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CRACKING THE NEPA PARADIGM: ASSESSING ENVIRONMENTAL IMPACTS THROUGH SUBSTANTIVE ENVIRONMENTAL STATUTES

By

Stephen Howard Blewett

B.A., May 1978, University of Southern Maine
J.D., May 1981, Franklin Pierce Law Center

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Thesis directed by
Laurent R. Hourclé
Associate Professor of Environmental Law

Cracking the NEPA Paradigm: Assessing Environmental Impacts Through Substantive Environmental Statutes

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I. INTRODUCTION

In 1969 the U.S. Congress culminated a progression of hearings and seminars that spanned many years to enact the National Environmental Policy Act (NEPA).[1] In doing so, Congress gave focus to the environmental condition that the country was in. It recognized that economic and technological progress had imposed costs on the environment which needed immediate attention. Through NEPA, Congress expressed the intent that the Federal Government would roll up its sleeves and pitch in as an example for the rest of the nation to follow. It espoused an overarching policy that every executive agency was to reexamine its physical and policy infrastructure and embed into it an environmental sense and purpose. Planners of agency activities would no longer ignore the environmental consequences but would, instead, give those considerations high priority. And to insure that the environment impacts were considered, it established a simple requirement - that before taking an action that would significantly impact the environment, the agency must document those impacts in an environmental impact statement (EIS).

From this simple procedural requirement sprang the EIS process. The EIS, which originally was expected to be a minimal burden on agencies,[2] has burgeoned into a major Federal activity in and of itself. What was at first intended to be a documentary process resulting in no more than a few dozen pages has become a major literary effort, of which examples, such as the 11 volume final EIS for the Alaska natural-gas pipeline, or the 36 lb. draft EIS on a U.S. Army Corp of Engineers Upper Mississippi River operations and

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[1] Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 853, codified at 42 U.S.C. 4321 *et seq.*

[2] Information Resource Press, *EIS Annual Review*, p. 19 (1978) [hereinafter *EIS Annual Review*]. Congress assumed that a complex EIS might entail a few dozen pages and a few weeks time. *Id.*

maintenance project, are illustrative.[3] The EIS process can take a large bite out of personnel and budget resources. A study of the EIS process conducted by the Council on Environmental Quality (CEQ) in 1976 attempted to identify time and budget costs.[4] The average time it took for agencies to complete a draft EIS varied widely, but for larger Departments with natural resource responsibilities, it was usually 10 months to a year,[5] and the time from draft EIS to completion of the final was about the same.[6]

In the same study, the CEQ also addressed the monetary costs of EIS compliance. It said that it was neither possible nor worth the effort to determine the exact costs of federal compliance with NEPA and the EIS process. This was because the integration of NEPA into everyday agency practice, the use if salaried personnel as part of their overall duties, and the requirements of other environmental statutes which imposed related obligations made it too difficult.[7] Furthermore, no agencies had put in place any means of keeping track of those costs.[8] Nevertheless, CEQ made a stab at it. It estimated total costs to be 1% to 3% of an agency's total O&M budget.[9] Since then, only one agency has made an attempt to keep formal track of NEPA compliance costs.[10] Per request of Senator Domenici of New Mexico, the Department of Energy estimated and tabulated the costs of NEPA compliance for that agency for FY 1994.[11] The DOE calculated those

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3 *Id.*

4 Council on Environmental Quality, *The EIS: An Analysis of Six Years Experience By Seventy Federal Agencies* (March 1976) [hereinafter *6 Year Study*].

5 *Id.*, Table 5, p. 29.

6 *Id.*, Table 6, p. 30.

7 *6 Year Study*, pp. 43, 44.

8 *Id.*

9 *Id.*, Table 11, pp. 46, 47.

10 Telephone Interview with Mr. Raymond Clark, Council on Environmental Quality (March 28, 1995).

11 Letter from Hazel R. O'Leary, Secretary, U.S. Department of Energy, to The Honorable Pete V. Domenici, U.S. Senator from New Mexico (June 2, 1995).

costs to be $20 to $30 million per year for routine NEPA compliance,[12] approximately $50 million per year on " several major, one-time programmatic" EISs,[13] and about $30 million per year for "several site-wide" EISs.[14] This corroborates another study, prepared in 1977,[15] that suggested: "Although there are no more reliable estimates, the EIS process is known to cost Federal agencies, State and local governments, and private industry several hundred million dollars per year."[16]

One additional cost not factored into any of the above guesstimates or studies is the cost to the agency in terms of time and money expended defending against litigation brought by plaintiffs challenging either the form or lack of NEPA process for a particular project. From 1970 until 1993 there were an average of 102 suits per year brought against federal agencies under NEPA.[17] From 1979 to 1993, these cases included an average of just under 12 injunctions per year,[18] at least temporarily stopping the project until the agency could go back and do the necessary paperwork. In no case, did the suit result in an

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12 *Id.* This figure includes costs of performing environmental assessments as well. It does not include, however, some costs that cannot be readily broken out from other budgetary accounting, such as salaried personnel costs. *Id.*

13 *Id.*

14 *Id.*

15 *EIS: A Report From the Commission On Paperwork Reduction*, Washington, D.C., February 25, 1977, [hereinafter *Paperwork Reform Study*].

16 *Id.*, p. 3. See also Nelson, *U.S. Department of the Interior, The New Range Wars: Environmentalists Versus Cattlemen For the Public Rangelands* 46-63, Office of Policy Analysis (draft, 1980) wherein the author estimates EIS production costs between $200 and $300 million.

17 *CEQ 24th Annual Report*, 1993, U.S. Government Printing Office, Washington, D.C., pp. 368, 369. This average does not include the year 1982, an odd year in which there were only 17 NEPA cases filed in court! This same data also records that the number of NEPA challenges filed each year has averaged just above 77 since 1984. Though the numbers have dropped since the 1970s, they continue to remain high, and require significant agency and DOJ attention.

18 *Id.*

environmental impact assessment which stopped the agency from ultimately performing the proposed federal action.[19]

Given the resource dedication requirements and the threat of interference from interest groups if the NEPA process is shortcut or shirked, Federal agencies are more and more focusing their efforts on the all-important EIS. However, "Congress never intended the EIS to be a *pro forma* document, nor another of the myriad forms of bureaucracy."[20] Indeed, much of what Federal agencies now must do to perform NEPA compliance stems from detailed requirements in CEQ regulations prescribing activities of federal agencies.[21] The results are a decision-making tool that is of dubious utility. Is it realistic to expect agency decision-makers to pore through massive volumes of complex data before they decide to commit resources to projects that were proposed and kept on the burner as far back as two years ago? I would submit that in all too many cases Federal officials look at the EIS as the finished product of the NEPA process, rather than a needed step in developing an environmentally informed decision.

Two other important considerations have changed the face of environmental assessment within Federal agencies. First, when NEPA was enacted, there were virtually no other substantive command and control environmental laws which effectively regulated public or private conduct. Since 1970, however, some 20 - 30 statutes have been enacted which directly regulate and/or protect the environment. When NEPA was enacted, there was no Clean Water Act, no federal enforcement of clean air standards, no federal regulation of hazardous substances or wastes, no federal land fill restrictions, no federal reporting requirements or emergency planning mandates; there was no protection of the working

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[19] *Id.*
[20] *Paperwork Reform Study*, note 15, *supra*, p. 1.
[21] 40 Code of Federal Regulations (C.F.R.) Part 1500.

public from asbestos, PCBs, pesticides, or other toxic chemicals. There were no planning requirements for protection of our national forests, parks, wilderness areas or scenic rivers. There was virtually no protection for endangered species. Wetlands were considered a bane, not a benefit. There was no EPA or CEQ. Environmental protection in State governments was minimal. The present condition is vastly different. We simply do not live in a society where a little forethought, a little planning ahead is considered enough to save the environment. The substantive environmental laws and regulations implementing them have forced public and private project planners to not only consider environmental impacts, but to curtail or amend projects to avoid adverse consequences. These statute have, in many instances superseded NEPA, making its "action-forcing" provisions a paper exercise.

The second major change in the last 25 years has been the monumental erosion of sovereign immunity.[22] Whereas before 1969 Federal officials could work without regard for most command and control type statutes, now it is unquestionable that every major substantive environmental law expressly applies to Federal agencies. Federal officials are liable criminally for violations for callous disregard of statutory or regulatory duties. Agencies are subject to civil penalties for noncompliance. Regulatory watchdogs such as the EPA are aided by local and State officials legally authorized to tell the Federal officials what to do and how to do it. No longer can agency officials propose a major action significantly effecting the quality of the human environment without taking some measures to do more than study and acknowledge the adverse impacts before proceeding to do whatever they think the mission requires.

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[22] *See* Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 Envtl. L. Rep. (Envtl L. Inst.) 10,326 (1985), and Marc G. Laverdiere, *Natural Resources Damages: Temporary Sanctuary For Federal Sovereign Immunity*, 13 Va. Envtl. L. J. 589 (Summer 1994).

