

THE FEDERAL GOVERNMENT AND ENVIRONMENTAL CONTROL: ADMINISTRATIVE REFORM ON THE EXECUTIVE LEVEL

PETER A. DONOVAN*

I. INTRODUCTION: ENVIRONMENTAL POLLUTION AND THE ROLE OF GOVERNMENT

Society has at last awakened to the consequences of the increasing degradation of man's environment. The media have publicized the imminent shortage of potable water and food supplies, the sudden accretion of toxic wastes in the air, the presence of dangerous metals such as mercury in the food chain, the increasingly rapid deterioration of the inner cities, the psychological and physiological harm which results from constant noise assault and population density, the growing stockpile of deadly radioactive wastes, the pollution of soil with pesticides and herbicides, and the peril of thermal imbalance. An aroused scientific community also has warned society of the impending dangers, and many interested scientists have begun to study and document the deleterious effects of non-circumspect technology upon the environment. These developments, which have filtered down into the understanding of the average citizen, portray the scope of environmental pollution as a national, and, indeed, an international or transnational problem.

Any attempt to rectify existing environmental abuses and to achieve and maintain environmental quality, therefore, must necessarily be at least national in scope. This is axiomatic even though Congress has declared that the primary responsibility for environmental quality rests with state and local governments. While all levels of government must coordinate their activities in achieving the collective goal, federal example must undoubtedly supply the impetus behind any meaningful national achievement.

During the year 1970, the national fight against pollution enlisted new and potentially powerful weapons. These ranged from the enactment of the most important administrative statute ever passed by Congress, through subsequent congressional legislation and executive reorganization of the federal bureaucracy, to initially successful steps in modifying and adapting the federal antitrust laws to comport with environmental protection. Of particular significance are the administrative reforms.

On this administrative level, the first environmental development during the year 1970 was the formal enactment of the National En-

* Professor of Law, Boston College Law School.

vironmental Policy Act of 1969, which was signed into law by the President on January 1, 1970. This Act declared the dual federal objective of restoring and maintaining environmental quality. The Act created in the Executive Office of the President a new institution, the Council on Environmental Quality, to assist and advise the President in connection with environmental programs and the purposes and policies of the Act.

Congress quickly followed with the passage of the Environmental Quality Improvement Act of 1970, which established the Office of Environmental Quality, also within the Executive Office of the President, to provide a professional and administrative staff in support of the Council. Next came executive reorganization of the federal bureaucracy to streamline procedures and responsibilities. Many conflicting and, in some instances, even contradictory duties and policies previously imposed upon several agencies of the federal government were eliminated. The reorganization plans also created two new agencies. One of these, the Environmental Protection Agency (EPA), is a "super-agency" to which has been transferred authority over most federal environmental protection programs. These reorganization plans became effective on October 3, 1970.

This article surveys these developments at the administrative level. Particular emphasis is given to the discussion of the National Environmental Policy Act of 1969 since this statute may justifiably be said to be the fountainhead for federal activity in the area of the environment.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

On January 1, 1970, the National Environmental Policy Act of 1969 (NEPA) became effective.¹ This Act is the most important administrative statute ever passed by Congress in the area of environmental protection. The Act contains a congressional declaration of national environmental policy and imposes both substantive and procedural duties on all federal officials and agencies to implement its policy. In summary, the stated purposes of the act are

[t]o 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

¹ 42 U.S.C. § 4321 et seq. (Supp. V, 1970).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

to the Nation; and to establish a Council on Environmental Quality.²

Because of its importance and overriding influence on all federal activities, NEPA requires careful consideration and analysis.

A. *Purposes and Policies*

It should be noted initially that NEPA declares the national environmental policy in broad, sweeping language. Section 101(a), for example, recognizes the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and then "declares that it is the continuing policy of the Federal Government to use all practical means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in protective harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."³

Section 101(b)⁴ carries this thought forward by providing that "[i]n order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources" toward certain stated ends.⁵ These goals are detailed in the statute as follows:

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and ap-

² 42 U.S.C. § 4342 (Supp. V, 1970).

³ 42 U.S.C. § 4331(a) (Supp. V, 1970).

⁴ 42 U.S.C. § 4331(b) (Supp. V, 1970).

⁵ 42 U.S.C. § 4332(d) (Supp. V, 1970).

proach the maximum attainable recycling of depletable resources.⁶

Section 101(c) contains the further important declaration that "[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."⁷ With reference to this section and the provisions of the Administrative Procedure Act,⁸ one commentator has suggested that "a private citizen . . . should have standing to challenge actions and decisions of federal agencies allegedly in violation of the National Environmental Policy Act of 1969, where the action or decision threatens to have adverse effects on the ecosystem in which he resides or in the ecosystem that he uses for recreation."⁹ Although this construction of the Act seems desirable, it is not entirely clear that this position is supported by the legislative history. A change which occurred during the legislative process leading to the enactment of the provision appearing as section 101(c) should be noted.

NEPA itself is a synthesis of two bills introduced into the Senate and House, respectively (S. 1075 and H.R. 6750). Originally, the Senate version provided that "[t]he Congress recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."¹⁰ This language should be compared with the present version which now provides that "each person should enjoy a healthful environment." According to the House managers of the bill, the change was made "because of doubt on the part of the House conferees with respect to the legal scope of the original Senate provision."¹¹ Apparently, the conferees feared that S. 1075 might result in the issuance of injunctions against federal agency action which in any manner violated a citizen's "fundamental and inalienable right to a healthful environment."

Some consideration should be given to the words "fundamental and inalienable right." Language of this type is generally used to describe constitutional rights enjoyed by citizens. It is unclear whether the Senate bill employed the term in this sense. If this is what S. 1075 intended, the question arises whether Congress can articulate constitutional rights by legislative pronouncement. It is generally assumed

⁶ 42 U.S.C. § 4331(b) (Supp. V, 1970).

⁷ 42 U.S.C. § 4331(c) (Supp. V, 1970).

⁸ 5 U.S.C. § 701 et seq. (1964).

⁹ Yannacone, *National Environmental Policy Act of 1969*, 1 *Environ. Law* 8, 31 (1970).

¹⁰ S. 1075, 91st Cong., 1st Sess. (1969).

¹¹ Cong. Rep. No. 765, 91st Cong., 1st Sess. 8 (1969).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

that the judiciary alone is competent to interpret the Constitution. Quite the contrary, however, is true. Congress is a proper body for constitutional interpretation and its standing in this regard is not affected by the assumed power of the Supreme Court of finality in declaring constitutional interpretations.

