34263, 34267 (1983), ELR ADMIN. MAT. 35045, and Question 24, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026, 18033 (1981), ELR ADMIN. MAT. 35020, 35026. *See also* California v. Block, 690 F.2d 753, 13 ELR 20092 (9th Cir. 1982) and Foundation on Economic Trends v. Lyng, 817 F.2d 882, 17 ELR 20902 (D.C. Cir. 1987).

46. NEPA §102(2)(c), 42 U.S.C. §4332(2)(C), ELR STAT. NEPA 003.

47. *See* 40 C.F.R. §1506.8 for the applicable requirements.

48. 40 C.F.R. §1508.22.

49. "Lead agency" and "cooperating agency" designations are used when

that are applicable to the proposal, set any time and page limits, and, in general, structure the process in such a way that all identifiable participants are informed and involved at appropriate points. A well designed scoping process can have an extremely positive ripple effect throughout the rest of the NEPA process.[50]

The next step is preparation of a draft EIS. The EIS may be prepared either by the lead agency, with assistance from any cooperating agencies, or by a contractor. However, if a contractor prepares the EIS, the contractor should be chosen by the agency and must execute a disclosure statement prepared by the lead agency, specifying that the contractor has no financial or other interest in the outcome of the project.[51] The agency may accept information from any party, including the applicant, but it *always* has the duty to independently evaluate such information.[52]

The content requirements of an EIS, from cover sheet to appendices, are set out in the CEQ regulations.[53] The "heart" of the EIS is the alternatives analysis, which inevitably leads to the question of which alternatives must be analyzed. The answer to that, like the answer to the question of what is "significant," is addressed on a case-by-case basis, with the key judicial standard being that of reasonableness.[54]

If the proposed action is the subject of a request for a federal permit or regulatory approval for a proposed action, the federal agency must consider both public and private purpose and need. Courts have stressed the need to consider the objectives of the permit applicant,[55] but they have also emphasized the requirement for the agency to exercise independent judgment as to the appropriate articulation of objective purpose and need.[56] Thus, NEPA requires the agency to consider both public and private purpose and need in formulating the alternatives to be examined in an EIS.

Once the draft EIS is prepared, it must be circulated for at least 45 days for public comment and review.[57] Federal agencies with jurisdiction by law or special expertise with respect to any of the relevant environmental impacts are expected to comment, although this may take the form of a "no comment" letter.[58] At the conclusion of the comment period, the agency must evaluate the comment letters and respond to the substantive comments in the final EIS.[59] The final EIS is sent to all parties who commented on the draft EIS. No decision may be made concerning the proposed action until at least 30 days after the Notice of Availability of the final EIS or 90 days after the publication of the Notice of Availability of the draft EIS, whichever is later.[60]

At the time of decision, the decisionmaker must sign a Record of Decision (ROD). The ROD states what the decision is, identifies which alternatives were considered by the agency in making the decision, specifies which alternatives were considered to be environmentally preferable, and discusses factors that were balanced by the decisionmaker. Further, the ROD states whether all practical methods to avoid or minimize environmental harm are being adopted, and if not, why not. The ROD also includes a description of any applicable enforcement and monitoring programs.[61]

The Referral Process

The referral process is a method for referring to CEQ those federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects.[62] The head of a federal department or agency may refer a proposed major federal action to CEQ no later than 25 days after the Notice of Availability for the final EIS has been published by EPA. Under §309 of the Clean Air Act,[63] the Administrator of EPA has broader authority to refer to CEQ any proposed legislation, action, or regulation that he or she deems unsatisfactory from the standpoint of public health or welfare or environmental quality. The regulations provide guidance on procedures to be followed, criteria for referrals, contents of referring letters and supporting documents, responses by agencies, and involvement by the public. If CEQ accepts a referral, it has a number of options, including making recommendations to the President for action. However, most typically, CEQ publishes Findings and Recommendations regarding the issues under consideration. These

there is more than one federal agency either proposing an action or involved in the same action or group of actions. Federal, state, or local agencies, including at least one federal agency, may act as joint lead agencies. For criteria and responsibilities of lead and cooperating agencies, see 40 C.F.R. §§1501.5 and 1501.6. For resolution of disputes over which agency should be lead agency, see 40 C.F.R. §1501.5(c).