These dynamic changes in the law have been ignored in the context of NEPA compliance. Coupled with the questions about the utility of the EIS as a useful tool for anyone but plaintiffs opposing an agency action, they suggest that Federal officials responsible for finite resources should reexamine the EIS requirements of NEPA. We in 1995 should reexamine the environmental paradigm of the late 60's to evaluate what is needed and what processes of a quarter century ago are excess today. Is NEPA outmoded? Should it be repealed? Is it a relic of no further utility? The primary purpose of this paper is to look at one aspect of our present experience - the substantive environmental laws as they perform the functions that the EIS requirement was to fulfill - to suggest a framework for performing the analysis necessary to truly understand NEPA's present day utility.

In Part II of this paper, I will examine the overall duties which NEPA imposes upon federal agencies to consider environmental impacts for all proposed major Federal actions. I will then distill from NEPA Section 102(2)(C) that essence which gives it potency to engineer Federal activity.

Part III will then focus on the direction from Congress respecting Sec. 102(2)(C), to glean any morsels of guidance it has given to Federal agencies on when Sec. 102(2)(C) must be exercised for an action that is major and significant in its effect on the quality of the human environment. This will be done by examining and analyzing the legislative history of Sec. 102(2)(C) and its relevant amendments, as well as the history of those 27 instances in which Congress states specifically that an action is (or, more frequently, is not) to be deemed a MFASAQHE.

Part IV will examine, briefly, the provisions of selected substantive environmental regulations to determine if, and to what extent, those statutes contain provisions which force the same actions that NEPA does. Because this paper is intended to suggest a framework for reexamining NEPA rather than to thoroughly perform that task, I will search only a few substantive statutes which are intended to present an overview of the kinds of Federal agency actions most often associated with environmental impacts. . The review will include statutes in three general areas of environmental law. First, the Clean Water Act (CWA),[23] the Clean Air Act (CAA),[24] and the Resource Conservation and Recovery Act (RCRA)[25] will be studied as media and substance statutes. Second, for pollution remediation and prevention statutes, I will examine the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[26] Finally, the Federal Land Policy and Management Act (FLPMA)[27] and the Endangered Species Act (ESA)[28] will represent the category of resource protection statutes. Taken together, these statutes encompass the wide range of federal environmental legislation.

Part V will compare these laws with the action-forcing provisions of NEPA to see if they duplicate its purpose, and examine some collateral issues which affirm that this analysis is appropriate. Finally, Part VI will draw conclusions and make recommendations as to how this analysis should be used in a quality review of NEPA and CEQ's implementation of it.

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[23] 33 U.S.C. 1251 *et seq.*; codifying the Federal Water Pollution Control Act of 1972, as amended, Pub. L 92-500, Oct. 12, 1972, 86 Stat. 816.

[24] 42 U.S.C. 7401 *et seq.*

[25] 42 U.S.C. 6901 *et seq.* The Solid Waste Disposal Act, was amended by RCRA, PUB. L. 94-580, Nov. 8, 1976, 90 Stat. 2806.

[26] 42 U.S.C. 9601 *et seq.*

[27] 43 U.S.C. 1701 *et seq.*

[28] 16 U.S.C. 1531 *et seq.*

II. WHAT NEPA DOES

The present system for applying NEPA to Federal agency activities is found in regulations promulgated by CEQ.[29] The NEPA statute itself consists of three main parts: Sections 2 and 101 - the statements of national purpose and policy; Sections 102 through 105 - Congressional direction to Federal agencies; and Sections 201 through 209 - establishing the Council on Environmental Quality (CEQ). Apart from those provisions giving life to the CEQ, the meat of NEPA is uniformly recognized as Sec. 102(2)(C): the EIS requirement. Apart from general direction to Federal agencies to interpret, administer, and execute all law in a way which integrates environmental factors into its statutory mandates, only Section 102(2)(C) specifies an affirmative obligation to act. This provision has been labeled the "action-forcing" provision of NEPA.[30] The specific actions NEPA demands are three: (1) an EIS, more fully described below, (2) consultations between the Federal agency and other agencies which, by law or expertise, have jurisdiction to address specific environmental impacts, and (3) public access.

The public access mandate is expressed as follows:

> *Copies of* [the EIS] 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, to the [CEQ] and *to the public as provided by [the Freedom of Information Act]*, and shall accompany the proposal through the existing agency review processes[.][31] [Emphasis added.]

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[29] CEQ regulations, 40 C.F.R. 1500 *et seq*. The NEPA process is sometimes referred to as "the EIS process", although CEQ regulations impose assessment requirements on Federal agencies even when the significance of an action's environmental impact is unclear. The two terms may be used interchangeably in this paper.

[30] CEQ *20th Annual Report* 20 (1990).

[31] 42 U.S.C. 4332(2)(C) (1995).

The Freedom of Information Act (FOIA)[32] requires public access to agency records. This statutory insistence on public *access* to the record - uniformly interpreted under FOIA law to be the final agency record,[33] as opposed to interim or drafts of the record - is considerably different from the present CEQ spin that encourages public *participation.*[34]

Congressional direction on what the EIS must be is:

> The Congress authorizes and directs that, to the fullest extent possible: ...
> (2) all agencies of the Federal Government shall - ....
> (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 commitment of resources* which would be involved in the proposed action should it be implemented.[35]
> [Emphasis added.]

Stripped to the bone, Sec. 102(2)(C) requires an EIS to address, in detail, the environmental impact of the action (Subpara. (i)), the unavoidable consequences (ii), alternatives (iii), and the cost in terms of resources, both governmental (v) and otherwise (iv).

A comparison of both public access vs. public participation and the essential EIS elements vs. the regulatory prescription for an acceptable EIS[36] shows that CEQ has

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[32] Codified at 5 U.S.C. 552.
[33] 5 U.S.C. 552(a)(3) (1995).
[34] 40 C.F.R. 1506.6
[35] 42 U.S.C. 4332(2)(C) (1995).
[36] 40 C.F.R. 1500 - 1517.

expanded and elaborated considerably on Congress' original outline. Yet nowhere in NEPA does the statute give CEQ authority to establish rules and regulations respecting the obligations of other agencies in connection with their EIS responsibilities. Rather, on May 24, 1977, President Carter, through Executive Order 11991, directed CEQ: "By virtue of the authority vested in me by the Constitution of the United States of America, in furtherance *of the purpose and policy of [NEPA]*, ..." to promulgate the regulations now found at 40 C.F.R. Part 1500. Given the President's plenary authority to establish procedural requirements for his agencies, there is little doubt that the CEQ regulations are sturdy. The point here is twofold. First, it highlights that it was CEQ, not Congress, that created the present NEPA process. Second, it supports the premise that it is well within the discretion, authority, and function of CEQ to reexamine the EIS process by stepping out of the paradigm in which Federal agencies have operated for over 20 years.[37]

This assessment is in close agreement with Congress' general purposes of NEPA:.

> Congress was occupied with more cosmic issues involving fundamental policy choices with respect to environmental protection and regulation, rather than with the environmental ramifications of a particular dam, highway, or other federal construction project, or the details of preparing environmental statements.[38]

Congress was interested in establishing rational, comprehensive thinking in the decision-making process, not the mechanical steps of preparing an EIS.[39] As put by the CEQ in its 1990 edition of its *Environmental Quality Annual Review*:

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[37] Although the regulations were not finally promulgated until 1978, CEQ had established guidelines for Federal agencies to follow in the NEPA process as early as 1972. These were substantially the same as the regulations. They were initially only guidelines because there was no rule-making authority.

[38] Alan S. Miller, Frederick R. Anderson and Richard A. Liroff, *The National Environmental Policy Act and Agency Policy Making: Neither Paper Tiger Nor Straightjacket*, 6 ELR 50020 (March 1976).

> "Expectations with respect to non-expert (in the area of environmental science) agencies were not spelled out by Congress but necessarily derived from the two principle functions that the environmental impact assessment process was designed to serve: (1) to provoke thought in directions with which agencies were generally unfamiliar; and (2) to restore public confidence in the government's capacity to balance the total needs of society in its decision-making apparatus."

CEQ, *20th Annual Report* 21 (1990).

Putting aside, for the purposes of this investigation, the procedural perquisites of its implementing regulations, the action-forcing provisions of NEPA should be viewed as directing the prospective consideration of a proposed action's environmental impacts in light of four essential aspects:

(1) Examination of alternatives to a proposed action;

(2) Examination of consequences of the proposed action;

(3) Involve other appropriate agencies in this examination; and

(4) Allowing public involvement in the decision-making process.[40]

This, then, is what NEPA does. Or, to be more precise, this is what NEPA Sec. 102(2)(C), as enacted by Congress, requires Federal agencies to do when proposing a MFASAQHE.[41] Section III below will explore Congress' direction to Federal agencies as to what kinds of actions it deems are not major Federal actions with significant environmental impacts. The purpose is to identify expressed policies or rationales that CEQ and other Federal agencies can refined for application to their comparable actions.