It is emphasized that the national policy enunciated in NEPA was designed to ensure that federal action does not contribute to environmental problems. Section 101(a), therefore, recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances"¹² The report of the Senate Committee on Interior and Insular Affairs, which held hearings on the bill, provides a more specific description of the types of problems that NEPA was designed to solve:

Examples of the rising public concern over the manner in which Federal policies and activities have contributed to environmental decay and degradation may be seen in the Santa Barbara oil well blowout; the current controversy over the lack of an assured water supply and the impact of a super-jet airport on the Everglades National Park; the proliferation of pesticides and other chemicals; the indiscriminate siting of steam fired power-plants and other units of heavy industry; the pollution of the Nation's rivers, bays, lakes, and estuaries; the loss of publicly owned seashores, open spaces, and other irreplaceable natural assets to industry, commercial users and developers; rising levels of air pollution; federally sponsored or aided construction activities such as highways, airports, and other public work projects which proceed without reference to the desires and aspirations of local people.

* * *

S. 1075 is designed to deal with many of the basic causes of these increasingly troublesome and often critical problems of domestic policy.

* * *

S. 1075 is also designed to deal with the long-range implications of many of the critical environmental problems which have caused great public concern in recent years.¹³

¹² 42 U.S.C. § 4331(a) (Supp. V, 1970).

¹³ S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969).

To attain these objectives, the national environmental policy set forth in NEPA focuses on both "restoring and maintaining environmental quality," in Section 101(a), and further emphasizes, in Section 2, its introductory general policy section, that one of the purposes of the Act is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man"¹⁴ This dual focus on prevention and elimination of environmental damage is supported by other provisions of the Act which impose substantive and procedural duties on federal officials to implement the national environmental policy by rectifying past instances of environmental abuse as well as by preventing future abuse.

The substantive duties are set forth in Sections 102 and 103 of the Act and require separate consideration. For purposes of analysis and comprehension, it is also important to distinguish the procedural duties which are also largely set forth in the same two sections. Accordingly, both types of duties are separately treated, as is the language of the statutory provisions themselves in the following three subsections of this article.

B. *Substantive Duties Under the Act*

The most important provision of the Act, and the one most debated in Congress, appears in Section 102(1) which contains the following provision:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . . .¹⁵

The significance and impact of this provision depend upon the interpretation accorded the clause, "to the fullest extent possible," which modifies all section 102 duties. It seems clear both from the language of the Act¹⁶ and its legislative history that the modifying clause was

¹⁴ 42 U.S.C. § 4321 (Supp. V, 1970).

¹⁵ 42 U.S.C. § 4332(1) (Supp. V, 1970).

¹⁶ The language of § 102, particularly the italicized words (as they appear here) immediately following the modifying phrase, should be emphasized and carefully noted: "(1) *the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall [comply with the action forcing procedures set forth in subparagraphs (A) through (H)].*" This language should be compared and contrasted with that of § 101(b) which imposes a duty on federal officials and agencies which appears to be discretionary because of specific qualifying language: ". . . it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs and resources. . . ." The determination of "practical

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

intended to make the duties mandatory, not discretionary.¹⁷ The legislative history concerning the purpose of the modifying phrase is summarized in the Conference Report on the substitute bill which was enacted:

The conference substitute provides that the phrase "to the fullest extent" possible [in section 102] applies with respect to those actions which Congress authorizes and directs to be done under both clauses (1) and (2) of section 102 (in the Senate Bill, the phrase applied only to the directive in clause (1)). In accepting this change to section 102 (and also to the provisions of section 103), the House conferees agreed to delete section 9 of the House amendment from the conference substitute. Section 9 of the House amendment provided that "nothing in this Act shall increase, decrease or change any responsibility or authority of any Federal official or agency created by other provision of law." In receding from this House provision in favor of the less restrictive provision "to the fullest extent possible" the House conferees are of the view that the new language does not in any way limit the congressional authorization and directive to all agencies of the Federal Government set out in subparagraphs (A) through (H) of clause (2) of section 102 The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives

means" and "consistency" with "other essential considerations of national policy" appears to be left to the decision maker, and thus the § 101(b) duty seems to be discretionary. Section 102 duties, however, are non-discretionary. Under the language of the section, it seems clear that federal judges and officials have no choice or discretion but are obligated to "interpret" and "administer" the policies, regulations and public laws of the United States in accordance with the policy set forth in NEPA "to the fullest extent possible." There is no reference to "practical means" of achieving the goals nor recognition of "other essential considerations" in § 102. See Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 E.L.R. 50035, 50037 (1971) [hereinafter cited as Peterson].

¹⁷ Several statements to this effect appear in the legislative history:

A statement of national policy for the environment—like other major policy declarations—is in large measure concerned with principle rather than detail; with an expression of broad national goals rather than narrow and specific procedures for implementation. But if goals and principles are to be effective, they must be capable of being applied in action. S.1075 thus incorporates certain action-forcing provisions and procedures which are designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment.

S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969). See also 115 Cong. Rec. S19009-013 (1969) (remarks of Senator Jackson).

impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorization to avoid compliance.¹⁸

It seems clear throughout the legislative history of the Act that the phrase "to the fullest extent possible" was inserted to require that agencies implement the national environmental policy unless precluded from doing so by statute.¹⁹ Thus, if implementation of NEPA policy is possible, the agency must comply with the Section 102 duty. Where full implementation of the policy is impossible because a portion of it is precluded by statute, the agency is excused from full implementation. However, it still has the responsibility to comply insofar as possible.²⁰

It is only when an agency determines that it is precluded by the statute governing its jurisdiction and activities from implementing the national environmental policy, in whole or in part, that it is excused from complying with the section 102 duties.²¹ In this event, however, section 103 requires the agency to "propose to the President, not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter." Detailed examination of the provisions of section 103 is deferred to the next subsection of this article. However, one salient point will be noted. Senator Henry Jackson, sponsor of NEPA and Chairman of the Senate Interior and Insular Affairs Committee, observed:

What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate ac-

¹⁸ Cong. Rep. No. 765, 91st Cong., 1st Sess. 9-10 (1969).

¹⁹ 115 Cong. Rec. H12635 (daily ed. Dec. 17, 1969); 115 Cong. Rec. S17453 (daily ed. Dec. 20, 1969) (major changes in S. 1075 as passed by the Senate); Representative Aspinwall's dissent from this otherwise unanimous interpretation appears to be without foundation. 115 Cong. Rec. H13094 (daily ed. Dec. 23, 1969) (remarks of Rep. Aspinwall).

²⁰ *Id.*

²¹ See Peterson, *supra* note 16, at 50037.

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

tions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.²²

The duties imposed by section 102 apply to a broad range of action. All federal officials and agencies,²³ including independent regulatory commissions,²⁴ with the exception of environmental protection agencies,²⁵ must comply. Thus, all decisions and actions which affect the environment, including those supported by federal contracts, grants, subsidies, loans, and other forms of funding assistance, as well as those which involve federal leases, licenses or permits, must comply with the national environmental policy except to the extent compliance is precluded by statute.²⁶

Perhaps the full impact of this extensive coverage can be seen most clearly in the way NEPA will affect the operation and decision making of those federal agencies which have no environmental responsibility under existing law.

