

CHAPTER THREE

National Environmental Policy Act

The National Environmental Policy Act (NEPA) is the foundation of modern American environmental protection. While U.S. conservation efforts began more than one hundred years ago, and continued throughout the twentieth century, NEPA focused environmental concerns within a comprehensive national policy.

One quarter of a century ago, NEPA set forth clear goals for agencies to foster “productive harmony” between “man and nature,” so as to “fulfill the social, economic, and other requirements of present and future generations of Americans.” Under NEPA, for the first time, agencies were required to prepare environmental analyses—with input from the state and local governments, Indian tribes, the interested public and other federal agencies—when considering a proposal for a major federal action.

With these provisions, NEPA set forth an inclusive, comprehensive vision for the environment. NEPA 25 years ago anticipated today’s calls for enhanced local involvement and responsibility, sustainable development, and government accountability.

BACKGROUND¹

The birth of NEPA and the Council on Environmental Quality (CEQ) originated from the growing public alarm that the environment was rapidly deteriorating—if not in crisis—and that few existing laws or public institutions could reverse the trend. By 1969, a bipartisan political coalition in both Congress and the White House came together to take action to remedy the situation.

Environmental crises—such as the drought and dust storms in the 1930s—had pushed conservation issues into the forefront at various times in American history. However, as of 1969, no unified framework or Presidential-level institution yet had been developed to integrate natural resources, pollution control, and socio-economic factors into a national policy.

Beginning in 1959 with Montana Senator James Murray, various legislative proposals were submitted to create a council of natural resource advisors, modeled after the Council of Economic Advisers, in the Executive Office of the President. In 1967, Washington Senator Henry M. Jackson, Chairman of the Senate Interior

and Insular Affairs Committee, and Michigan Representative John S. Dingell, Chairman of the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant Marine and Fisheries Committee, introduced legislation to create a Presidential advisory board or council.

Over the next few years, Congress held hearings and published reports on the environment in response to the public outcry that had mounted over a number of environmental emergencies throughout the 1960s. Rachel Carson's *Silent Spring* raised public concerns on the effects of the pesticide DDT, the Cuyahoga River caught fire, smog in Los Angeles was severe, the Bureau of Reclamation was proposing to build a dam on the Colorado River that would flood the Grand Canyon, and Lake Erie was proclaimed dead.

Professor Lynton K. Caldwell of Indiana University, serving as consultant to Jackson's Interior Committee, was instrumental in shaping NEPA. Historically, agency missions focused on projects and public works. With no statutory authority to do otherwise, agencies had little incentive to consider the environmental consequences of their actions. Caldwell devised the mechanism of environmental impact statements (EISs) as a way of forcing agencies to institutionalize environmental analyses into their decision-making. Following Jackson's contentious Committee hearings on the proposal to dam the Colorado River above the Grand Canyon², Jackson included an EIS requirement—referred to as a “detailed statement”—in what became NEPA.

“[R]efreshingly brief and of almost Constitutional tone,”³ NEPA provided that national policy was “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.” NEPA amended federal agency charters to incorporate this policy into each agency's statutory mission. The act required all federal agencies to identify and assess the potential environmental impacts of their major proposals, and to identify alternatives to those proposals. The act also established the Council on Environmental Quality.

By 1969, Congress passed Jackson and Dingell's NEPA with bipartisan support. In his floor remarks, Senator Jackson stated:

*What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth.*⁴

In the House, Representative Dingell said:

*[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment.*⁵

In submitting the conference report to the Senate, Jackson reminded his colleagues that “an environmental policy is a

Box 3.1
NEPA Glossary

Section 102(2)(C) of the National Environmental Policy Act of 1969 requires federal agencies to prepare a “detailed statement” for proposed major actions which significantly affect the quality of the human environment. The statement must include the environmental impacts of the proposed action, alternatives to the proposed action, and any adverse environmental impacts which cannot be avoided should the proposal be implemented. In 1978 the CEQ issued binding regulations which implement the procedural provisions of NEPA. The following are key terms:

- **Environmental Assessment (EA).** A concise public document that analyzes the environmental impacts of a proposed federal action and provides sufficient evidence to determine the level of significance of the impacts.
- **Finding of No Significant Impact (FONSI).** A public document that briefly presents the reasons why an action will not have a significant impact on the quality of the human environment and therefore will not require preparation of an environmental impact statement.
- **Environmental Impact Statement (EIS).** The “detailed statement” required by Section 102(2)(C) of NEPA which an agency prepares when its proposed action significantly affects the quality of the human environment.
- **Record of Decision (ROD).** A public document signed by the agency decision-maker at the time of a decision. The ROD states the decision, alternatives considered, the environmentally preferable alternative or alternatives, factors considered in the agency’s decision, mitigation measures that will be implemented, and a description of any applicable enforcement and monitoring programs.
- **Categorical Exclusion (CATEX).** Categories of actions which normally do not individually or cumulatively have a significant effect on the human environment and for which, therefore, an EA or an EIS is not required.
- **Cumulative Impact.** The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions regardless of what agency, federal or nonfederal, or what person undertakes the action.

policy for people. Its primary concern is with man and his future.”⁶ President

Richard Nixon signed NEPA into law on January 1, 1970.

NEPA has to date served as a model for over 25 states and nearly 90 countries.

Implementation

Environmental groups initially pressed CEQ to act as a judge of all federal agency EISs. With approximately 70 federal agencies falling under NEPA’s

purview, CEQ's small staff was quickly faced with the prospect of being overwhelmed.⁷ Instead, CEQ staff developed guidelines for agencies to follow in preparing EISs, placing the responsibility of complying with NEPA squarely with the agencies, as Congress had intended. During the Ford Administration, over the course of 18 months, CEQ staff began a study of federal agency EIS preparation. When the report was completed, it was made available to newly-elected President Jimmy Carter, who then issued an executive order requiring CEQ to promulgate regulations, so as to streamline the NEPA process. Executive Order 11991 called for the regulations to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives."⁸

The regulations are binding on all federal agencies. In the preamble to the regulations, then-CEQ Chairman Charles Warren stated that the EIS:

*has tended to become an end in itself, rather than a means to making better decisions . . . [EISs have] often failed to establish the link between what is learned through the NEPA process and how the information can contribute to decisions which further national environmental policies and goals.*⁹

Accordingly, the new regulations were "designed to gear means to ends—to ensure that the action-forcing procedures of Section 102(2) of NEPA are used by agencies to fulfill the requirements of the

Congressionally mandated policy set out in Section 101 of the Act."¹⁰ Chairman Warren insisted that the regulations have the consensus of agencies and interested groups, which ensured that the regulations would be supported over the long term.

The courts also played a critical role from the beginning in ensuring that agencies would not ignore NEPA and its environmental analysis requirements. In one of the earliest and most influential cases, *Calvert Cliffs v. Atomic Energy Commission*,¹¹ Judge Skelly Wright ruled that the Atomic Energy Commission (AEC) failed to comply with NEPA even though it had prepared an EIS. Although the policy provisions in Section 101 of NEPA were found to be flexible and within an agency's discretion, Section 102's procedural requirements were not. Wright called for the AEC to consider less environmentally damaging alternatives and to analyze potential environmental impacts fully, rather than have environmental data merely "accompany" an application through the decisionmaking process.