50. 40 C.F.R. §1501.7. *See also* "Memorandum for General Counsels, NEPA Liaisons, and Participants in Scoping: Scoping Guidance," (Apr. 30, 1981), ELR ADMIN. MAT. 35031. The U.S. Forest Service uses scoping techniques to good advantage for all proposed actions, regardless of whether an EIS is required. *See* Ketcham, *How Does the Scoping Process Affect the Substance of an EIS?* and O'Brien, *The Importance of Scoping*, in N. ROBINSON (ed.), PROCEEDINGS OF A CONFERENCE ON THE PREPARATION AND REVIEW OF ENVIRONMENTAL IMPACT STATEMENTS (1988).

51. 40 C.F.R. §1506.5(c). An applicant may prepare an EA. However, in this case, the agency must make its own evaluation of the environmental issues and take responsibility for the scope and content of the document. 40 C.F.R. §1406.5(b).

52. The agency may also incorporate information by reference in the EIS and adopt another agency's NEPA documents. However, the independent review standard still applies. *See* 40 C.F.R. §1502.21 for incorporation by reference and 40 C.F.R. §1506.3 for adoption procedures.

53. 40 C.F.R. §1502.10.

54. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 8 ELR 20288 (1978). Sometimes "reasonable alternatives" may include those outside the jurisdiction of the lead agency. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 2 ELR 20029 (D.C. Cir. 1972).

55. Roosevelt Campobello International Park Comm'n. v. U.S. EPA, 684 F.2d 1034, 12 ELR 20911 (1st Cir. 1982).

56. Van Abbema v. Fornell, 807 F.2d 633, 17 ELR 20429 (7th Cir. 1986).

57. 40 C.F.R. §1506.10(c). Both the draft and final EISs are filed with the Office of Federal Activities in the Environmental Protection Agency, which then publishes the official Notice of Availability for the EISs. Timing periods run from publication of the Notice of Availability for comments on EISs and for referrals to CEQ.

58. 40 C.F.R. §1503.2.

59. 40 C.F.R. §1503.4(b). The CEQ regulations state that the text of final EISs "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." 40 C.F.R. §1502.7. All participants in the process would be better served if agencies would take serious efforts to comply with this standard.

60. 40 C.F.R. §1506.10. Agencies that have internal appeal procedures that provide a real opportunity to alter the ultimate decision may make and record the ultimate decision at the same time the EIS is published. 40 C.F.R. §1506.10(b)(2).

61. 40 C.F.R. §1505.2.

62. *See* 40 C.F.R. Part 1504 for full referral procedures.

63. 42 U.S.C. §7609, ELR STAT. CAA 046.

recommendations are not binding on the lead agency, but they are most often accepted.[64]

Current Issues

Several issues related to NEPA are currently being examined, and still more should be addressed. Some of these issues were identified at a conference on the preparation and review of environmental impact statements sponsored by CEQ and the Environmental Law Section of the New York State Bar Association in November 1987 at West Point, New York;[65] others are the subject of legislative or judicial attention; and some issues have yet to be focused on seriously by anyone.

The Post-Decisional NEPA Process

NEPA implementation has focused on the pre-decisional aspects of the process. This emphasis has been essential to achieving the goal of integrating environmental considerations into agency decisionmaking. As the process matures, however, the post-decisional aspects of the NEPA process are beginning to receive attention. For example, questions are being asked about the enforceability of agency commitments to mitigation measures. Are commitments made in a Record of Decision (ROD) directly enforceable?[66] Does it make a difference if the action is a federally initiated action or a decision on a permit request from a non-federal applicant?