Many older operating agencies of the Federal Government, for example, do not at present have a mandate within the body of their enabling laws to allow them to give adequate attention to environmental values. In other agencies, especially when the expenditure of funds is involved, an official's latitude to deviate from narrow policies or "the most economical alternative" to achieve an environmental goal may be strictly circumscribed by congressional authorizations which have overlooked existing or potential environmental problems or the limitations of agency procedures. There is also reason for serious concern over the activities of those agencies which do not feel they have sufficient authority to undertake needed research and action to enhance, preserve, and

²² 115 Cong. Rec. S17451 (daily ed. Dec. 20, 1969).

²³ See S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969).

²⁴ See Hearings on S. 1075 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. 116-17, 121.

²⁵ 115 Cong. Rec. S17453 (daily ed. Dec. 20, 1969) (major changes in S. 1075 as passed by the Senate). This legislative intent is also recognized in the "Interim Guidelines" of the Council on Environmental Quality, 35 Fed. Reg. 7391 (1970).

²⁶ Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970) implies that NEPA is to be applied to the following federal actions:

- (1) Recommendations or reports relating to legislation and appropriations;
- (2) Projects in continuing activities directly undertaken by federal agencies, supported in whole or in part through federal contracts, grants, subsidies, loans, or other forms of funding assistance, or involving a federal lease, permit, license certificate or other entitlement for use;
- (3) Policy and procedure making.

maintain the qualitative side of the environment in connection with development activities.

S.1075, as reported by the committee, would provide all agencies and all federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment. This would be true of the licensing functions of independent agencies as well as the ongoing activities of the regular federal agencies.²⁷

One of the major purposes and accomplishments of NEPA, as Senator Henry Jackson has pointed out, is that it "provides a statutory foundation to which administrators may refer . . . for guidance in making decisions which find environmental values in conflict with other values."²⁸ Federal officials must thoroughly analyze the impact of all proposed actions on the environment. Thus, two decisions must be made. Initially, it must be determined whether the proposed action will have any significant environmental impact and, subsequently, whether there exists any conflict with or between environmental values and other values. In this regard, the procedural "action-forcing" requirements of section 102(2), especially the provisions of subparagraphs (C) and (D), become most important. Both of these provisions are discussed in detail in the following section.

It seems clear that one of the main purposes of these procedural "action-forcing" provisions was to establish a restructuring of the decision-making process and to accomplish a reordering of priorities. One observer has even suggested that they go so far as to shift the burden of proof to the proponent of action which would disturb the environment.²⁹ The following statement of the Senate Committee on Interior and Insular Affairs offers support to this view:

As a result of . . . failure to formulate a comprehensive national policy, environmental decision making largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes

²⁷ S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969).

²⁸ 115 Cong. Rec. S17451 (daily ed. Dec. 20, 1969). See also 115 Cong. Rec. S19009 (daily ed. July 10, 1969).

²⁹ See Peterson, *supra* note 16, at 50040, citing Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

of previous decades. Today it is clear that we cannot continue on this course.⁸⁰

The provisions analyzed here, if enthusiastically accepted and implemented by federal officials, could have far-reaching national and transnational consequences. Not only could conservation values become accepted for their own merit, but the history of industrialized, developed societies in depleting the irreplaceable resources of their own and other countries at an alarming rate might be reversed. Unfortunately, as the recent interim report issued by the Department of the Interior on the trans-Alaskan oil pipeline controversy indicates, this reversal does not appear to be the necessarily emerging result. The opposition of the newly created Environmental Protection Agency to this interim position, however, suggests that proposed federal action must have a strong base when it becomes inconsistent with the national environmental policy. Moreover, NEPA has not been entirely ineffective in obtaining favorable judicial interpretation.

C. *Procedural Duties Under the Act*

Briefly stated, all agencies of the federal government are required by section 102(2), "to include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting (sic) the quality of the human environment, a detailed statement" on certain specified environmental considerations. Prior to making the detailed statement, the responsible federal official is required to consult and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. In full, section 102(2) contains the following provisions:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this Chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in de-

⁸⁰ S. Rep. No. 296, 91st Cong., 1st Sess. 5 (1969).

cision making along with economic and technical considerations;

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

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

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

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

(E) 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;

(F) make available to States, counties, municipali-

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

ties, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

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

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

The overlap and interrelationship between these procedural "action-forcing" provisions and the substantive duties discussed above is at once apparent. While each of the subparagraph provisions is important, detailed attention is given here only to subparagraphs (C), (D) and (F) because of their particular potential for reordering priorities.

Section 102(2)(C) requires that a "detailed statement" be prepared by the agency whenever "legislative proposals" or "other major Federal action" is involved. This provision does not seem intended to imply that the environmental impact of agency action may be ignored in other instances. The stated policies of sections 2 and 101, and the duty imposed by section 102(1), require that adverse environmental impact be considered even where section 102(2)(C) statements are not required. Otherwise federal agencies and officials could not attain the Act's dual objectives of "restoring and maintaining environmental quality"³¹ by rectifying past instances of environmental abuse as well as by preventing future abuse.³²

Subparagraphs (C)(iii) and (D) of section 102(2) become particularly important where adverse environmental effects will result from proposed action, and also where it is possible to restore environmental quality previously lost. Under these provisions, the federal agency or official must consider alternatives to the proposed action. Under section 102(2)(D), federal agencies and officials have the responsibility 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."

This language suggests that the consideration of alternatives must be as thorough as the consideration of environmental impact. If an environmentally harmless alternative exists, it must be adopted instead of the original proposal. Where the proposal has no alternative compatible with the national environmental policy, the legislative history suggests that federal officials and agencies have the responsibility to reassess the justification for the proposed action. Particularly pertinent to this point is Senator Jackson's statement that environmentally

³¹ 42 U.S.C. § 4331(a) (Supp. V, 1970).

³² See Peterson, *supra* note 16, at 50038.

destructive activity be permitted infrequently: "This basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from this standard of excellence, they should be exceptions to the rule and the policy. And, as exceptions, they will have to be justified in the light of public scrutiny as required by section 102."³³ As one commentator has stated:

Even if an agency succeeds in proving that an environmentally destructive action is justified, its responsibility does not end. The agency must then take all possible steps to minimize the adverse effects of its action. This conclusion flows from the application of the national environmental policy to all of the subordinate decisions after the initial decision is made. A consideration of alternative techniques of implementing the decision is especially important at this stage of the decision-making process.³⁴

The provisions of subparagraph (F) and the second part of subparagraph (C) of section 102(2) are particularly relevant to state environmental action. These two provisions would give state governments and their agencies, private institutions and citizens access to federal agency records which are relevant to the protection of the environment as well as to the statements required to be filed by section 102(2)(C). The impact of subparagraphs (C) and (F) in this regard is quite important since the benefits of the duties imposed upon the federal government by the remaining provisions of subparagraphs (A) through (H) of section 102(2) are made available to all environmentally concerned parties. At the present time, the Council on Environmental Quality, created by Title II of NEPA, has adopted the position of not making the environmental impact statements of other federal agencies public until it has prepared and submitted its own comment on the statements. As a practical matter, this means that parties not consulted by the EPA under subparagraph (C), do not have a chance to participate in the agency's evaluation or influence its decision.