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[39] *EIS Annual Review*, note 2, *supra*.

[40] Interview with Mr. Clark, note 10, *supra*. See also *EIS Annual Review*, p. 24.

[41] Acronym for "major federal action significantly affecting the quality of the human environment." It will be used intermittently throughout this paper.

As will be seen, that guidance from Congress is anything but crystal clear, and consistently suggests that Federal agencies - and CEQ - are left to fend for themselves.

III. MFASAQHE's LEGISLATIVE HISTORY

A. In NEPA Itself

As a starting point for examining what Congress meant by the phrase "major federal action significantly affecting the quality of the human environment", the legislative history of the National Environmental Policy Act is not very helpful. It is clear, from a review of both the Committee Reports in each house and the floor speeches by members of Congress, that their focus was on the broad issue of pollution.[42] As the very name of the Act illustrates, they were concerned with establishing policy, not procedure. Congress was looking at the environmental harm, not the source of the harm. Although NEPA only applied to Federal agencies, Congress was looking beyond those who had to implement the act to those for whose benefit it was established - the whole of American society.[43] Congress wanted to establish a national policy, not a federal policy. Federal agencies were to be the example for all segments of society and industry to follow.[44]

In addressing the "action-forcing" procedures of Section 102, Congress never discussed for the record how the procedures of interdisciplinary, systematic planning[45] and impact assessment documentation were to be infused into the "ongoing activities of the Federal

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42 "Given the intricacies and interrelatedness of the human environment, a policy oriented toward very specific goals or objectives was seen as impractical. Thus, it was believed that "a comprehensive policy toward the environment cannot help but be philosophical rather than specific.' " *CEQ 20th Annual Report* 20 (1990) note 30, *supra.*

43 S. Rep. No. 296, 91st Cong., 1st Sess. (1969), reprinted at 115 C.R. 19,011.

44 *Id.*

45 42 U.S.C. 4332(2)(A) (1995).

Government in carrying out its other responsibilities to the public."[46] Because policy was their focus, procedural guidance was limited to a general description of end results, not procedures.

As to Section 102(2)(C) specifically, the subparagraph is more detailed than the other "action-forcing" provisions. It does set forth categories of essential information to be included in the impact statement which documents environmental consideration given to every proposal for a major Federal action. But it spells out neither what segment of executive branch function is major nor what level of impact is significant. A thorough review of the legislative history reveals that neither of these issues was considered on the record.

It was the Senate version of NEPA, S. 1075, that originally contained the action-forcing language we now have in Section 102 of the final act.[47] The initial Senate Committee on Interior and Insular Affairs, which considered S. 1075, did not focus on the environmental impact statement requirements of the bill. In fact, in the segment of the report describing the purpose of the Act,[48] the committee declared that it would

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[46] *Major Changes in S. 1075 as Passed by the Senate*, an attachment to H.R. Conf. Rep. No. 765, 91st Cong, 1st Sess. (1969), reprinted at 115 C.R. 40,417, at 40,419.

[47] The initial House version of NEPA, H.R. 12549, did not even include the present day action-forcing provisions of section 102(2)(C). It solely amended the Fish and Wildlife Coordination Act of 1962 to create a Council on Environmental Quality designed to assist the President in developing and pursuing environmental policy. Its consideration of a procedure to implement a national environmental policy within the Executive Branch was limited to a footnote in the Committee Report. The footnote favorably mentioned a proposal to send out employees of the newly created CEQ as "auditors", assigned to the various federal agencies to advise on environmental issues and help mitigate adverse environmental impacts.
H.R. Rep. No. 378, 91st Cong., 1st Sess. (1969), reprinted at 1969 U.S.C.C.A.N 2751, 2759.

[48] S.Rep. No. 296, 91st Cong., 1st Sess. 9 (1969), reprinted in 115 C.R. 19,010-19,011.

"contribute to a more orderly, rational and constructive Federal response to environmental decision-making" in five major ways. It mentioned only in passing the statute's "action-forcing" provisions and procedures. Instead, it gave significant attention to Section 201 of the Senate bill which "authorized all agencies of the Federal Government to conduct research, studies, and surveys related to ecological systems and the quality of the environment".[49] The report touted these Section 201 provisions, rather than those in 102, as the solution to the problem of "actions - often actions having irreversible consequences ... undertaken without adequate consideration of, or knowledge about, their impact on the environment."[50] By developing a database of research results and sharing it with the country, these studies would be the wellspring of a national environmental conscience and a remedy for the harmful practices denigrating our environment.

Senator Henry Jackson of Washington, a leading sponsor of S. 1075, presented a "white paper" on the NEPA bill to the Senate on October 8, 1969. In a portion of the document which analyzed the bill section by section, Sen. Jackson discussed what kind of actions were contemplated in Section 102(2)(C):

> [(c)] [E]ach agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansions or revisions of ongoing programs, shall make a determination ... .

115 C.R. 29,085.

The above description serves as a good definition for "action", and broadly encompasses the range of duties required of Federal agencies in executing federal law. However, it does not give any sort of guidance on what size project or program revision or extension

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[49] *Id.*, p. 19.011
[50] *Id.*

would trigger the need for an impact statement.[51] More troubling is the failure of S. 1075's sponsors or proponents to give guiding criteria for assessing what impacts should be considered significant. In neither house did final debate include an analysis of what actions trigger an environmental impact statement. In fact, there was little debate about any provisions of the bill. The reason for this may be gleaned from the next-to-last speech before passage of the conference report, given by Representative Harsha of California, a lone voice calling for more careful consideration:

> The impact of S. 1075, if it becomes law, I am convinced would be so wide sweeping as to involve every branch of the Government, every committee of Congress, every agency, and every program of the Nation. This is such an important matter that I am convinced that we here should consider it very, very carefully and *make a clear record as to exactly the direction in which we wish the various elements of our Government to move* ... I regret that so important a matter is being handled in so light a manner. I realize the Members desire to adjourn for Christmas [debate occurred on December 22nd] and that the hour is late and that we are all tired, but this is no subject to merely brush aside ... Mr. Speaker, I fear, too, that there may be a measure of politics in the action forced upon us here tonight. [Emphasis added]

115 C. R. 40,928.

The actual impact of NEPA on Federal facilities was consequently overlooked by Congress. Congress concerned itself with the big picture and gave only enough guidance to establish the mandate to implement environmental factors into decision-making. The Senate report discussed then-existing Federal agency infrastructure as it constrained agencies from including environmental impact forethought in agency activities.[52]

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[51] This has lead some courts to suggest in dicta that any Federal action, if it has a significant impact on the environment, is a major one. City of Alexandria, Virginia v. Federal Highway Administration, 756 F. 2d 1014, n. 5 1020 (4th Cir. 1985), Citizens For Responsible Area Growth v. Adams, 477 F. Supp. 994, 999 n. 6 (D.C. N.H. 1979).

[52] The Report said:

> Nevertheless, on the basis of recent hearings, seminars, colloquia, and the staff studies conducted by the committee, it is clear that there is very

The final version of NEPA's action-forcing provisions was designed to force Federal agencies to overcome the obstacles that this report had identified.[53] It provided them with the mandate to consider environmental factors as part of their mission, it foreclosed budget limitations as an excuse to disregard measures or alternatives that, if cleaner, were frequently more costly, and it directed the use of agency funding for research, if necessary, to find ways to minimize or prevent adverse environmental impacts.

B. 1975 Amendments

> real reason for concern for those areas in which no policies have been established or in which conflicting operational policies of different agencies are frustrating and complicating the achievement of environmental quality objectives which are in the interest of all. 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 maintain the qualitative side of the environmental connections 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.

S. Rep. No. 296, 91st Cong., 1st Sess., 10 (1969), reprinted at 115 C. R. 19,012.

[53] *Id.*, at 19,011.

Since its enactment on January 1, 1970, NEPA has been amended only twice.[54] The only amendment to NEPA Sec. 102 (2)(C) did not address the issue of what constitutes a major Federal action with significant environmental impacts.

In 1974, the U.S. Second Circuit Court of Appeals held that an environmental impact statement performed in conjunction with a proposed highway construction project in the Northeast was insufficient to satisfy the NEPA requirements of Section 102(2)(C).[55] It's ruling stemmed from the fact that a portion of the EIS had been prepared by one of the States involved in the highway project. The court held that NEPA required the Federal agency whose prospective action triggered an EIS to be the one physically preparing the statement. This ruling effectively halted all highway construction in the Second Circuit.[56]

H.R. 3130 was introduced to amend NEPA to provide that the EIS process may include information provided and developed by certain non-federal entities as long as the responsible Federal official thoroughly reviewed the data and made the final decision using the EIS.[57] The final version of H.R. 3130, in substance, was a single paragraph,[58] amending Section 102(2)(D). Listed in subparagraphs (i) through (iv) were conditions under which EISs' prepared by State officials were to be considered legally sufficient.