The scientific accuracy of the predictions in an EIS is another current issue. Generally, EISs are examined after the proposed action has been completed only if the agency is "tiering," that is, using the original EIS as a base from which to prepare additional analysis under NEPA. Few agencies systematically assess the predictions in an EIS in light of the actual after-the-decision impacts. The first study examining this issue was released in 1987, and, while it necessarily focused on EISs prepared in the early 1970s, the study dealt with a sample of 239 EISs and provides valuable insights.[67] The authors concluded that EIS forecasts were generally "not inaccurate," though many of the forecasts were "accurate" solely by virtue of vagueness and generalities.[68] The authors also found that "Despite some general cynicism about the veracity of government promises, agency managers prove to be quite responsible in carrying out promised mitigations."[69]

Finally, there are questions about whether NEPA requires an agency to undertake mitigation measures at all, and, if so, if there is a required order of priority in terms of types of mitigation. The issue of whether NEPA requires federal agencies to include in each EIS a fully developed plan to mitigate environmental harm will be addressed by the U.S. Supreme Court as it hears appeals from *Oregon Natural Resources Defense Council v. Marsh*[70] and *Methow Valley Citizens Council v. Regional Forester.*[71]

The question of whether mitigation measures must be undertaken in a particular order arises in the context of CEQ's regulatory definition of "mitigation."[72] Because the definition lists five types of mitigation in a logical order, beginning with avoidance of the impact and ending with compensation for the impact by replacement or substitution of the affected resource or environment, some have suggested that agencies are legally obligated to consider mitigation measures in the order presented in the regulation. While there is no support for that argument in the regulatory history, agencies are free to adopt such a course as a matter of policy.

The Extraterritorial Reach of NEPA

The question of whether the procedural requirements of NEPA apply to *all* proposed federal actions, wherever they occur, has been at issue for the past 19 years. Shortly after NEPA's passage, the Department of State argued that its procedural provisions do not apply to U.S. actions occurring in other nations.[73] The following year, the Legal Advisory Committee to CEQ studied the issue and concluded that §102(2)(C) applied to actions of federal agency actions anywhere, including those "carried out within the ter-

64. For an analysis of the referral process, see S. RAND & M. TAWATER, ENVIRONMENTAL REFERRALS AND THE COUNCIL ON ENVIRONMENTAL QUALITY 1986 (report by the Environmental Law Institute to the Council on Environmental Quality), *reprinted in* CEQ, Environmental Quality [17th Annual Report] 248-266 (1986).

65. *See* N. ROBINSON (ed.), PROCEEDINGS OF A CONFERENCE ON THE PREPARATION AND REVIEW OF ENVIRONMENTAL IMPACT STATEMENTS (1988).

66. To date, this issue has received little attention in the courts. One answer often given is that the remedy for failure to comply with federal commitments made in a Record of Decision would be to require the agency to prepare a supplemental EIS or EA based on the "substantial change" or "new circumstances" criteria in 40 CFR §1502.9(c). Others have suggested that mitigation commitments made by either an agency or applicant should be directly enforceable. *Cf.* Question 34d, "Forty Most Asked Questions and Answers Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026, 18037, ELR ADMIN. MAT. 35020, 35029 (1981) ("the terms of a Record of Decision are enforceable by agencies and private parties").

67. P. CULHANE, H. P. FRIESEMA, & J. BEECHER, FORECASTS AND ENVIRONMENTAL DECISIONMAKING—THE CONTENT AND PREDICTIVE ACCURACY OF ENVIRONMENTAL IMPACT STATEMENTS (1987).

68. *Id.* at 253.

69. *Id.* at 254. This conclusion was also supported by a General Accounting Office (GAO) investigation initiated in 1987 by the House Merchant Marine and Fisheries Committee. No report was ever filed by GAO, which recommended ending the study after identifying no significant problems in this area. Nonetheless, concern about fulfillment of mitigation measures remains in light of the overall budgetary situation. H.R. 2020 and S. 1792, introduced but not passed in the 100th Congress, would have amended NEPA to require CEQ to issue guidance for federal agencies to review a sample of implemented EISs, to measure the predicted environmental effects against actual effects, and evaluate the implementation of any mitigation requirements specified in the EISs. Agency reviews would have been submitted to CEQ for evaluation, which, in turn would have reported on its findings to Congress.

70. 832 F.2d 1489, 18 ELR 20321 (9th Cir. 1987).

71. 833 F.2d 810, 18 ELR 20163 (9th Cir. 1987). The cases also raise the issue of whether CEQ's 1986 amendment of 40 C.F.R. §1502.22 (incomplete or unavailable information) is consistent with NEPA, or whether a "worst case analysis" is specifically required under NEPA.