The Supreme Court further clarified agency responsibilities in stating that agencies must take a "hard look" at the environmental consequences of proposals before proceeding with them.¹² The "hard look" must satisfy two aims of NEPA: to provide enough information to the agency regarding potential environmental impacts to ensure a "fully informed and well-considered decision," and to ensure that the agency will inform the public that environmental concerns

have been considered during the decisionmaking process.¹³

Throughout the 1970s, courts were split on whether NEPA imposed a duty on agencies other than the procedural requirements of Section 102(2), or whether NEPA was intended to change agency decisionmaking substantively.¹⁴ The Supreme Court addressed this issue in two cases in 1978 and 1980, finding that while NEPA set forth “substantive goals,” NEPA’s mandate to agencies was “essentially procedural . . . to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency.”¹⁵

Nonetheless, these and subsequent decisions by the Supreme Court emphasized that environmental quality is an integral part of every agency’s mission and must be considered when pursuing other national policy objectives.¹⁶ Moreover, courts have found that it is the process of generating information, disclosing that information to the public, and consulting with the public, Indian tribes, and interested federal, state and local agencies during the decisionmaking process that promotes agency consideration of social, economic and environmental factors. As the Supreme Court pointed out, “[T]he requirement that agencies prepare detailed impact statements inevitably bring[s] pressure to bear on agencies ‘to respond to the needs of environmental quality.’”¹⁷

TRENDS IN NEPA IMPLEMENTATION

Several major trends in NEPA implementation have become apparent since the CEQ regulations were issued.¹⁸

First, the overall number of lawsuits filed under NEPA has generally declined. In 1974, 189 cases were reported to be filed. In 1994, 106 NEPA lawsuits were filed. In general, for the last twelve years, the number of NEPA lawsuits filed annually has consistently been just above or below 100.¹⁹

In addition, agencies today prepare substantially more environmental assessments (EAs) than EISs. However, because agencies are not required to report the number of EAs they prepare, accurate data are not readily available. Moreover, comparisons between numbers of EISs and EAs are not exact. Annual EIS numbers represent draft, revised, supplemental, and final EIS documents, rather than representing projects for which several NEPA documents may be prepared. In contrast, EAs are usually only prepared once, and so tend to correspond to actual projects. Nonetheless, since the CEQ regulations were promulgated, all signs point to a significant increase in EAs and a decrease in EISs. The annual number of draft, revised, supplemental, and final EISs prepared has declined from approximately 2,000 in 1973 to 465 in 1993 and 532 in 1994, averaging 488 annually between 1990-1994. By 1993, a CEQ survey of federal agencies estimated that about 50,000 EAs were being prepared annually.

An agency's decision to prepare an EIS is important because an EIS tends to contain more rigorous analysis and more public involvement than an EA. The primary purposes of an EA are to determine whether there may be a significant impact from a federal proposal (thus requiring preparation of an EIS) and to aid an agency's compliance with the act when no EIS is required. On the other hand, an EIS assesses the potential impacts of alternatives once an agency has determined that a proposed action may have significant impacts. While some agencies—such as the Department of Energy, the Department of the Army, and the U.S. Forest Service—provide for a public comment period on environmental assessments, many do not.

Another significant trend is that agencies increasingly identify and propose measures to mitigate adverse impacts from a proposed action during preparation of an EA. If an agency finds that such mitigation will prevent a project from having significant impacts on the environment, the agency can then conclude the NEPA process by issuing a finding of no significant impact (FONSI), rather than preparing an EIS. Early identification of potential impacts and measures to mitigate them tends to save time and money.

A particularly encouraging trend is that of agencies seeking input from other agencies and the public earlier in the planning process, and often well before scoping. The extent to which an agency integrates its planning process with NEPA's framework will dramatically improve the approval time, cost and ulti-

mate viability of a proposal. Some agencies have begun to employ systems designed to foster interdisciplinary and interagency cooperation before a proposal has been fully developed. NEPA has not generally been used to coordinate federal activities on an ecosystem-wide scale, but its procedures to promote collaboration are consistent with an ecosystem-based approach. Some agencies, such as the Tennessee Valley Authority, use NEPA as a general planning framework for the ecosystem approach through programmatic EISs, which are designed to analyze whole programs instead of individual projects. In some cases, agencies are making use of agreements with other agencies and states to outline planning and proposal development responsibilities, jurisdiction, and dispute resolution mechanisms.