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[54] The second instance, Pub. L. 97-258, Sec. 4(b), Sep. 13, 1982, 96 Stat. 1067, gave attention only to changes applicable to Section 203 of the original Act (codified at 42 U.S.C. 4343), dealing with CEQ's use of non-federal experts and consultants.

[55] Conservation Society of Southern Vermont. v. Volpe, 508 F.2d 927, (2nd Cir. 1974).

[56] 121 C.R. 11,061, speech by Rep. Leggett of Cal., April 21, 1975.

[57] *See* 42 U.S.C. 4332(2)(D) (1995). The legislative history of the bill shows that Congress was primarily concerned with lifting the *de facto* construction ban that the Second Circuit had imposed. From introduction to passage in the House took a little over two months. A month later the Senate had passed its own version. Two months later, a conference report was agreed to by both House and Senate. During the limited debate none called for reexamination of the action-forcing provisions of NEPA.

[58] Pub. L. 94-83, Aug. 9, 1975, 89 Stat. 424.

Subparagraphs (i) through (iii) were represented essentially as codification of what Congress had originally intended to mean by that section of NEPA.[59] Section (iv) added an additional condition:

> (iv) after January, 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which *may have significant impacts upon such State or affected Federal land management entity*, ... [emphasis added]

42 U.S.C. 4332(2)(D)(iv).

This expansion of impact assessment, and its burden upon the Federal Highway Administration, stirred opposition to the bill. This opposition was voiced by Rep. Howard of New Jersey in this way:

> One of the major defects of H.R. 3130 lies in the ambiguous language of subparagraph (iv). ... The *language of subparagraph (iv) invites litigation as to what constitutes "significant impacts" upon "any other State or affected Federal land management entity."* ... If you think we have had delays due to litigation up to this time wait until obstructionists take advantage of subparagraph (iv). Mr. Speaker, ... the issue is not public works versus the environment, or jobs versus the environment, ... The issue is one of balance, weighing economic and other legitimate interests against the increasing emphasis on procedural purity, which by now we should know better than to confuse with environmental quality. [Emphasis added]

121 C. R. 25,520.

The same reservations expressed over the language of Section 102(2)(D)(iv) may be applied to the ambiguity over the broader definition of what constitutes a Federal action significantly impacting the quality of the human environment. In the 25 years since

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[59] Speech by Rep. Ottinger of N.Y., reprinted at 121 C.R. 11,067; speech by Rep. Howard of N.J., at 121 C.R. 25,519.

NEPA was enacted, Congress has never directly modified or amended NEPA to address the definition of a MFASAQHE. However, it has added language to other statutes 27 times[60] declaring that a Federal activity is or is not a major Federal action significantly affecting the quality of the human environment.

C. Other Statutes[61]

In those instances where Congress has addressed what is not a MFASAQHE, Congress legislatively directs Federal officials to exclude those categories of actions from the NEPA process. When it states that a kind of action is a MFASAQHE, the opposite is true. An examination of those statutes and their legislative history is important for two purposes. First, it can serve to identify what Federal actions Congress - the creator of MFASAQHE - considers to meet that standard. A second purpose is to explain why Congress made that determination. If the reason can be isolated it should be possible to compare those actions with similar Federal actions to establish qualities or characteristics that would make the comparable Federal actions major and environmentally significant, or not. This will help Federal agencies to put scarce resources where they will do the most good and avoid wasting them where the NEPA process is not necessary.

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60 A list of those statutes is provided in the Appendix.

61 This analysis does not address instances where Congress has exempted an agency action from NEPA without finding that action to not be a "major Federal action, etc...", such as found at 43 U.S.C. 1652(d) (trans-Alaska pipeline); 42 U.S.C. sections 10132(d) and 101134(a)(3)(B) (procedures to develop Yucca Mtn. Nevada as a high-level radioactive waste disposal facility); and Pub. L. 100-202, Dec. 22, 1987, 101 Stat. 1329-121 (addressing the initial development stages of a new production reactor; *but see, Summary of Major Provisions - Amendments to the Nuclear Waste Policy Act, S. 1668, as Incorporated in H.R. 2700*, reprinted at 133 C.R. 30,702 (1987), which states that "... the conferees believe that the authorization ... of planning, design, and construction of new production reactor capacity is not a major federal action ... until such time as the Sec. of Energy has selected a specific cite for the new production capacity." *Id.*, at 30,703.)

As will be seen below, the kinds of Federal actions Congress has deemed to be or not to be a MFASAQHE are varied. However, Congress has rarely provided Federal officials with guidance or reasoning behind its conclusions leaving them little aid in interpreting and implementing NEPA Sec. 102(2)(C).

1. Strategic Petroleum Reserves

In only one instance has Congress articulated a clear rational for its finding that a Federal action is not a major one for NEPA purposes. This is found in the legislative history of the Strategic Petroleum Reserve Planning Process, passed in 1982.[62] The Strategic Petroleum Reserve Plan was necessary to give the nation some footing on which to begin an energy policy that accounted for a continuing reliance on foreign oil despite the harsh lessons of the oil embargo of the 1970's.[63] A portion of that law is as follows:

> (3)(A) No action relating to the storage of petroleum products in existing interim storage facilities in the Reserve shall be deemed to be "a major Federal action ... " within the meaning of that term as used in [NEPA].

42 U.S.C. 6239(h)(3)(A) (1994).

In discussing a modifying amendment (which defined what was meant by "existing facility") then-Rep. Breaux of Louisiana explained:

> The Merchant Marine and Fisheries Committee, in the exercise of exercise of its jurisdiction, has examined this waiver carefully and concluded that, in this narrow fact situation, such a waiver is warranted ... [W]e see no harmful consequences to the environment if all we are doing is placing SPR oil in private facilities that are originally designed to

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[62] Pub. L. 97-229, Aug3, 1982, 96 Stat. 251.

[63] *See* legislative history of this Act in 1982 U.S.C.C.A.N. 600.

> hold petroleum products and that normally hold those products for private industry. ... Our amendment ... specified that only facilities constructed or reconstructed in a manner suitable for the purposes of holding petroleum products would qualify for the waiver.

128 Cong. Rec. 14,961 (1982)

This statute demonstrates Congressional recognition that merely maintaining the *status quo* of a particular activity - here storing petroleum in petroleum storage - is not a major Federal action triggering NEPA. This principle has been recognized in a number of cases.[64] Careful elaboration about the circumstances under which a facility can be considered "existing"[65] precluded circumvention of NEPA for potentially adverse activity. The true significance of this NEPA-related statute is that it is the only instance where the record articulates a rationale.

2. Clean Water Act[66]

One of the first comprehensive, command and control substantive environmental laws, the Clean Water Act broadly exempted much of EPA's action in implementing the Act from NEPA requirements.[67] This broad exemption from NEPA's impact statement

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[64] Sabine River Authority v. U.S. Department of the Interior, 951 F.2d 669,679 (5th Cir. 1992), *cert. denied* U.S. , 113 S.Ct. 75 (1993) (negative easement preventing development and other uses of property maintained status quo and did not require a NEPA review by DOI prior to acquisition); Burbank Anti-Noise Group v. Goldschmidt, 623 F.2d 115 (9th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481 (1981).

[65] 42 U.S.C. 6239(h)(3)(B) (1994).

[66] Popular name for the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, Oct. 12, 1972, 86 Stat. 893, as amended.

[67] Section 511(c)(1) of the 1972 Amendments said:

> (c) (1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant

requirement was the subject of much debate. The majority of it dealt with the issue of NEPA's applicability to actions of the EPA in general. In favor of section 511(c)(1) was primarily Sen. Muskie of Maine.[68] He advocated that the EPA, as an environmental protection agency rather than an environmentally impacting agency, was intended to be exempt from the terms of NEPA itself;[69] consequently the only real effect of section 511 (c)(1) was to expand, rather than restrict, the action-forcing provisions of NEPA.[70]

Taking the contrary position were Senators Jackson from Wyoming and Buckley of New York.[71] They not only disputed Sen. Muskie's position on the general NEPA exemption enjoyed by the EPA, but expressed concern over the wisdom of enacting section 511(c)(1).[72] They expressed reservation over the dangerous precedent of carving NEPA exemptions and the inherent value to the environment in EPA's compliance with the national environmental policy.[73]

After considerable debate on the issue, section 511(c)(1) was passed as part of the Clean Water Act without a clearly articulated basis for finding that EPA actions, such as

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> by a new source as defined in section 1316 of this title, no action of the Administrator [of EPA] taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]; ...