72. 40 C.F.R. §1508.20.

73. *See* Memorandum from Christian A. Herter, Jr., Special Assistant to the Secretary of State for Environmental Affairs, to Russell Train, Chairman, Council on Environmental Quality, and accompanying "Legal Memorandum: Application of National Environmental Policy Act of 1969 to Actions of the Federal Government Occurring Outside of the United States," May 4, 1970, *reprinted in* Hearings Before the Subcommittee on Fisheries and Wildlife Conservation, Committee on Merchant Marine and Fisheries, December 7-22, 1970. The State Department did conclude that NEPA's requirements could be applied to the high seas, outer space, and Antarctica.

ritorial jurisdiction of another nation.'"[74] Never decisively answered by the courts,[75] the issue was debated by both commentators[76] and federal agencies[77] throughout the 1970s.

During the course of working on the NEPA regulations in 1977-78, CEQ identified the issue of NEPA's applicability to federal actions as an issue which needed to be addressed in a regulatory context. That effort, involving a long and much publicized interagency debate,[78] resulted in the January 4, 1979, issuance by President Carter of Executive Order 12114,[79] "Environmental Effects Abroad of Major Federal Actions." Executive Order 12114 "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions."[80] It does not create a cause of action in the courts.[81] It requires agencies to publish implementing procedures, in consultation with CEQ and the Department of State. The Executive Order provides for environmental analysis and documentation for actions affecting the global commons;[82] actions affecting the environment of a foreign nation not participating with the United States or otherwise involved in an action (the "innocent bystander" situation);[83] actions that provide a product that is prohibited or strictly regulated by United States law because its toxic effects on the environment create a serious public health risk; and actions that provide a project which in the United States is prohibited or strictly regulated to protect the environment against radioactive substances.[84] The Executive Order exempts a number of federal actions, including votes in international conferences and organizations, intelligence activities, arms transfers, and actions taken in the interests of national security.[85] Additionally, the Executive Order grants agencies broad authority to modify the contents, timing, and availability of documents to other affected federal agencies and affected nations for such reasons as "to enable the agency to decide and act promptly when required," "to avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities," and "difficulties of obtaining information and agency ability to analyze meaningfully environmental effects of a proposed action," and other similar factors.[86]

Recently, CEQ surveyed all federal agencies with regard to their compliance with Executive Order 12114. Since 1985, over 200 documents have been prepared under it, by 7 federal agencies.[87] The vast majority of these documents are for the EPA Prevention of Significant Deterioration Permits under the Clean Air Act. Excluding these, approximately 45 documents have been prepared. The responses to the survey demonstrated some confusion among the uses of EISs, EAs, concise environmental reviews, and bilateral or multilateral environmental studies referenced under Executive Order 12114, and several agencies asked CEQ for guidance.

During the 1988 session of Congress, the Senate Environment and Public Works Committee approved S.1792, including an amendment to NEPA §102(2)(C) specifically extending that section's coverage to extraterritorial actions. The accompanying report language referred to federal involvement in the Three Gorges Dam on China's Yangtze River, and criticized Executive Order 12114 as being inconsistent with the policy and principles set forth in NEPA.[88] While the bill was not acted upon by the full Senate or the House of Representatives during 1988, it appears likely that the issue will be revisited in Congress in 1989.

Legislative Environmental Impact Statements

One issue that is not receiving attention in Congress, and that should be, is the use of the legislative EIS process. The language of §102(2)(C) specifically emphasizes *proposals for legislation* as being the subject of the "detailed statements," now known as EISs, and, of course, the CEQ regulations provide procedures for legislative EISs.[89] The legislative EIS process can raise difficult problems for agencies trying to clear proposed legislation through the

74. Report of the Legal Advisory Committee to the President's Council on Environmental Quality, December 1971, pp. 13-17.

75. *See* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345, 11 ELR 20266 (D.C. Cir. 1981); Environmental Defense Fund v. Agency for International Development, 6 ELR 20121 (D.D.C. 1975); Sierra Club v. Coleman, 405 F. Supp. 53, 6 ELR 20051 (D.D.C. 1975), 421 F. Supp. 63, 6 ELR 20798 (D.D.C. 1976); Sierra Club v. Atomic Energy Commission, 4 ELR 20685 (D.D.C. 1974); Wilderness Society v. Morton, 463 F.2d 1261, 2 ELR 20250 (D.C. Cir. 1972).