Finally, once a project is approved, agencies have not tended to collect long-term data on the actual environmental impacts of those projects. Nor do agencies tend to gather data on the effectiveness of mitigation measures. While NEPA and the CEQ regulations do not require mitigation measures be implemented (unlike some state "little NEPA" laws), the CEQ regulations do require agencies to adopt a monitoring and enforcement program with respect to mitigation measures in a Record of Decision, and to make available to the public the results of that monitoring.²⁰ Some agencies are increasingly using monitoring after project approval to gather data for future planning, as well as to adapt project management to new information or changing conditions. This approach

has enabled these agencies to increase their flexibility in implementing programs over the long term.

International Trends in Environmental Impact Assessments

One of the most important and rapidly-evolving trends internationally is the application of environmental impact analysis to policies, plans, and programs. This approach, called strategic environmental assessment, or SEA, addresses the environmental considerations and consequences of proposed policy, plan, and program initiatives before specific projects have been identified. Variations on this approach have been widely proposed and in some cases recently adopted in Australia, Canada, New Zealand, western Europe, and Hong Kong.

The purpose of SEA is to integrate environmental and sustainability factors in a flexible manner into the mainstream of policy-making. Although an SEA scheme should be consistent with the generally accepted principles of environmental impact analysis, not all countries have adopted the specific procedures called for under environmental impact analysis statutes.

SEA is still at a relatively early, formative stage. Many practical questions remain to be answered about effective procedures, methods and institutional frameworks. However, employed well, SEA may serve a number of goals. SEA may incorporate sustainability considerations by addressing the cause of the environmental problems at the policy source, rather than just treating the final symp-

toms or impacts. SEA may also serve as an early warning mechanism to identify cumulative effects by dealing with them regionally, rather than on a project-by-project basis. Finally, SEA may serve to focus and streamline project environmental impact assessments by ensuring that questions of project need have been answered and alternatives have had environmental scrutiny at the policy or program level.

In the years to come, the scope and form of SEA will depend upon its function, the policy and institutions that are in force, and the extent to which other processes are used for similar purposes.

CEQ Awards

The Council on Environmental Quality annually recognizes federal agencies that have integrated NEPA into their routine decisionmaking processes. The "Federal Environmental Quality (FEQ) Award" was established in 1992 in partnership with the National Association of Environmental Professionals (NAEP). The awards recognize agencies for a particular NEPA analysis and the best-sustained NEPA program that best meets the award criteria (Box 3.2).

In 1996, CEQ and the NAEP announced that the U.S. Army Corps of Engineers and the Minerals Management Service (MMS) had won the FEQ award for 1995. In 1995, the U.S. Army Corps of Engineers and the U.S. Department of Energy were chosen to receive the award for the year 1994. The winners were selected by a committee chaired by CEQ. Other members of the committee

Box 3.2

Criteria for Federal Environmental Quality Awards

1. The goal of reinventing environmental regulations includes strategies for innovation, partnering, flexibility and cost reduction. How does the project/program reflect this goal and provide for these four strategies?
2. How does the agency engage in cooperative consultation with other federal, state, local agencies, and Indian tribes?
3. How is the public participation process managed?
4. How does the agency ensure editorial excellence, including readability and brevity?
5. Does the agency use an interdisciplinary approach to environmental impact analysis preparation?
6. How does the agency ensure scientific integrity of the environmental analysis?
7. How much time elapsed between the project scoping meeting and the issuance of the final environmental impact statement? For a NEPA program, what is the average length of time the agency requires to issue a final environmental impact statement?
8. What innovative approaches were used in the environmental impact analysis for the action? What innovative approaches have been institutionalized by the agency?
9. How does the action Record of Decision reflect the purposes and policies of the National Environmental Policy Act? How has the agency institutionalized the environmental values embodied in NEPA?
10. Has the agency monitored the environmental effects of the action? Does the agency have a monitoring and mitigation program for the NEPA program? How does the agency ensure that mitigation detailed in the environmental impact analysis is honored?
11. What was the cost of the action's environmental impact analysis? How did the action manager control the cost of the environmental impact analysis? Does the agency have cost control methods in place? What are those methods?

included the President of NAEP, the National Governors' Association, the

non-governmental organization American Rivers, and the U.S. Environmental

Protection Agency. The awards were presented at the NAEP annual conferences.