68 Sen. Muskie was the Senate manager of the bill as reported out of Conference Committee.

69 All of NEPA, not just Sec. 102(2)(C); *see* Sen. Muskie's floor debate excerpt reprinted in 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, at 198-200 (1977).

70 *Id.* As an additional factor favoring EPA exemption, he recited from the joint statement of the conference managers that "If the actions of the Administrator were subject to the requirements of NEPA, administration of the [Clean Water] Act would be greatly impeded." H.R. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. 149 (1972).

71 In the House, Rep. Dingell of Michigan, although he supported passage of the conference report containing sec. 511(c)(1), voiced strong opposition to Sen. Muskie's portrayal of the clause in the earlier Senate debate. *See Id.*, at pp. 104-109.

72 *See, e.g.*, statement of Sen. Jackson at *Id.*, pp.200-205.

73 *Id.*

approving regional water quality management plans[74] or non-point source management plans,[75] developing new source performance standards,[76] or developing treatment standards,[77] are not major Federal actions as far as environmental analysis is concerned.[78]

3. The Refugee Education Assistance Act of 1980

To deal with an influx of emmigrants from Cuba and other Caribbean islands, which heavily burdened Florida's economy and its educational and social infrastructure,[79] Congress passed the Refugee Education Assistance Act of 1980 [80] to help defray the cost. Title V of the Act gave federal authority for emergency relief. It authorized the President to direct any Federal agency to provide : "assistance (in the form of materials, supplies, equipment, work, services, facilities, or otherwise) for the processing, care, maintenance, security, transportation, and initial reception and placement in the United States of Cuban and Haitian entrants... on such terms and conditions as the President may determine."[81] The Act went on to provide:

> (3) The furnishing of assistance or other exercise of functions under this subsection shall not be considered a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA].

Pub. L. 96-422, Sec. 501(c)(3), Oct. 10, 1980, 94 Stat. 1820.

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74 33 U.S.C. 1313(e)(3) (1994).
75 33 U.S.C. 1329 (1994).
76 33 U.S.C. 1316(b) (1994).
77 *E.g.*, 33 U.S.C. 1317(a) (1994).
78 *See* statement of Sen. Jackson, note 72, *supra*.
79 *See. generally*, the legislative history at 1980 U.S.C.C.A.N. 3810.
80 Pub. L. 96-422, Oct. 10, 1980, 94 Stat. 1820.
81 *Id.*, Sec. 501(c)(1)(A).

The legislative history of this Act is silent as to Congress' thought processes in deciding that these activities would not be a MFASAQHE. It is important to note that in the 27 instances wherein Congress has pronounced actions not major or significant for NEPA purposes, rarely is there such a broad exemption so varied and open ended for those actions and the actors. Usually a specific planning or regulatory action is exempted. Also, the action is usually the responsibility of a specific Department Secretary or agency official. Here the action could be anything from facility construction to welfare funding. The actor could be any Federal official the President deemed appropriate for the task.

There are two conjunctive rationales that may have driven Congress to conclude that Cuban or Haitian refugee assistance was not a major Federal action. First, the office of the President is itself exempt from NEPA procedural requirements.[82] Since the actions were to be at the specific direction of the President, they may be seen as actions of his office, even though carried out by an official otherwise required to follow the EIS process to fulfill his statutory duties. Second, CEQ regulations contain an emergency exception wherein agency officials may, after coordination with CEQ, have NEPA procedural requirements modified or waived.[83] The tremendous influx of refugees in the

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[82] 40 C.F.R. 1508.12. *See also* Dalton v. Specter, U.S. , 114 S.Ct. 1719 (1994) (President is not an agency for purposes of the Administrative Procedure Act (APA), and his forwarding to Congress allegedly flawed recommendations of Commission in accordance with Defense Base Closure and Realignment Act of 1990 was not subject to review); Franklin v. Massachusetts, U.S. , 112 S.Ct. 2767 (1992) (reapportionment report prepared by the Secretary of Commerce and submitted to Congress by the President not covered by NEPA Sec. 102(2)(C) because the President is not an agency for purposes of the APA and the APA is the only avenue open by which to challenge alleged NEPA violations); Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied,* U.S. , 114 S.Ct. 685 (1994) (holding that NAFTA trade activity by Office of the Trade Representative was not final action, but rather that the final action for NEPA and APA purposes was within the discretion of the President who was not an agency).

[83] 40 C.F.R. 1506.11 (1994).

late 70's produced critical strains upon Florida.[84] Congress may have seen this situation as a potential emergency condition triggering the need to permit quick action by the Federal Government to protect Florida.

Ultimately, however, no guidance is given in this legislation to clarify the kinds of actions Congress may have envisioned when it pronounced this wide variety of possible actions as not constituting a MFASAQHE.

4. The Energy Supply and Environmental Coordination Act of 1974

The Energy Supply and Environmental Coordination Act of 1974[85] was a strategic response to the threat to the nation's oil supply brought about by the Arab oil embargo of the early 1970's.[86] A key element of the strategy was to force the conversion of electrical powerplants[87] from fossil fuels to coal. The heavy impact which coal burning has on air quality was a major factor which had to be addressed.[88]

Within the legislation, Congress made two separate declarations that actions were not major Federal actions with significant environmental effects. The first was a broad statement that:

> (1) No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].

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84 *See* legislative history, note 79, *supra.*

85 Pub. L. 93-319, June 22, 1974, 88 Stat. 259, codified at 15 U.S.C. 791 *et seq.*

86 *See* legislative history at 1974 U.S.C.C.A.N. 3282.

87 And other major fuel burning installations; *see* 15 U.S.C. 792(a)(2).

88 Congressional intent, expressed within the Act, was to make the transition "consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment." 15 U.S.C. 791(1) (1983).

15 U.S.C. 793(c)(1) (1983).

The essence of Congressional debate concerning this provision was an explanation by Senator Muskie of Maine that this provision was designed to curtail the EPA in its practice, as a matter of policy, of taking upon itself the unnecessary and dilatory burden of following NEPA EIS procedures. This subsection would confirm that NEPA did not mandate such a practice.[89]

For other Congressmen, the issue was not so cut and dried. Sen. McClure from Idaho, for example, stated his support of the provision, but only as it applied to the Clean Air Act provisions.[90] For him, at least, the deciding factor favoring passage of 15 U.S.C.

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[89] Senator Muskie expressed his position this way:

> As my colleagues know, at the time [NEPA] was enacted in 1969, its principle sponsor, Senator Jackson, agreed with members of the Senate Public Works Committee that the environmental review procedures were intended to apply to mission agencies - agencies whose activities impacted the environment - and not to environmental protection agencies.
>
> The courts have repeatedly upheld the position to which Senator Jackson and I agreed nearly 5 years ago. Unfortunately, the [EPA] has chosen ... to ignore that intent, to ignore those court decisions, and to proceed to prepare environmental impact statements...

Floor Speech by Sen. Muskie, May14, 1974, recorded at 120 C.R. 14,527. But for a contrary position that EPA was not intended to be exempt from NEPA, see the speech by Rep. Dingell of Michigan, recorded at 120 C.R. 18,782.

[90] He said:

> The question is not involved with the standards set under the Clean Air Act, because the Congress has mandated them, and I know the amendment we are dealing with here today should deal only with the Clean Air Act. That is why I am not attempting to go into any change in the amendment that is adopted in the bill. But the statement of the Senator from Maine goes far beyond this amendment and he has said that the [EPA] should be exempted from the balancing that is required of all other agencies, and I am saying that [NEPA] requires that balancing.

Floor statement by Sen. McClure, on May 14, 1974, at 120 C.R. 14,543.

793(c)(1) appears to have been that in executing the Clean Air Act standards, the EPA had no discretionary authority to exercise, and, therefore, nothing to apply NEPA procedures to. In other words, fulfillment of non-discretionary duties imposed by Congress does not constitute a major Federal action.[91]

This position does not jive with the broad language of 15 U.S.C. 793(c)(1), however. It provides that "no action taken under the Clean Air Act" is to be considered a MFASAQHE. It does not limit its application to the EPA, to say nothing of any language limiting application to execution of only those air pollution standards set by Congress. Conceivably, the broad language could include a Federal facility undertaking the permitting requirements of New Source Review[92] or Title V.[93] On its face, the language would include implementation and enforcement under EPA-approved State Implementation Plans. Not even Senator Muskie's expansive view of NEPA exemption for environmental protection agencies explains the broad language of the statute. Once again, Congress has given a broad directive to achieve a macro solution - in this case, independence from foreign fuel sources - while the procedural implementation of attendant national environmental policy is left unclarified.

The other declaration that particular Federal actions were not deemed to be MFASAQHEs[94] covered temporary actions by the Federal Energy Administrator[95] in

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91 *See* notes 102 and 103, *infra*, and accompanying text.

92 42 U.S.C. 7411.