76. *See, e.g.*, Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353 (1982); Comment, *The Extraterritorial Scope of NEPA's Environmental Impact Statement Requirement*, 74 MICH. L. REV. 349 (1975); Robinson, *Extraterritorial Environmental Protection Obligations of the Foreign Affairs Agencies: The Unfulfilled Mandates of NEPA*, 7 N.Y.U.J. INT'L L. AND POL. 257 (1974); Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 N.Y.U.J. INT'L L. AND POL. 459 (1974).

77. CEQ consistently maintained that the procedural requirements of NEPA applied to U.S. international actions, reasoning that "The 'human environment' is not limited to the United States, but includes other countries and areas outside the jurisdiction of any country . . . . The Act contains no express or implied geographic limitation of environmental impacts to the United States or to any other area. Indeed, such a limitation would be inconsistent with the plain language of NEPA . . . ." CEQ, Memorandum to Heads of Agencies on the Applying the EIS Requirement to Environmental Impacts Abroad (Sept. 24, 1976). Agencies with a foreign assistance mission or other overseas programs continued to resist this interpretation.

78. *See President Orders Environmental Review of International Actions*, 9 ELR 10011 (1979); *Forthcoming CEQ Regulations to Determine Whether NEPA Applies to Environmental Impacts Limited to Foreign Countries*, 8 ELR 10111 (1978).

79. 3 C.F.R. 356 (1980), ELR ADMIN. MAT. 45023.

80. Exec. Order 12114, §1-1.

81. *Id.*, §3-1.

82. *Id.*, §2-3(a).

83. *Id.*, §2-3(b).

84. *Id.*, §2-3(c). A fourth category of actions requiring environmental analysis and documentation under the Executive Order is major federal actions that significantly affect natural or ecological resources of global importance designated for protection by the President, or in the case of a resource protected by international agreement binding on the United States, by the Secretary of State. No such designations have been made.

85. *Id.*, §2-5(a).

86. *Id.*, §2-5(c).

87. The seven agencies are the Defense Logistics Agency, the Defense Nuclear Agency, the Joint Chiefs of Staff—Pacific Command, Army, the State Department, the Environmental Protection Agency and the Coast Guard.

88. S. REP. No. 100-52, 100th Cong., 2d Sess. 6 (1988).

89. 40 C.F.R. §§1506.8, 1508.17.

Office of Management and Budget, and it raises questions of enforceability through the courts because of separation of powers questions.[90] Nonetheless, some agencies do attempt consistent compliance with the requirements.[91] With a few exceptions, the process appears to be ignored by the congressional recipients of the EISs. Congress has its own processes for gathering information, seeking public comment and making decisions, and may view the legislative EIS process as an unnecessary extension of an executive branch process into legislative decisionmaking. The situation is discouraging for those who try to comply with the dictates of the statute, and frustrating in terms of overall use of resources. Responsible officials in both the Congress and the executive branch should focus on if and how the process could be made more useful and relevant to congressional debate.

Cumulative Impacts

By now, most federal agencies with much experience in NEPA compliance are reasonably adept at analysis of direct and indirect environmental impacts. Cumulative impacts, however, pose more difficult legal and methodological problems. Cumulative impacts are the impacts on the environment that result from the incremental impact of the proposed action when added to other past, present, and reasonably likely future actions. Both federal and nonfederal actions must be taken into account when making this evaluation.[92]

Over the past few years, several court cases have highlighted the importance of cumulative impact analysis.[93] There probably will be further litigation defining the boundaries of this important requirement in particular factual situations. Meanwhile, some agencies have developed methodologies and guidance for the assessment of cumulative impact assessment.[94] Because this form of assessment presents unique challenges, CEQ has commissioned the Conservation Foundation to prepare an inventory of federal agency activities and documents related to cumulative impact assessments. An interagency work group, headed by CEQ, has been formed to focus on various methodological aspects of cumulative impact assessment.