The Council's position in declining to make the environmental impact statements available until it has prepared and submitted its own comment is based upon the absence of explicit time provisions for making the data available under the Freedom of Information Act.³⁵ Its position in distinguishing between environmental impact statements

³³ 115 Cong. Rec. S17451 (daily ed. Dec. 20, 1969); see also 115 Cong. Rec. S7815 (daily ed. July 10, 1969) (remarks of Senator Jackson).

³⁴ Peterson, *supra* note 16, at 50040.

³⁵ 5 U.S.C. § 55 (1964).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

which are "drafts" and those which are "final," has generated strong criticism.⁸⁶ As the Environmental Law Institute has stated:

[T]he Council is free to guarantee early public access to "detailed" 102(2)(C) statements. In light of this Presidential directive [Executive Order 11514] it seems anomalous that the public should now be last in the hierarchy of consultation behind federal, state and local agencies, especially when the way is open under the act to put the public on an equal footing with them. (Also, when read literally NEPA requires that the President, the Council and the public be given contemporaneous access to the statements.)⁸⁷

Prior to the passage of NEPA, planning and decision making of the federal government and private industry was all too frequently "the exclusive province of the engineer and cost analyst."⁸⁸ These people often ignored environmental factors because of the difficulty in evaluating them quantitatively in the same equation with the economic and technical factors motivating proposed action.⁸⁹ NEPA now requires that federal agencies and officials strive to develop the methodology and techniques necessary for determining the value and importance of environmental factors. This can be seen in the various other subparagraphs of section 102(2). Subparagraph (A), for example, specifically states that federal agencies are to "utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts," and subparagraph (B) imposes upon them the further duty to "identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." The further duty to "initiate and utilize ecological information in the planning and development of resource-oriented projects" is imposed by subparagraph (G). Finally, NEPA recognizes that the duty to rectify ecological abuse and maintain environmental quality must be viewed in its proper international or transnational perspective. The provisions of subparagraph (E) require federal agencies and officials to "lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation" whenever cooperation is consistent with the foreign policy of the United States.

These procedural requirements are particularly important to con-

⁸⁶ 1 E.L.R. 10005-007 (1971).

⁸⁷ *Id.* at 10007.

⁸⁸ S. Rep. No. 296, 91st Cong., 1st Sess. 20 (1969).

⁸⁹ *Id.*

servationists and environmentalists. They are now assured that the necessary energy of government will be devoted to the development of heretofore unknown data bearing upon their concerns. They have won their initial victory, and NEPA now provides that full investigation and consideration must be accorded ecological factors, along with economic and technological factors, in order to fulfill the country's responsibility to succeeding generations to maintain and enhance environmental quality. Regrettably, much of these data may not be made available to concerned public and private institutions and individuals because of the Council's position in distinguishing between draft and final statements which it conceivably might apply to the other ecological data collected and prepared by federal agencies.

D. *Agency Review of Existing Operations*

The final provision of the National Environmental Policy Act of 1969 which is important to the present analysis is contained in Section 103. This section provides that all agencies of the federal government shall review their present statutory authority, administrative regulations, current policies and procedures to determine whether any deficiencies or inconsistencies exist which prohibit full compliance with the national environmental policy. Prior to July 1, 1971, these agencies are to propose to the President measures necessary to bring their authority and policies into conformity with the intent, purposes and procedures set forth in NEPA. In its interim guidelines, the Council of Environmental Quality advanced this date to September 1, 1970, and these statements have been prepared by all principal agencies and have been publicly disclosed.⁴⁰

As noted above, the question arises as to the relationship between Sections 103 and 102 of the Act, particularly in light of the clear statement in Section 105⁴¹ that the Act is supplemental and does not repeal existing legislation. In response to these inquiries, it is necessary to underscore one fact. Section 103 is not intended to provide federal agencies and officials with an escape from the duties imposed by section 102. It was emphasized during the debates on the Conference compromise bill that the provisions of section 102 "direct any Federal agency which takes action that it must take into account environmental management and environmental quality considerations."⁴² The section was "designed to assure consideration of environmental matters by all agencies in their planning and decision making—especially those agen-

⁴⁰ Copies may be obtained from the Environmental Law Institute.

⁴¹ 42 U.S.C. § 4335 (Supp. V, 1970).

⁴² 115 Cong. Rec. S17451 (daily ed. Dec. 20, 1969) (remarks of Senator Jackson).

cies who now have little or no legislative authority to take environmental considerations into account."⁴³

From the Conference Committee Report, it appears that section 103 is to have application only when there is "a clear conflict between [an agency's] existing statutory authority" and NEPA.⁴⁴ Although federal agencies are not to construe their present statutory authority in an "unduly narrow manner," it is also clear that they are not to construe their statutory authority in a manner which will avoid full compliance with the Act. Thus, section 103 has application, and federal agencies are to recommend changes under it, only when a provision of their enabling statutes "clearly precludes full compliance with the act."⁴⁵ The text of the statements which have been filed does not appear to present as many inconsistencies and deficiencies between NEPA objectives and the goal of other federal legislation as some had anticipated.⁴⁶

E. Case Law Under the Act

It is now only a little over a year from the effective date of the National Environmental Policy Act of 1969. The paucity of cases dealing with NEPA has left unanswered many questions which only judicial interpretation can ultimately resolve. Three of these questions are of sufficient importance to the prospective impact of the Act to warrant raising them here: (1) whether judicial review is precluded under NEPA or whether the duties imposed by the Act are legally cognizable; (2) what plaintiffs or classes of plaintiffs have standing to enforce the Act's provisions; and (3) whether the Act was intended to be, or will be, applied retrospectively.

1. Judicial Review Under NEPA

The question whether a plaintiff has standing under a statute to assert his claim should be distinguished from the question whether Congress intended to preclude judicial review of administrative findings under that statute. The general rule as to the latter question is that judicial review is not precluded absent a clear manifestation of congressional intent to do so. Since no such express intent is manifested in NEPA, this initial issue would seem settled. Moreover, as the ensuing discussion illustrates, no case which has relied upon NEPA as the basis of a cause of action has yet been dismissed on the ground that judicial review was precluded by the statute itself.

⁴³ Id. at 17453.

⁴⁴ Conf. Comm. Rep. No. 765, 91st Cong., 1st Sess. 10 (1969).