In 1996, the Corps of Engineers won the FEQ award for its project, “Houston-Galveston Navigation Channels—Supplemental Environmental Impact Statement.” The project was done in partnership with the Port of Houston Authority and the Galveston Wharves. The project involved dredging over 53 miles of channel and disposing of 350 million cubic yards of dredged material. The Supplemental EIS team developed scientific models to assess the potential environmental effects and employed mitigation that was responsive to public concerns. In 1995, the Corps of Engineers won the FEQ award for its project, “Programmatic Environmental Impact Statement Joint Task Force Six Activities Along the U.S.-Mexico Border.” The project was organized in response to the National Drug Control Strategy, and provides technical, logistical, operational, and engineering support to federal, state, and local law enforcement agencies throughout the southwestern United States.

In 1995, the Minerals Management Service won the FEQ award for the management program they began in 1973 with the preparation of an EIS to ensure that oil and gas development near the Flower Garden Banks Marine Sanctuary would be compatible with protection of that resource. The program has been sustained for the last 23 years by supplementing the original EIS or preparing new NEPA analyses. The Department of Energy won the FEQ award in 1995 for the year 1994 for the continued improve-

ment of its NEPA Compliance Program. Secretary Hazel O’Leary has taken bold steps to reinvent DOE’s NEPA program and has brought a change of culture and instilled in senior managers a commitment to openness and public participation in environmental decisionmaking.

These case studies show that when the public is involved throughout the NEPA process, opportunities are created to resolve conflicts and eliminate delay. The NEPA process helped forge partnerships in place of adversarial relationships.

CEQ Oversight and Federal Agency Implementation

One of CEQ’s more important roles is in NEPA outreach and training initiatives, for both the public and private sector. As the agency charged with overseeing federal agency implementation of the procedural provisions of NEPA, CEQ’s interpretations and perspectives are often requested. In addition to assisting agencies and the public in making the NEPA process more efficient and accessible, CEQ’s participation in training courses and outreach programs ensure that it consistently hears about issues and concerns that are critical to those most affected by the NEPA process.

NEPA Conferences. In October of 1994, CEQ convened a workshop with all the federal agency NEPA liaisons at the White House Conference Center. The purposes of the workshop were to seek input from the agencies on how well NEPA was working within their agencies and to identify ways CEQ could help make the process more effective and

efficient. Presentations and small focus groups focused on using NEPA as a tool for an ecosystem approach to management, methods, tools and techniques available to increase the effectiveness of assessing cumulative impacts, and to address how agencies could ensure they addressed the environmental justice concerns reflected in Executive Order 12898.

In 1995, CEQ co-hosted a conference with the Department of Energy to commemorate the 25th anniversary of NEPA. Its theme, "New Visions, Better Decisions," reflected Secretary of Energy Hazel O'Leary's personal commitment to ensuring that DOE took a new approach to the NEPA process which would streamline management, and improve the integration of NEPA into decision-making. In her keynote address, Secretary O'Leary stressed that NEPA is an activity that is not set apart from decision-making; rather, it is an activity to inform and drive decisions, while facilitating DOE's effective engagement of the public. She also encouraged initiatives to improve the timeliness and cost-efficiency of the NEPA process.

Also in 1995, CEQ co-hosted with the Federal Highway Administration (FHWA) a 25th anniversary workshop to explore ways to streamline transportation planning and decisionmaking, improve the FHWA NEPA process, and balance social, economic, and environmental considerations. FHWA personnel acknowledged that the department had become proficient at writing documents, but also acknowledged they needed to improve the linkage between NEPA Sec-

tion 101 (the policy) and Section 102 (the analysis and documentation). The workshop's goals were to: (1) evaluate the FHWA's performance over the past 25 years in carrying out its NEPA responsibilities and to refocus FHWA attention on Section 101 of the Act; (2) create collaboratively a set of goals and objectives to improve FHWA performance; and (3) find innovative ways to focus FHWA's efforts so as to protect environmental resources, preserve communities and neighborhoods, and integrate social, economic, and environmental interests in order to build sustainable transportation infrastructure.