Alternatives to NEPA Litigation

The development of NEPA law and its enforcement is closely intertwined with NEPA case litigation. Indeed, the ease with which litigants have been able to avail themselves of the judicial system has been viewed as either a major strength or a serious shortcoming of the environmental impact assessment in the United States, depending upon the viewpoint of the observer. Currently, the number of cases brought under NEPA is significantly decreasing, from a high of 189 cases in 1974 to a low of 71 cases in 1986.[95] The basic profile of NEPA disputes, however, has not changed over the years: the common forum for resolving claims of inadequate NEPA compliance remains the federal courts.

Meanwhile, parties in other environmental dispute situations have been searching for more effective and efficient means of resolving such matters.[96] Officials at EPA have encouraged and engaged in regulatory negotiation on several occasions.[97] The Administrative Conference of the United States has done much work in encouraging alternative dispute resolution (ADR).[98] Environmental organizations and industry groups have used such techniques to attempt to arrive at a consensus on legislative matters. While clearly not always successful, and subject to some criticism from environmental organizations,[99] there appear to be some situations in which ADR techniques can provide a more constructive solution to an environmental controversy than litigation. Yet with very few exceptions, ADR techniques have not been applied to NEPA controversies. Some aspects of the NEPA process, notably scoping, are quite compatible with ADR techniques. Efforts should be made to meld the procedural aspects of NEPA with successful ADR techniques to attempt to resolve incipient environmental controversies before court battles become inevitable.

Conclusion

While NEPA may be an old statute, by environmental law standards, it has important continuing vitality in light of current environmental problems. Its most important functions continue to be integrating environmental factors into federal decisionmaking and opening up that process to outside parties. Its breadth covers such timely concerns as biological diversity and global climate change, and it will continue to cover the concerns of future generations.

90. For example, what remedy can the courts impose if Congress is proceeding to debate and decide on a proposal that is unaccompanied by the appropriate NEPA documentation, or if an EIS that has been transmitted to Congress is arguably inadequate?

91. The Forest Service and the Bureau of Land Management, for example, have filed many legislative EISs for proposals for Wild and Scenic Rivers and Wilderness Areas. A legislative EIS was prepared for the Department of Interior's proposed oil and gas leasing program in the Alaska National Wildlife Refuge Area. EPA and the Department of State have submitted legislative NEPA documents related to various proposed international agreements and treaties.

92. 40 C.F.R. §1508.7.

93. *See, e.g.*, Connor v. Burford, 848 F.2d 1441, 18 ELR 21182 (9th Cir. 1988); Fritiofson v. Alexander, 722 F.2d 1225, 15 ELR 21070 (5th Cir. 1985); Thomas v. Peterson, 753 F.2d 754, 15 ELR 20225 (9th Cir. 1985).

94. *See, e.g.*, U.S. Forest Service, Region 6 Procedures for Cumulative Effects Analysis: Direction for Cumulative Effects Analysis in Forest Planning (Dec. 1986); J. Gosselink and L. Lee, Cumulative Impacts Assessment in Bottomland Hardwood Forests (Center for Wetland Resources, Louisiana State University) 1987 (prepared for the Environmental Protection Agency).

95. These totals are derived from annual CEQ NEPA litigation surveys, published in annual environmental quality reports.

96. For a survey and analysis of situations in which alternative dispute resolution techniques have been used, spanning a period from the early 1970s to spring of 1984, see G. Bingham, Resolving Environmental Disputes: A Decade of Experience (1986).

97. *See* Mays, *Alternate Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?*, 18 ELR 10087 (1988).

98. *See* Administrative Conference Recommendation 86-3, calling on agencies to employ alternative means of dispute resolution in a broad range of controversies (adopted in June 1986), and Recommendation 86-8, on acquiring the services of "neutrals" for alternative means of dispute resolution (adopted in December 1986).

99. There is, for example, deep concern on the part of environmental organizations about available resources for intensive negotiating sessions. *See generally* Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 ELR 10515 (1988).

Some aspects of both NEPA and the environmental impact assessment need clarification or further attention. During 1989 and 1990, there will be a series of forums for examining these issues in connection with the 20th year anniversary of the statute. CEQ is taking the lead role in coordinating these activities. These events should be useful in highlighting the strengths and weaknesses of current practices under NEPA.