⁴⁵ Id.

⁴⁶ This is the position of the Environmental Law Institute. See 1 E.L.R. 10008.

However, there remains the other more difficult threshold question whether NEPA creates any legally cognizable duties. Since Section 102(1) states expressly that "the policies, regulations, and public laws of the United States shall be interpreted in accordance with the policies set forth [in NEPA] to the fullest extent possible," this second question would also seem to be resolved. Nevertheless, at least one court has indicated that NEPA was not intended to create any legally cognizable rights or duties. In *Bucklein v. Volpe*,⁴⁷ the court stated:

Moreover, it is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the Council, the Act is simply a declaration of Congressional policy; as such it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only this general command to federal officials to use all practicable means to enhance the environment.⁴⁸

With all due deference to the *Bucklein* court, it is submitted that this interpretation ignores the legislative history of NEPA and, in particular, the Section 102(1) requirement that all "*public laws*" of the United States, as well as "policies and regulations," be "*interpreted and administered*" in accordance with the national environmental policy "to the fullest extent possible" unless precluded by statute from doing so. (Emphasis added.)⁴⁹ In the final analysis, this mandate would seem to be enforceable only by courts whose duty it is to interpret the law.

Although it also contains a rather narrow construction of NEPA, the decision of the court in *Ely v. Velde*⁵⁰ stands in contrast to that of the *Bucklein* court. In *Ely*, plaintiffs sought permanently to enjoin the building of a medical center for Virginia prisoners in a "uniquely historic" rural area of the state where plaintiffs resided. Part of the cost of the center was to be paid by the federal government under the Safe Streets Act.⁵¹ In approving the grant of moneys under this Act, the federal Law Enforcement Assistance Association (LEAA) admittedly did not consider the environmental impact of the proposed construction on the area. Alleging violations of both the National Historic Preservation Act⁵² and NEPA, plaintiffs brought suit under

⁴⁷ — F. Supp. —, 2 E.R.C. 1082 (N.D. Cal. 1970).

⁴⁸ Id. at —, 2 E.R.C. at 1083. It should be noted that the quoted statement on the applicability of NEPA was dictum.

⁴⁹ See pp. 546-50 *supra*.

⁵⁰ 321 F. Supp. 1088, 2 E.R.C. 1185 (E.D. Va. 1971).

⁵¹ 42 U.S.C. § 3701 et seq. (Supp. V, 1970).

⁵² 16 U.S.C. § 470 et seq. (1964).

the provisions of the Administrative Procedure Act.⁵³ Although the court denied plaintiffs the relief requested, it held the case cognizable both under the National Historic Preservation Act and under NEPA.

The confusion caused the judiciary by the language of section 102(1) is apparent from the decision on the merits in the *Ely* case. In denying the injunction, the court based its holding upon the determination that NEPA is a "discretionary" statute while the Safe Streets Act was "non-discretionary," and, therefore, the LEAA officials administering the Safe Streets Act did not have to comply with NEPA.⁵⁴ The court admitted that "the Congress did not intend the clause in [section 102] 'to the fullest extent possible' to be an escape provision" but, nevertheless, concluded that the NEPA obligation to consider environmental impact "is discretionary only."⁵⁵ In reaching its decision, the court relied upon language in the Safe Streets Act which provided that "the Administration shall make grants . . . to a state planning agency if such agency has on file . . . an approved comprehensive state plan"⁵⁶

This seems an unduly narrow construction of the Act in face of the clear congressional intent to accomplish a reordering of national priorities. As indicated above, this intent is manifested both in the legislative history and in the language of NEPA. If Congress intended to create only discretionary directives, why was it so careful to point out in the several committee reports and in the debates that the phrase modifying section 102 was not intended to create an escape hatch, and that "each agency of the Federal Government shall comply with the directives set out in [section 102] unless the existing law applicable to such agency's operations *expressly* prohibits or makes full compliance with one of the directives impossible?" (Emphasis added.)⁵⁷ Why did it use the terms "*authorizes* and directs that, to the fullest extent possible . . . [the] *public laws* of the United States *shall be interpreted* and *administered* in accordance with the policies set forth in *this* chapter" and that "*all* agencies of the Federal Government *shall*" abide by the provisions of subparagraphs (A) through (H) of section 102(2)? (Emphasis added.)

It would appear that NEPA contains as much mandatory language as the Safe Streets Act. As the United States District Court for the Western District of Texas stated in its opinion in *Texas Committee v. United States*: "It is hard to imagine a clearer or stronger

⁵³ 5 U.S.C. § 701 et seq. (1964).

⁵⁴ 2 E.R.C. at 1187.

⁵⁵ Id.

⁵⁶ 42 U.S.C. § 3733 (Supp. V, 1970).

⁵⁷ See pp. 546-48 *supra*.

mandate to the Courts."⁵⁸ The court's distinction between "discretionary" and "non-discretionary" statutes as applied in the case is poorly founded.⁵⁹

Apart from this deficiency, it seems clear that the decision in *Ely* falls far short of implementing NEPA policy "to the fullest extent possible." It would have been much more consistent with the spirit and language of NEPA for the court to have ordered LEAA to consider the environmental consequences of its action. This position would not make implementation of the Safe Streets Act objectives impossible, but would help to make them compatible with other federal policy objectives. A more preferable interpretation of the two statutes would have resulted. It would seem that in approving a plan, a federal agency should be required to consider the matters Congress directed it to consider in a statute clearly designed to establish a comprehensive environmental program.

Each of the points made in criticism of the *Ely* decision seems particularly well articulated in the following thoughtful extract from the *Texas Committee* opinion:

The Congress has expressed in strong and clear language their concern over what we are doing to our environment. In the language of the statute, Congress has recognized the "critical importance of restoring and maintaining environmental quality." In very repetitive language, Congress has made clear that it intends to "use all practical means and measures . . . to preserve" the "natural aspects of our national heritage, and maintain wherever possible, an environment which supports diversity and variety of individual choice." Furthermore, the Congress:

authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act. Sec. 102.

It is hard to imagine a clearer or stronger mandate to the Courts . . .

It should also be pointed out here that the Congress in mandatory language requires all federal agencies to undertake, to the fullest extent possible, measures to insure protection and preservation of the environment, consistent, of course, with other economic and social requirements and goals. . . .⁶⁰

⁵⁸ — F. Supp. —, 1 E.R. 1303 (W.D. Tex. 1970).

⁵⁹ See Peterson, *supra* note 16, at 30037 (1971).

⁶⁰ 1 E.R. at 1304.

2. Standing Under NEPA

Because NEPA contains no express standing provisions, the issue of standing under the Act is largely unresolved, and this article will not attempt an exhaustive analysis of the problem. Some observations, however, are appropriate.