Consultation and Education. In 1994 and 1995, CEQ worked with professional organizations and academic institutions to provide training and information to environmental professionals on NEPA. CEQ also received input from them on their experience with the implementation of NEPA. As it has since 1992, CEQ joined with Duke University to sponsor a semi-annual NEPA course aimed at mid- and senior-level professionals at the Nicholas School of the Environment. CEQ also participated in environmental law and NEPA seminars with such organizations as the American Law Institute/American Bar Association and the Smithsonian Institution. In addition, CEQ provided faculty for the NEPA courses offered by such institutions as UCLA, the Environmental Law Institute, and the Department of Justice's Legal Education Institute.

Environmental Justice. On February 11, 1994, President Clinton issued Executive Order 12898, directing federal

agencies to incorporate environmental justice principles into their day-to-day operations. The order promotes nondiscrimination and public participation in federal programs involving human health and the environment. The Presidential Memorandum accompanying the Executive Order also directed agencies to include the analysis of environmental effects on minority and low-income populations in the NEPA process where appropriate, and to improve opportunities for community input during the NEPA process. CEQ has developed draft guidance for agencies to incorporate and address environmental justice concerns in their NEPA processes. EPA and other agencies have developed guidances more specifically tailored to their programs and activities. For more information, see Chapter 6, "Environmental Justice."

NEPA-NHPA Integration. Since late 1995, CEQ has been working with the Advisory Council on Historic Preservation to revise their regulations to allow agencies to meet their obligations under Section 106 of the National Historic Preservation Act (NHPA) through the NEPA process. This initiative is aimed at streamlining both the NEPA process as well as the NHPA process, while ensuring the protection of historic resources. Draft regulations are pending.

Grazing Pilot Project. CEQ and the U.S. Forest Service have set up a small team to develop more efficient NEPA and grazing permitting processes. The U.S. Forest Service manages 191 million acres of forest and grassland in 33 states, much of which is made available to private citizens for grazing cattle and sheep.

The Forest Service is required to prepare environmental impact analyses prior to making land use planning decisions related to grazing.

Nearly 78 million acres of national forest lands are managed for rangeland vegetation objectives. Through a forest plan, each forest manager determines the quantity of land to be allotted for grazing for that forest. An individual forest may contain from zero to several hundred grazing allotments. Grazing permits may cover any number of allotments, while allotments may have more than one permittee. However, many allotments have only one permittee.

The Forest Service traditionally conducted its NEPA analyses on allotment decisions. But preparing the NEPA analyses at this level is often both too cumbersome and not informative enough to the decisionmaker, who may not receive adequate information about the cumulative impacts of particular allotment decisions on the surrounding environment.

In response, CEQ and the Forest Service put together a team to develop more efficient alternatives to the existing system. Under the team's grazing pilot project, the Forest Service is working on a landscape-based analytical system to integrate the environmental analyses for adjacent allotments, addressing the environmental effects in one analysis, rather than in separate analyses for each individual allotment.

NEPANet. CEQ established a World Wide Web site as a tool for giving the public better access to environmental information. Within the web site is NEPANet, which contains the statute,

CEQ regulations, “40 Most Frequently Asked Questions Concerning CEQ’s NEPA Regulations,” Scoping Guidance Memorandum, and CEQ Guidance on Incorporating Pollution Prevention. Additionally, this web site contains the entire contents of this Annual Report, as well as the text of the 1993 Annual Report. NEPANet is linked with an EPA database which provides a summary of EISs filed with EPA. A list of NEPA training courses is also included in the web site. Finally, NEPANet offers agencies links to environmental databases in all the 50 states and it offers the public a link to all agency-specific NEPA data sets. Access the CEQ web site through <http://www.whitehouse.gov/CEQ>.