93 42 U.S.C. 7661 *et seq.*

94 That portion of the statute reads as follows:

> (2) No action under Section 792 of this title for a period of one year after initiation of such action shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]. However, before any action under section 792 of this title that has a significant impact on the environment is taken, if practicable, or in any event within sixty days after such action is taken,

exercising its authority to order electric powerplants to develop mechanisms to convert to coal fuel. The record gave no indication as to why Congress deemed these actions of less than one year's duration to not be major Federal actions. However, that authority was circumscribed by three factors which significantly reduced their potential for adverse environmental impact. First, they were to be temporary.[96] Second, the order could not be effective unless and until the EPA certified that the plant could comply with all applicable air pollution requirements. Finally, absent NEPA compliance, those actions which did have a significant impact on the environment needed to have an "environmental evaluation with analysis equivalent to that required by" NEPA.[97] For the short term, then, the statutory safeguards built into 15 U.S.C. 792 meant that actions contemplated by that statute were not major Federal actions significantly affecting the quality of the human environment.

> an environmental evaluation with analysis equivalent to that required under section 4332(2)(C) of Title 42, to the greatest extent practicable within this time constraint, shall be prepared and circulated to appropriate Federal, State, and local government agencies and to the public for a thirty-day comment period after which a public hearing shall be held upon request to review outstanding environmental issues. Such evaluation shall not be required where the action in question has been preceded by compliance with [NEPA] by the appropriate Federal agency. Any action taken under section 792 of this title which will be in effect for more than a one-year period or any action to extend an action taken under section 792 of this title to a total period of more than one year shall be subject to the full provisions of [NEPA], notwithstanding any other provision of this chapter.

15 U.S.C. 793(c).

[95] These Federal Energy Administrator functions were later transferred to the Secretary of Energy. See Pub. L. 95-91, Aug. 4, 1977, 91 Stat. 565, codified at 42 U.S.C. 7151 and 7293.

[96] For any such order to be effective for longer than one year, full NEPA compliance was required by the end of that one year period.

[97] Although couched in terms which made compliance with this later requirement mandatory "to the greatest extent practicable", this analysis was expected to contribute sufficient recognition of adverse impacts to educate and inform the FEA.

A concurrent authority of the Secretary of Energy which Congress proclaimed to not be a major Federal action for NEPA Sec. 102(2)(C) purposes is in granting temporary[98] or permanent[99] exemptions to the prohibition of using fossil fuels or natural gas to power electrical powerplants.[100]

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[98] Temporary exemptions by the Secretary which would allow the use of petroleum or natural gas in electrical power generation were authorized under 42 U.S.C. 8351 if:

- there was no adequate and reliable supply of coal, environmental regulations would be violated, or other factors inhibited the use of coal or alternate fuels (subsection (a));
- the applicant for the exemption had filed a plan in which the use of synthetic fuels was programmed for the future (subsection (b)) ;
- the applicant has planned for implementing innovative technology to use coal or alternative fuels (subsection (c));
- the application is for close-out use of a unit to be retired (subsection (d));
- such exemption is in the public interest (subsection (e));
- the plant is to be operated solely as a peakload powerplant (subsection (f)); or such an exemption is necessary to maintain reliable service (subsection (g)).

[99] Permanent exemptions were authorized under 42 U.S.C. 8352 without NEPA review if:

- the same conditions existed as allowed a temporary exemption under sec. 8351(a) described above (subsection (a));
- the applicant uses petroleum or natural gas in mixture with coal or other alternative fuel within a specified formula (subsection (d));
- the powerplant will only be operated for emergency purposes (subsection (e));
- the powerplant is operated solely as a peakload plant (subsection (f));
- the powerplant uses natural gas and has low (less than 250 million Btu/hr) capacity (subsection (h)); or
- the plant uses LNG and meets certain other requirements (subsection (i)).

[100] At 42 U.S.C. 8473 a list of such actions is found:

> The following actions are not deemed to be major Federal actions for purposes of [NEPA]:
>
> (1) the grant or denial of any temporary exemption under this chapter for any electric powerplant;
>
> (2) the grant or denial of any permanent exemption under this chapter for any existing electric powerplant, other than an exemption --
>
> (A) under section 8352(c) of this title, relating to cogeneration;
>
> (B) {Repealed};
>
> (C) under section 8352(b) of this title, relating to certain State or local requirements;

This Congressional finding, without reference in the legislative record, should be considered in context. Though it appears to cover a broad range of circumstances, there are two principles that could readily explain this provision. First, the Chapter deals only with exemptions to allow existing facilities to continue operating. Consequently, any exemption by the Secretary will result in maintaining the *status quo*,[101] not in a new form of environmental degradation.

Second, the statutory language in every case states that the Secretary "shall" grant the exemption if she finds the necessary conditions to exist. The law allows her no discretion in the matter. She has no choice that an environmental assessment could help her make. Thus, the action addressed in the statute is ministerial.[102] Ministerial acts "are not within the ambit of NEPA's EIS requirement."[103] Congress has passed other provisions,

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> (D) under section 8352(g) of this title, relating to certain intermediate load powerplants; and
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> (3) the grant or denial of any exemption under this chapter for any powerplant for which the Secretary [of Energy] finds, in consultation with the appropriate Federal agency, and publishes such finding, that an environmental impact statement is required in connection with another Federal action and such statement will be prepared by such agency and will reflect the exemption adequately. ... .

42 U.S.C. 8473 (1983).

101 *See* discussion of *status quo* cases, *supra,* at note 64.

102 As defined at 63A Am. Jur. 2D *Public Officers and Employees* Sec. 301 (1978), an official duty is ministerial when "it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts; ... . Where the officer or official body has no judicial power or discretion as to the interpretation of the law, and the course to be pursued is fixed by law, their acts are ministerial only."

103 National Association of Property Owners v. U.S., 499 F.Supp. 1223, 1264 (D.C. MN 1980), citing South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir. 1980). *See also* U.S. v. S.C.R.A.P., 412 U.S. 669, 93 S.Ct. 2405, (1973) (where Federal official had no discretion, compliance with NEPA not appropriate where it conflicts with another statute); Friends of the Earth v. Weinberger, 562 F.Supp. 265, 272 (D.C.D.C. 1983)

embedded in larger Acts, wherein non-discretionary functions are all that it expressly deems to not be a major Federal action. A common example of this is in the area of executing agreements[104] or leases[105] already drafted at the time the legislation is

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(non-discretionary process for developing recommendations for MX missile siting supported DOD position that legislative amendment excluding the report from NEPA process also covered the process by which the recommendations were derived).

[104] An uncodified portion of the Arizona Desert Wilderness Act of 1990 (Pub. L. 101-628, Nov. 28, 1990, 104 Stat. 4469), included as its Title IV the Fort McDowell Indian Community Water Rights Settlement Act. This separate Act provided that the Secretary of the Interior was to execute and perform the water rights agreement already concluded by a number of State, Tribal, and municipal participants in central Arizona. The Secretary's authority to execute the agreement included any amendments later agreed to among the participants. The Act provided that the execution of the agreement did not constitute a major Federal action under NEPA. Congress made clear that only the execution of the agreement was to be a non-major Federal action, for that section also provided that: "The Secretary is directed to carry out all necessary environmental compliance, except as specifically directed otherwise herein, during the implementation phase of this settlement." (Sec. 410(a) of the Act) Thus, performance still required environmental assessment and/or an EIS when necessary. Execution of the Agreement, when bifurcated from the performance and implementation, is clearly a ministerial action. The Secretary was directed by Congress to execute it without the benefit of criteria which could give him discretion to do otherwise. As a ministerial action, this readily falls under that traditional definition-by-exception of a MFASAQHE. Congress, however, did not articulate that as its reason for enacting this NEPA exemption.

[105] Title IX of the Energy Policy Act of 1992 (Pub. L. 102-486, Title IX, Oct. 24, 1992, 106 Stat. 2935) created the United States Enrichment Corporation (USEC) to take over gaseous diffusion plants in Paducah, Kentucky and Piketon, Ohio that the Federal Government had developed to enrich uranium for nuclear fuel. The operation was to continue under the parameters already developed during the Federal operation of the facilities. The nature and responsibilities of the USEC were set forth in the statute, as were the leasing arrangements between the USEC and the Secretary of Energy. Part of that enactment provided that "(g) The execution of the lease by the Corporation and the Department shall not be considered a major Federal action significantly affecting the quality of the human environment for purposes of section 4332 of this title." 42 U.S.C. 2297c-2(g) (1995).

Congress had written all but the fine print of the lease. Additionally, under the terms of Section 2243, an EIS was already to have been prepared on the facilities turned over to the USEC in the lease. Consequently, the finding by Congress espoused in section 2297c-2(g) can be easily understood in the context of a purely ministerial action by the DOE in executing the lease. There was no discretion delegated to the

enacted. Similarly, the certification that an applicant meets statutory criteria for an entitlement is ministerial in nature.[106] None of these statutes, however, articulate this ministerial aspect of the Federal action as the reason Congress deems that action to not be a MFASAQHE.