The recent Supreme Court decision in *Association of Data Processing Service Organizations v. Camp*⁶¹ lays down the standing test for a plaintiff whose complaint is grounded on a federal statute. First, he must allege that "the challenged action [or inaction] has caused him injury in fact, economic or otherwise."⁶² Second, he must place the interest he seeks to protect "arguably within the zone of interests to be protected or regulated, by the statute . . . in question."⁶³

If one adopts the more likely result that judicial review of administrative findings is not precluded under NEPA, then the application of the *Data Processing* test would seem to demand the result that all legitimate representatives of the public have standing to enforce NEPA in the courts. This result follows from the recently expanded view⁶⁴ of standing taken by federal courts and from the intent of the statute itself. First, it now seems accepted that the interest of a public representative which is injured in fact need not be economic,⁶⁵ but can reflect "aesthetic, conservational and recreational values."⁶⁶ Second, since NEPA is clearly designed to protect the public interest in environmental quality, that same public interest must necessarily be "within the zone of interest to be protected" by NEPA.⁶⁷ This is the position adopted in the *Ely* case where the court held that NEPA was a relevant statute within the meaning of the Administrative Procedure Act, and that the plaintiffs, who were residents of the affected area, were within the class sought to be protected by the Act. The court held that they satisfied the *Data Processing* test "not only [because of] injury to their personal interest, but also, acting as private attorneys general, [because of] injury to the public interest"; they were clearly within the zone of interests protected by the relevant statute, NEPA.⁶⁸

⁶¹ 397 U.S. 150 (1970).

⁶² Id. at 152.

⁶³ Id. at 153.

⁶⁴ Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450 (1970).

⁶⁵ See text at note 54 *supra*, quoting from the Supreme Court opinion in *Data Processing*.

⁶⁶ See *Citizens Comm. for the Hudson Valley v. Volpe*, 320 F. Supp. 203 (S.D.N.Y. 1969). *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965).

⁶⁷ There would seem to be as much connection between the private citizen and the NEPA zone of interests as there was between the tenant farmers and the Upland Cotton Program enacted as part of the Food and Agricultural Act of 1965, 7 U.S.C. § 144(d) (Supp. IV, 1969), in *Barlow v. Collins*, 397 U.S. 159 (1970).

⁶⁸ 2 E.R.C. 1188.

This view that all representatives of the public have standing to enforce the mandates of NEPA has already been espoused by at least one commentator⁶⁹ and is undoubtedly the better view.⁷⁰ Nevertheless, it is not alone conclusive of the problems in the area of public representation, the foremost of which is the process the courts will ultimately use to determine which persons or groups can justifiably be said to represent the public interest.⁷¹

Despite the *Ely* decision, the truly perplexing question of standing under NEPA exists with respect to the private litigant. The difficulty arises from some interesting considerations. Federal courts have favored having before them the specific plaintiff or plaintiffs who directly suffered from the injuries alleged in the complaint. The policy favoring this approach is that the specific plaintiff or plaintiffs will present the factual issues in their most concrete and adversary form.⁷² Where a statute is expressly intended to protect a public interest, however, opposite policy considerations become operative. Now, it is impossible to anticipate having specific individuals who have suffered unique damage. Their injury would be of the same quality as that suffered by other citizens, though there probably will be differences in degree. In these cases, therefore, the judicial interest must be to have before the court a litigant capable, both in resources and sophistication, of eliciting facts relevant to large-scale environmental damage or deterioration. These demands may, in fact, be beyond the abilities of most private litigants.

Courts would do well to consider these distinctions when called upon to resolve the question of standing under NEPA. At the minimum, it is certainly arguable that since the statute is silent, a private party has standing to enforce NEPA's directives, and this is the conclusion reached by the court in the *Ely* case. If the public has sustained damage in fact to an environmental interest, a fortiori, so has the individual, at least an individual residing in or otherwise using the area affected by the environmentally harmful activity. It is a contradiction to argue that the damage to the public is more specific than the damage to the individual. If the public is within the zone of interest to be

⁶⁹ See note 8 *supra*.

⁷⁰ See text at notes 8-11 *supra*.

⁷¹ Cf. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), cert. granted sub nom. *Sierra Club v. Morton*, 39 U.S.L.W. 3359 (U.S. Feb. 23, 1971). The court denied the *Sierra Club* standing to challenge the issuance of a license to build a ski resort. The *Sierra Club* did not allege a violation of NEPA. Nevertheless, in finding that the *Sierra Club's* (78,000) members did not "possess a sufficient interest for standing to be conferred," the court noted that the United States Ski Association, the Far West Ski Association (109,000), and the County of Tulare, where the development was to be located, all favored the issuance of the license. No. 24966 at 6-7.

⁷² See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

protected by NEPA, as the *Ely* court held, so must be the private individual. However, while this conclusion is logically required, it does not automatically follow that private citizens can always qualify as public representatives. In this connection, it is interesting to note the statement of the *Ely* court that "[t]he plaintiffs, even when acting in the public interest as private attorneys general, cannot purport to substitute their standard of public need for that lawfully designated to [the appropriate state official]."⁷³

3. Retrospective Application

Probably the most important question concerning NEPA which remains unresolved is whether the Act will receive retrospective application. At the one extreme, if NEPA is held to be fully retroactive, all federal administrative agency decisions made before January 1, 1970 must be brought into conformity with the Act's directives. At the other extreme, prospective application alone would mean that all decisions made prior to NEPA's effective date would stand regardless of their environmentally destructive effects. A middle ground would see decisions pre-dating the Act essentially remain unaffected, except for administrative review on the question of how best to minimize possibly undesirable consequences.⁷⁴ Pending resolution by the Supreme Court, determination of retroactive application remains an open question.

In *Pennsylvania Environmental Council v. Bartlett*,⁷⁵ the court was asked to enjoin construction of a road approved by the Secretary of Transportation which allegedly would affect a trout stream.⁷⁶ In dismissing the request for the injunction, the court considered the issue of the retroactivity of NEPA:

[T]he most reasonable interpretation that can be given to the legislative history of the Act is that there is no manifest Congressional intention or unequivocal and inflexible impact in the language used to indicate that the Act should be applied retroactively. Indeed, if the language of the Act favors any position, it most likely favors non-retroactivity.⁷⁷

The court cited the language of *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*,⁷⁸ that "the first rule of construction is that legisla-

⁷³ *Ely v. Velde*, 321 F. Supp. 1088, 2 E.R.C. 1185, 1190 (E.D. Va. 1971).

⁷⁴ Cf. *Texas Comm. v. United States*, — F. Supp. —, 1 E.R. 1303 (W.D. Tex. 1970).

⁷⁵ 315 F. Supp. 238, 1 E.R. 1271 (M.D. Pa. 1970).

⁷⁶ The defendants were the Secretary of Highways for the State of Pennsylvania, the Secretary of Transportation of the United States, and the contractors who had been awarded the construction contract for the project. Id.