Cumulative Effects Handbook.

CEQ’s experience suggests that perhaps the most ecologically devastating environmental effects may not result from individual projects, but the combined effects of numerous projects, termed cumulative effects. Continuing degradation of the human environment—in spite of the improved federal decisionmaking resulting from NEPA—may in part be attributed to these incremental, or cumulative, effects. CEQ has been working on a handbook to assist practitioners in identifying appropriate methods to assess these effects as they plan projects. The handbook is in final draft form.

Agency NEPA Regulations. Federal agencies are required by CEQ regulations to adopt procedures based on the CEQ regulations, and tailored to the regulatory and program activities of the individual agency. Each agency is required to consult with CEQ while developing or

revising their procedures and before publishing them in the Federal Register for public comment. Relying on the experience of 25 years of NEPA implementation, CEQ’s recent consultations have focused on streamlining the NEPA process. For example, CEQ has worked with agencies to identify activities that should be categorically excluded from the full NEPA process because they do not normally result in significant environmental impacts. CEQ has also worked with agencies through its regulatory consultation mechanism to reduce unnecessary and redundant paperwork such as EIS implementation plans, and has worked to encourage the integration of reviews under other statutes such as section 404 of the Clean Water Act, section 7 of the Endangered Species Act, and section 106 of the National Historic Preservation Act.

In 1994 and 1995, the agencies that consulted with CEQ regarding major revisions in their NEPA procedures included the Department of Energy, Department of Housing and Urban Development, Food and Drug Administration, Tennessee Valley Authority, Department of the Army, Army Corps of Engineers, U.S. Forest Service, National Park Service, and Bureau of Land Management.

SELECTED NEPA LITIGATION

As in previous years, most NEPA cases decided during 1994 and 1995 involved claims that an agency had failed to prepare an EIS when one was required or

that the analysis that had been prepared was inadequate under NEPA and the CEQ regulations. However, some decisions were particularly noteworthy because they further delineated differences between federal circuits, reaffirmed past case law, or raised issues in a new context. Generally, federal courts continued to balance agencies' responsibility to take a "hard look" at the environmental impacts of their proposed actions with a high degree of deference to agencies' analyses of technical issues. (See Appendix A for an expanded selection of case summaries and NEPA statistical tables.)

The issue of whether Forest Service Land and Resource Management Plans (LRMPs), required under the National Forest Management Act of 1976, are justiciable was the subject of sharply differing court opinions in 1994 and 1995. In *Sierra Club v. Robertson*, 28 F.3d 753 (8th Cir. 1994), the appellate court concurred with the Forest Service's characterization of LRMPs as programmatic statements of general management practices that do not constitute decisions to undertake any particular site-specific activity. Thus, the court found that there was no injury-in-fact and that the plans were immune from judicial review arising as the result of claims under NEPA. However, in *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995), the Seventh Circuit disagreed, finding that LRMPs clearly authorized certain projects to be undertaken, were concrete enough to meet the Supreme Court's most recent standing requirements, and therefore present sufficient injury-in-fact and are ripe for judicial review.

The adequacy of perhaps the most well-known EIS prepared in the context of forest planning during this period—commonly referred to as the President's Forest Plan or the Pacific Northwest Forest Plan—was upheld by Judge Dwyer in *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994). This EIS, prepared for standards and guidelines for management of habitat within the range of the northern spotted owl, was the first judicial test of the Clinton Administration's direction to implement an interagency ecosystem management approach within the context of current environmental statutes. The court rejected arguments that such an approach was illegal, commended the new-found interagency cooperation, and stated that there was no way the agencies could comply with the environmental laws without planning on an ecosystem basis. The court went on to uphold the EIS in the face of a number of NEPA challenges to agency objectivity, the range of alternatives, sufficiency of the discussion of cumulative effects, the discussion of monitoring and mitigation measures, public involvement, and the economic effects of the plan. The court warned, however, that the promised monitoring was "central to the plan's validity. If it is not funded, or not done for any reason, the plan will have to be reconsidered." *Id.* at 1324.