5. Endangered Species Act Amendments of 1978

The 1978 amendments to the Endangered Species Act[107] created a new entity, the Endangered Species Committee (ESC).[108] The ESC has a singular purpose.[109] It considers applications from Federal agencies for exemption from the Act. After a careful review including public comment, the ESC is to grant the exemption upon a finding that the requesting agency has complied with statutory requirements and that the proposed

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agency (or to the USEC in operating the facilities), and hence there was no environmental impact as a result of the enrichment plant merely changing hands.

[106] Indeed, Congress made a similar finding, without any legislative history to explain it, in The Deep Seabed Hard Mineral Resources Act of 1980 (Pub. L. 96-283, June 28, 1980, 94 Stat. 568, codified at 30 U.S.C. 1419(d)). Congress concluded that non-discretionary, pre-issuance actions by the Administrator of the National Oceanographic and Atmospheric Administration to certify that an applicant for a deep-sea mining permit met certain statutory threshold requirements were not major Federal actions. The actual issuance of the application was. In addition to the ministerial aspect of applicant qualification certification, the statute required the NOAA Administrator to accomplish certification within 100 days of filing for the application. This short time limit would conflict with the timeframe needed to conduct an environmental impact statement. *See* Flint Ridge, discussed at note127, *infra*.

[107] Pub. L. 95-632, Nov. 10, 1978, 92 Stat. 3752.

[108] 16 U.S.C. 1536(e) (1994).

[109] 16 U.S.C. 1536(e)(2) (1994). The Act prohibits taking any action that is "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat ... which is determined ... to be critical..." 42 U.S.C. 1536(a)(2) (1994).

activity meets a given level of public interest.[110] The statute provides that the decision of the ESC to grant an exemption is not a major Federal action:

> ... *Provided,* That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order. [Emphasis in original]

16 U.S.C. 1536(k) (1994).

Despite its far reaching consequences,[111] the ESC has no discretion to deny an exemption if the applicant meets the statutory criteria. Thus, granting an exemption is largely a ministerial act.[112] If the requesting agency has met certain requirements, and if the proposed activity is important enough to the public,[113] then the ESC is required to grant the exemption. A public hearing process[114] and judicial review[115] are available to override conclusions drawn by the ESC that are arbitrary and capricious.[116] The

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[110] 16 U.S.C. 1536(h) (1994).

[111] Because an exemption could theoretically mean the extinction of a species, the ESC has been referred to as "The God Squad."

[112] *See* discussion of ministerial acts at notes 102 and 103, *supra*, and accompanying text.

[113] The activity need only be of regional significance. *See* 16 U.S.C. 1536(h)(1)(A)(iii).

[114] 16 U.S.C. 1536(g)(4) and (6) (1994).

[115] 16 U.S.C. 1536(h)(1)(A) and subsection (n).

[116] An additional safeguard is that this step is only deemed to not be a major Federal action because previous activity on the proposal has already identified it as one. In other words, Congress is saying that there is no need for a supplemental EIS. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851 (1989), wherein the Court held that new information developed after an initial EIS is finished does not automatically force an agency to do a supplemental EIS to address that new information if it does not alter the environmental impact as initially assessed. The principle espoused by the Court was: " [The] [a]pplication of the 'rule of reason' thus turns on the value of the new information to the still pending decisionmaking process. ... If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. *Id.*, 490 U.S. at 374, 109 S.Ct. at 1859.

requirements imposed by the statute on the requesting agency[117] are expected to thoroughly prepare the administrative record for a final decision incorporating all information valuable to the ESC's fact finding.

The legislative history of these amendments do not comfortably spell out the rationale for proclaiming an ESC decision a non-MFASAQHE. In fact, Senator Wallop of Wyoming made a troubling statement during a colloquy with Senator McClure regarding the EIS requirements in relation to the designation of critical habitats:[118]

> [Sen. McClure:] ... it is possible that the requirement for an EIS on designation of a species or a habitat may require an EIS under existing law. ... [119]I agree with the Senator from Wyoming that with no prohibition in the present law, it may be construed to be a major Federal action requiring an environmental impact statement, and that would have to be judged upon the facts of each case.
>
> Mr. Wallop: I think that is correct. It *would be a determination for the courts to make as to whether or not anything that we could determine in any given designation would be a major Federal action, and certainly not something that we could determine in any manner of detail here on the floor, in this kind of debate.* I believe that is a matter the courts will have to decide.

124 C. R. 21,589.

Leaving such questions of law for the courts to decide makes life difficult for Federal officials charged with making such determinations in advance. They must develop approaches that conform to the law without needless expenditure of public funds in

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[117] 16 U.S.C. 1536(g)(3) (1994).

[118] This colloquy occurred during discussion of an amendment which was later withdrawn.

[119] *But see* Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), discussed at pp. 84 and 85, *infra*, holding that designation of critical habitat does not require implementing NEPA procedures. *See also* Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981), holding that decisions to list species as threatened or endangered under the ESA are exempt from NEPA.

costly procedures or litigation. The opposite of Senator Wallop's comment is true; Congress is in the best position to establish criteria identifying major Federal actions and/or the meaning of "significance" as it relates to environmental impacts.

6. Columbia River Gorge National Scenic Area Act of 1986

Under the terms of the Columbia River Gorge National Scenic Area Act,[120] the States of Washington and Oregon were to establish a Columbia River Gorge Commission (CRGC) and develop a management plan for the National Scenic Area. The Act designated certain actions[121] of the Secretary of Agriculture (or his delegatee, the Director of the National Forest Service) and then declared that those actions were not to be considered major actions under NEPA:[122]

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[120] Pub. L. 99-663, Nov. 17, 1986, 100 Stat. 4300, codified at 16 U.S.C. 544 - 544p.

[121] The statute reads:

> (f) Actions of Secretary as major Federal actions affecting the environment.
>
> 1) Actions by the Secretary pursuant to subsections (f), (g), and (h) of section 544d of this title; subsections (f), (j), (k), and (l) of section 544f of this title; section 544g of this title; and subsections (a) and (b)(2) of section 544h of this title shall neither be considered major Federal actions significantly affecting the quality of the human environment under [NEPA] nor require the preparation of an environmental assessment in accordance with that Act.
>
> (2) Except as provided in paragraph (1) of this subsection, nothing in sections 544 to 544p of this title shall expand, restrict, or otherwise alter the duties of the Secretary under [NEPA].

16 U.S.C. 544o(f) (1994).

[122] See *Columbia River Gorge National Scenic Area Act - A Section by Section Analysis*, reprinted at 132 C.R. 29,501, which specified that the actions of the Forest Service were not to be deemed major Federal actions under NEPA. *Id.*, at 29,505.

An examination of the statutory sections cited for NEPA exemption show that much of the exempted actions were simply review and coordination of plans and ordinances developed by local counties and the CRGC in furtherance of the Scenic Area.[123] The purpose of the review was to ensure that those plans and ordinances conformed to explicit standards and criteria which Congress had set out in the statute.[124]
The legislative record does not articulate Congress' rationale for not requiring a NEPA review of the Commission's plans and counties' ordinances. For the most part, the actions described above are ministerial reviews of plans developed by a non-Federal entity to ensure compliance with legislatively proscribed standards.[125]

There are other actions by the Secretary, however, that are much more than just review of non-Federal entities' plans and ordinances. Yet Congress finds them also to not be major Federal actions for NEPA purposes. Specifically:

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[123] Specifically, those sections directing review and coordination were:

- Section 544d(f) - directs the Secretary to review the Commission's management plan to determine whether or not it is consistent with the standards set out elsewhere in the statute. The Secretary will either concur to that effect or not. If he does not concur, he sends the plan back to the Commission with an explanation of the reasons for finding the plan inconsistent and suggested modifications designed to conform the plan.
- Section 544d(g) - requires a review of the plan at least every five years, using the same procedures as in 544d(f).
- Section 544d(h) - addresses amendments to the plan initiated by the Commission. The same procedures outlined above apply.
- Section 544f(j) - directs the Secretary to review land use ordinances developed by counties and coordinated through the Commission. He is to either concur that they are consist with the management plan and guidelines developed under section 544f(f) or return them to the Commission with suggested modifications.
- Section 544f(k) - deals with return of the ordinance from the Commission to the Secretary after the process in 544f(j).
  Section 544f(l) - If the county fails to make an ordinance consistent with the management plan, the Commission must draft one, which goes to the Secretary for review as above.

[124] See Sec. 544(d) for those standards.

[125] *See* notes 102 and 103, *supra,* and accompanying text discussing ministerial actions.