⁷⁷ 315 F. Supp. 238, 248, 1 E.R. 1271, 1279 (M.D. Pa. 1970).

⁷⁸ 231 U.S. 190 (1913).

tion must be considered as addressed to the future, not to the past, . . . [and] a retrospective operation will not be given to a statute . . . unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' ”⁷⁹

The court in *Bartlett* also seemed to construe the language of NEPA narrowly. It read the phrases “to use all practicable means and resources” and “to the fullest extent possible” in sections 101 and 102 as indicating a lack of retroactive intent on the part of Congress.⁸⁰ This interpretation does not seem warranted by the legislative history.⁸¹

In *Bartlett*, the plaintiff cited the *Texas Committee* case for the proposition that NEPA should be applied retroactively. This contention was rejected on two grounds; first, that the language referred to by plaintiff was dictum and, second, that the cases were actually distinguishable. The court noted that in *Texas Committee* no construction had yet begun, while it had in *Bartlett*. The court’s consideration seems limited to what the Department of Transportation was statutorily required to consider at the time the contract was awarded. Since this was finalized prior to the passage of NEPA, it concluded that no violation of the Act occurred. This approach seems to ignore the complete transaction. No federal money had yet been paid and construction had only just begun. Thus, the court easily could have applied the dictates of NEPA to the remainder of the construction, thereby achieving a harmonization of the two federal programs without necessarily defeating the purposes of either. This harmonization was favorably received in *Texas Committee*.

The case of *Zabel v. Tabb*⁸² would seem, at first glance, to indicate that the prospects for applying NEPA retroactively are significant. Specifically, the Fifth Circuit held proper the decision of the Army Corps of Engineers to deny a license for a wetlands fill project on the grounds that the project would have an adverse environmental impact. In so holding, the court introduced the directives of NEPA to support its conclusion that the Corps’ denial on non-navigational grounds was within its authority. Since the Corps first recommended denial of the license in 1966, it would seem that the court had applied NEPA retroactively:

Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision *must be determined by the applicable stan-*

⁷⁹ Id. at 199.

⁸⁰ 1 E.R. at 1279.

⁸¹ See pp. 544-50 *supra*.

⁸² 430 F.2d 199 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3356 (U.S. Feb. 23, 1971).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

dards of today. (Emphasis added.) The national policy is set forth in plain terms in § 101 and the disclaimer of § 104(3) neither affects it nor the duty of all departments to consider, consult, collaborate and conclude. For we hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies particularly on all these environmental factors Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.⁸³

While the position of the court on the question of retroactivity is clear, the existence of alternative grounds for its holding makes the real basis for the decision doubtful.⁸⁴

F. Summary

As indicated, sections 102(1) and (2) are designed to operate within the policy objectives set forth in sections 2 and 101. Read together as an integrated pattern (as indeed they must be read since they are but individual sections of a single statute) these several provisions impose on all federal agencies and officials the responsibility to take into account the environmental impact of their activity, and to implement the national environmental policy "to the fullest extent possible."

The provisions of Sections 102, 103, 104 and 105, and particularly the modifying language "to the fullest extent possible" contained in Section 102, make it clear that the National Environmental Policy Act is intended to "supplement" rather than "modify or repeal" the existing statutory authority of federal agencies. Yet, at the same time, it is clear that the National Environmental Policy Act is intended to require federal agencies and officials to follow its policies, goals and procedures unless their existing statutory authorizations clearly prohibit full compliance with the Act's directives. When this conflict occurs, section 103 then becomes operative. Under this section reports have already been made to the President recommending legislative changes which are needed to harmonize the competing policy objectives.

⁸³ Id. at 213.

⁸⁴ The court also held that (1) under the Fish and Wildlife Coordination Act, 16 U.S.C. § 66 et seq. (Supp. IV, 1969), Congress intended that the Chief of Engineers and the Secretary of the Army consult with the Fish and Wildlife Service before issuing a permit for a private dredge and fill operation, and (2) that the correctness of the decision on the permit would be determined by standards of the Fish and Wildlife Coordination Act.

It is not yet clear the extent to which subsequent case law will implement the policy goals of the Act. The Supreme Court has not had occasion to consider any of these questions arising under NEPA, and, consequently, they remain open issues. Indeed, there is little judicial indication as to the meaning of the Act because only a short time has elapsed since its passage, and because of the problem which has arisen as to its retrospective application. From the few cases discussed here, it is apparent that only after extensive litigation and judicial decisions will the meaning of the disputed section of NEPA, its standing requirements, and its relationship to the Administrative Procedure Act and other federal statutes be resolved.

III. THE ENVIRONMENTAL QUALITY ACT OF 1970

Another important provision with respect to the environment is included in the Environmental Quality Improvement Act of 1970, which was approved on April 3, 1970. The Act begins with a statement of Congressional Findings in Section 202(a), which are:

- (1) that man has caused changes in the environment;
- (2) that many of these changes may affect the relationship between man and his environment; and
- (3) that population increases and urban concentration contribute directly to pollution and degradation of our environment.

The Act then states in Section 202(b)(1) that "the Congress declares that there is a national policy for the environment which provides for the enhancement of the environmental quality," and further provides in Section 202(b)(2) that "[t]he primary responsibility for implementing this policy rests with State and local governments." Section 202(c) states that the purposes of the Act are twofold: first, "to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing laws"; and second, to establish an Office of Environmental Quality which shall provide professional and administrative staff for the Council on Environmental Quality established by the National Environmental Policy Act. The relationship between these two agencies is explained below. Additionally, the Act serves to underscore the critical importance of state and local activity in the fight to restore and maintain environmental quality. By its own language, the Act recognizes the futility of inaction by these political institutions while hopefully awaiting federal restoration of the environment. In the final analysis, Congress has properly deemed that state and local governments must act.

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

IV. REORGANIZATION OF FEDERAL AGENCIES

Since the present administration took office on January 20, 1969, it has reorganized the federal bureaucracy with respect to environmental pollution. The first organizational step taken by the President was the establishment of the now defunct "Cabinet Committee on the Environment,"⁸⁵ by Executive Order No. 11472 on May 29, 1969. The Cabinet Committee was chaired by the President and consisted of the Secretaries of the Departments of Agriculture, Commerce, Health, Education and Welfare (HEW), Housing and Urban Development (HUD), Interior, and Transportation. Its functions were to promote the preservation of the environment, to be aware of the effects of federal programs on the environment, and to coordinate governmental programs concerning the environment.