In *Public Citizen v. Kantor*, 864 F. Supp. 208 (D.D.C. 1994), the Court reaffirmed its earlier decisions to the effect that trade agreements are not subject to judicial review under NEPA because there is no "final agency action"

to review. This decision, dealing with the General Agreement on Tariffs and Trade (GATT), again focused on the President's role in the conducting international trade negotiations and in submitting an agreement to Congress.

The significance of new circumstances in requiring additional NEPA analysis was highlighted in *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995). This case involved proposed timber sales that had been analyzed in an EIS at a time when two timber companies held long-term (50 year) timber sales contracts to operate in the Tongass National Forest. When one of those contracts was cancelled by the Forest Service, plaintiffs sued to require the agency to reconsider the proposed sales by evaluating additional alternatives in light of the cancellation of the contract. The Forest Service argued that it was simply substituting parties and that the environmental effects of

the sales had been adequately analyzed. However, the Court agreed with plaintiffs' argument that cancellation of the contract presented the Forest Service with an opportunity to consider a broader range of alternatives for the affected areas than the EIS analyzed when the contract was still in force.

Finally, the issue of whether NEPA applies to a decision to designate critical habitat for an endangered or threatened species under the Endangered Species Act was first decided by an appellate court in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995). The court found that it did not. It based its holding on determinations that ESA procedures displace NEPA's requirements, that NEPA does not require an EIS for actions that preserve the natural physical environment, and that ESA itself furthers the goals of NEPA.

ENDNOTES

¹ Much of the information in this section appears in Boyd Gibbons, *CEQ Revisited: The Role of the Council on Environmental Quality*, Henry M. Jackson Foundation (1995).

² In contrast, in March 1995, the Bureau of Reclamation completed a highly visible environmental impact statement on the re-operation of the Glen Canyon Dam. The EIS was a major cooperative effort among twelve state, federal and tribal entities, as well as many other interested parties. As part of the effort, significant research was conducted in the Grand Canyon below the dam to evaluate the impacts of various operational alternatives, including researching the interrelationships among the resources within a watershed.

³ Gibbons, at 5.

⁴ 115 Cong. Rec. 40416 (1969).

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⁵ *Id.*, at 40924. Both Jackson's and Dingell's remarks were quoted in the Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983).

⁶ Quoted in Gibbons, at 5.

⁷ As of June 30, 1971, 1380 draft or final EISs were filed with CEQ. (2nd Annual Environmental Quality Report, August 1971.)

⁸ 3 C.F.R. sec. 123, 42 Fed. Reg. 26967, sec. 2(g) (1977).

⁹ 43 Fed. Reg. 230 at 55978 (as quoted in eds. Clark and Canter, *Environmental Policy and NEPA*; Welles, H., "The CEQ NEPA Effectiveness Study: Learning From Our Past and Shaping Our Future" (expected publication date 1996)).

¹⁰ 43 Fed. Reg. 230 at 55980 (as quoted in Welles (expected pub. 1996)).

¹¹ 449 F.2d 1109 (D.C. Cir. 1971).

¹² *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

¹³ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553, 558 (1978); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

¹⁴ Compare *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971), with *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974).

¹⁵ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). See also *Strycker's Bay Neighborhood Council v. Karlan*, 444 U.S. 223 (1980).

¹⁶ See, e.g., *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835 (1989).

¹⁷ *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845 (1989).

¹⁸ With the twenty-fifth anniversary of NEPA, and in support of the President's efforts to reinvent government and ensure common sense reform, CEQ has been studying how effectively NEPA has fulfilled its goals over the years.

¹⁹ 1995 figures will be published in the Twenty-sixth Annual Report.

²⁰ 40 C.F.R. secs. 1505.2(c) and 1505.3.