At best, the Cabinet Committee on the Environment was a stop-gap measure which did not produce any significant results. The inability of the Cabinet Committee to achieve or enhance environmental quality was predictable. Cabinet committees often prove ineffective for several reasons. The Secretary's time is already overburdened with the administration of his own department. Moreover, the Secretaries usually hesitate to criticize the work of the other departments. Another more important reason, however, is that the Cabinet Committee on the Environment was not an adequate method by which to resolve the conflicts of interests existing within the individual departments. For example, the Department of Agriculture has traditionally been responsible for the inherently contradictory tasks of promoting agriculture, on the one hand, and of controlling pesticides and herbicides, on the other. Similarly, the Atomic Energy Commission was charged with the conflicting duties of promoting the peaceful uses of nuclear power and, at the same time, of protecting the environment against the hazards of radioactive pollution. The Cabinet Committee could not cope with problems of this type. The history of intra-cabinet disputes has been one of jealous guarding of jurisdiction and responsibility in order to insure continued political importance and expansion. A firmer organizational commitment to the preservation and renovation of the environment was necessary to rectify these conflicts and their resultant inadequacy within the structure of the Cabinet Committee on the Environment.

The first major commitment of this kind was made by Congress with the enactment of the National Environmental Policy Act of 1969. As previously noted, the Act required all federal agencies to notify the President of measures deemed necessary to bring their jurisdiction

⁸⁵ 34 Fed. Reg. 8693 (1969), as amended by Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970).

and program operations into conformity with the stated policies of the Act. It also established, within the Executive Office of the President, the Council on Environmental Quality, a full-time three-member group charged with the responsibility of advising the President on environmental affairs. The Council on Environmental Quality is similar in form to the Council of Economic Advisors, and it was expected that it would achieve similar importance.

The subsequently enacted Environmental Quality Improvement Act of 1970 enhanced the effectiveness of the Council by establishing the Office of Environmental Quality within the Executive Office of the President. The Office of Environmental Quality is the extension of the Council on Environmental Quality (the same person heads both bodies), and, as noted, provides professional and administrative staff in support of the Council.

These two innovations, the Council and the Office of Environmental Quality, made the Cabinet Committee on the Environment superfluous, and its existence was terminated on July 1, 1970 by Executive Order No. 11541.⁸⁶ The new environmental agencies should prove more effective than the Cabinet Committee because their status as separate entities with full-time operations and personnel places them in a better position to criticize the activities and programs of the various departments of the government.

The remaining implementation of the declared national policies of NEPA was effectuated by a restructuring of the numerous federal agencies, departments and bureaus in order to parallel their organization with that of the single entity responsible for environmental affairs. This rearrangement was effected by the President in Reorganization Plans No. 3⁸⁷ and No. 4⁸⁸ which were issued on July 9, 1970, and became effective in September, 1970.

Reorganization Plan No. 3 created a "super-agency" known as the Environmental Protection Agency (EPA). Many scattered bureaus and administrations were transferred from the Departments of the Interior, HEW, Agriculture, and elsewhere to the newly created EPA. This restructuring eliminated many of the old conflicts of interests. Reorganization Plan No. 3 does not define the relationship of the Executive Office with the EPA and the Council on Environmental Quality. The Council and the EPA are, however, separate, and the Administrator of the EPA is directly responsible only to the President. Moreover, the EPA is of such importance that it was established as an independent body rather than as a department of an existing

⁸⁶ 35 Fed. Reg. 5844 (1970).

⁸⁷ 71 Environ. Rep. 0211 (Fed. Laws 1970).

⁸⁸ 71 Environ. Rep. 0221 (Fed. Laws 1970).

FEDERAL INITIATIVES IN ENVIRONMENTAL CONTROL

agency, and it has been given authority over federal environmental programs. The Council, on the other hand, serves mainly to advise the President rather than to exercise power over federal agencies whose programs affect the environment. It does exercise considerable power, however, by establishing guidelines for federal action and has already required one agency to prepare a detailed environmental impact statement when the agency failed to do so of its own accord.⁸⁹

Reorganization Plan No. 4 established the National Oceanographic and Atmospheric Administration (NOAA) within the Department of Commerce. This agency is also a consolidation of various activities previously handled by many bureaus of the several departments on a non-coordinated basis.

The difference between the two newly created bodies is that the EPA is geared to respond quickly to common environmental threats (inland water pollution, radiation hazards, air pollution, etc.), while the NOAA is responsible for long-range planning in the preservation of the ocean and the atmosphere.

Finally, at the close of the year, the Attorney General announced the creation of a new unit within the Department of Justice to strengthen enforcement of federal antipollution programs. The newly established Pollution Control Section is part of the Department's Division of Land and Natural Resources. It will be responsible for pursuing all litigation previously handled by the Lands Division and other sections within the Department of Justice, and will handle matters referred to it by the Environmental Protection Agency and other departments of the federal government.

V. CONCLUSION

The above discussion illustrates that considerable administrative changes have taken place. Some were accomplished by Congress in refocusing national priorities. Others were effected by the executive branch both to avoid the conflicting responsibilities of government agencies and to centralize control over antipollution programs. While it is clear that these undertakings represent a significant step at the federal level in the newly instituted struggle to restore and maintain environmental quality, only the passage of time will indicate their degree of effectiveness. There is some question whether administrative changes alone can be effective.

As distinguished an environmentalist as Professor Joseph L. Sax has stated his belief that environmental change cannot be accomplished through administrative processes:

⁸⁹ Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 E.L.R. 50035, 50046 (1971).

[T]he administrative process tends to produce not the voice of the people, but the voice of the bureaucrat—the administrative perspective posing as the public interest. Simply put, the fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job. And . . . battles are best fought out between those who have direct stakes in the outcome.⁹⁰

Professor Sax argues that the bureaucratic middleman does not have the necessary direct stake in the outcome to fight the best battle, and all too often reflects the view of businessmen in the industry he is charged to regulate. Speaking to the several suggestions that the reform movement include within agency practice the voice of “independent councils of experts, ombudsmen, negotiators, and so on,” Professor Sax finds them insufficient: “They only rearrange, or rename, the insider perspective which is at the root of the problem. They fail because they do not change the balance of power—precisely what the development of a scheme of enforceable legal rights, backed by judicial power, can do.”⁹¹ Professor Sax’s central thesis is that there is a “need to reassert citizen initiative in the management of our environment,”⁹² and this can be accomplished only by giving the citizen access to the courtroom, which Professor Sax argues, “is an eminently suitable forum for the voicing of citizen concerns over the maintenance of environmental quality.”⁹³

This approach certainly differs from the approach of the administration and the main focus of the congressional concern as expressed in NEPA. Nevertheless, the few cases arising under that statute demonstrate that its provisions may support citizen participation in governmental decision making through the judicial process. Which-ever position is right—that of the regulators for administrative reform or that of Professor Sax for increased citizen litigation—the language contained in NEPA, could arguably serve as the foundation for each.

⁹⁰ J. Sax, *Defending the Environment: A Strategy for Citizens Action* 56 (1971).

⁹¹ *Id.* at 83.

⁹² *Id.* at XVII.

⁹³ *Id.* at 57.