- Section 544f(f) directs the Secretary to develop guidelines to ensure that the management of non-Federal lands in the scenic area is consistent with the standards and purposes of the Act. These guidelines are to be included in the management plan.
- Section 544g authorizes the Secretary to make federal land acquisitions, either by eminent domain or land exchange, within the special management areas of the Scenic Area.
- Section 544h(a) authorizes and directs the Secretary to issue interim guidelines for both land use activities and land acquisition without the owner's consent.
- Section 544h(b)(2) allows the Secretary, through the U.S. Attorney General, to seek in conjunction with any condemnation proceeding under this section, an injunction against any land use which is incompatible with the purposes of the scenic area.

The authority to pursue land acquisitions and develop interim guidelines does not convey merely a ministerial duty. On the contrary, those are duties which carry a great deal of discretion, even with the statutory restrictions placed on the Secretary's authority. Those actions may have a significant impact on the environment, albeit, presumably, for the enhancement of the natural and scenic quality of the area. But there is no clear cut explanation as to how this Congressional decision squares with the procedural requirements of NEPA. Unlike the concurrence or nonoccurrence with management plans and land use ordinances,[126] there are no time limits on Secretarial action. There is no apparent conflict between these directives and other duties of, or constraints upon, the

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[126] Under 16 U.S.C. 544(f)(1), for example, the Secretary has 90 days to concur or nonconcur. Failure to perform within that timeframe appears to result in constructive concurrence.

Secretary.[127] Nor is there the possibility of the Secretary's action being overruled by the Commission, as is true for management plans[128] and land use ordinances.[129]

It appears that Congress deems these actions by the Secretary to not be major ones for NEPA purposes either: (a) because they are merely cumulative to the true action which is the legislative establishment of the scenic area,[130] or (b) because the Secretary's actions are environmentally protective, rather than impactive.[131] Neither of these explanations lend themselves to a uniform rule by which Federal officials can differentiate between actions that may or may not be a MFASAQHE.

7. The Trans-Alaska Pipeline

The 1973 Trans-Alaska Pipeline Authorization Act[132] was enacted to expedite the development of a pipeline to carry oil from the vast oil fields of northern Alaska. It had two provisions dealing with relief of agency officials from compliance with NEPA section 102(2)(C).[133] One[134] was a finding that the Trans-Alaska Pipeline Environmental Impact Statement prepared by the Secretary of the Interior - at a cost of

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127 *See* Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, 96 S.Ct. 2430 (1976) (NEPA process inapplicable to certification action by Secretary of HUD because it conflicted with statutory 30-day time limit on HUD Secretary's discretion).

128 16 U.S.C. 544d(f)(3) (1994).

129 16 U.S.C. 544f(l)(5) (1994).

130 *But see* 40 C.F.R. 1508.7 and 1508.8 regarding cumulative impacts and effects.

131 *See* note 69 and accompanying text, *supra*.

132 Pub. L. 93-153, Nov. 16, 1973, 87 Stat. 584.

133 A third provision confirmed allegiance with Sec. 102(2)(C) in all other matters dealing with mining leases and permits. *See* 30 U.S.C. 185(h)(1).

134 43 U.S.C. 1652(d) (1994).

$9 million and 175 man-years of effort[135] -was sufficient to satisfy NEPA.[136] This section was the subject of considerable debate in both houses.

Overshadowed by the debate surrounding NEPA compliance for the trans-Alaska pipeline (TAPS) was another provision that amended the authority of Federal officials to grant right-of-way and permits for oil and gas pipelines throughout the country. Among the modifications of this portion of the Act was Section28(t) which deemed actions to ratify or confirm any right-of-way for an oil or gas pipeline to not be a MFASAQHE.[137] With all the attention showered on the action-forcing provisions of NEPA relating to the already completed TAPS EIS, no mention is made in debate of this subsection which precludes NEPA review of modified rights-of-way and permits even where no environmental assessment had heretofore been performed.

This omission is made more poignant by the fact that the genesis of this provision was the same as that which lead to the provision that the TAPS EIS was sufficient to comply with NEPA. In Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973); *cert. denied*, 411 U.S. 917 (1973), the court enjoined progress on the TAPS.[138] The Court

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[135] *See* speeches by Rep. Young of Alaska and Bartlett of Oklahoma at 119 C.R. 27,632 and 119 C.R. 22,839, respectively.

[136] This is not pertinent to our examination in that the language waives any further NEPA review. See note 61, *supra.*

[137] Specifically, the provision reads as follows:

> (t) Existing rights-of-way
> The Secretary or agency head may ratify and confirm any right-of-way or permit for an oil or gas pipeline or related facility that was granted under any provision of this law before the effective date of this subsection, if it is modified by mutual agreement to comply to the extent practicable with the provisions of this section. Any action taken by the Secretary or agency head pursuant to this subsection shall not be considered a major Federal action requiring a detailed statement pursuant to section 102(2)(C) of [NEPA].
> 30 U.S.C. 185(t) (1993).

[138] One reason for the injunction was that the court found the EIS insufficient because it

found that the Secretary of the Interior had exceeded his authority in permitting the pipeline construction to operate on Federal property beyond the 50-foot right-of-way allowed by then-section 185 of Title 15. Because Congress sought to end run further litigation challenges to the pipeline, both of these provisions were implemented.[139]

Even though confirmatory and ratification actions on past rights-of-way and permits may indeed have significant impacts on the environment, Congress nevertheless declared them to not be major Federal actions without giving a clue as to its rationale.

8. Mining Laws

Congress has had three occasions to declare a Federal action pertaining to mining laws to not be a major Federal action triggering the NEPA process. In two of them,[140] there is

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failed to address a trans-Canada alternative.

[139] It would seem that the only reason for providing that future Federal actions to ratify or confirm modified permits and rights-of-way, (presumably to expand the width of pipelines and construction operations beyond the too narrow confines of 25 feet on each side) were not subject to NEPA process was to avoid creating another breach in the wall for pipeline opponents to use as a means of judicial attack.
This supposition is confirmed by the Conference Report reporting out the final, joint version of the bill:

> 9. Section 28(t) permits the Secretary or agency head to ratify and confirm the validity of existing rights-of-way for oil and gas regardless of the statutory authority under which they were granted. It is needed because of the possible application of the decision of the United States Court of Appeals in The Wilderness Society, et al. v. Morton, et al.
>
> The conferees *expect* that previously granted rights-of-way should be confirmed only after carefully study and the fullest possible compliance with the provisions of Section 23 as amended by this Act.

H.R. Conf. Rep. No. 924, 93rd Cong., 1st Sess. (1973), reprinted at 1973 U.S.C.C.A.N. 2523, 2528.

[140] One of these has been addressed already. *See* note 106, *supra.*

absolutely no legislative history by which to glean meaning of a major Federal action significantly affecting the quality of the human environment.[141]

Only cursory legislative history addresses the application of NEPA to the Outer Continental Shelf Lands Act Amendments of 1978,[142] which required that:

> (1) At least once the Secretary [of the Interior] shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.

43 U.S.C. 1351(e)(1) (1994).

This provision appears to interject Congress' sense that DOI leases to develop and produce OCS oil and gas mining need NEPA review, while at the same time trying to

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[141] The Oil and Gas Leasing Reform Act of 1987 (Pub. L. 100-203, Title V, Subtitle B, Dec. 22, 1987, 101 Stat.1330-256) provided that the proposal or promulgation of regulations dealing with the minimum acceptable bid (at Section 5004(g)(2)(B), codified at 30 U.S.C. 226(b)(1)(B)) and test sales of oil and gas leases (at Sec. 5107 (not codified)) were not MFASAQHEs. These provisions, along with the rest of the Oil and Gas Leasing Reform Act, were buried within the budget cutting and tax increase battles of the 1987 Appropriations bill. There is no legislative history to explain how Congress reached its conclusion. Speculation would suggest that Congress believed, as the Courts had ruled, that Federal actions prior to issuing a permit to mine oil and gas on Federal lands were not major; they were primarily ministerial and their performance would have no significant impact on the environment. *Accord.*, South Dakota v. Andrus, note 103, *supra*, and Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553 (D.C. Cir. 1979) (Secretary of Interior has no discretion to withhold coal mining lease from applicant who satisfies statutory requirements).

Additionally, how little a bidder could get lease rights for would have no bearing on how those rights were exercised, the subject matter of environmental control and the EIS procedures. Further, the mechanics of how test sales were actually accomplished would have no environmental effect.

[142] Pub. L. 95-372, Sep. 18, 1978, 92 Stat. 629. The Act made extensive revision of Federal policy and procedure for oil and natural gas mining leases for the outer continental shelf.

defer to the agency as to when that review is best accomplished.[143] It also implies a Congressional sense that not every lease will be a major Federal action, but that the line of demarcation is too dim to trace within the legislation itself, and will, in fact, vary with the applicant, the location, and the content of the development and production plan presented for approval.[144]

The Surface Mining Control and Reclamation Act of 1977[145] (SMCRA) revamped coal mining in the United States. It implemented a command and control program for coal mining similar to the programs for air and water pollution, with requirements for federally-approved State programs to regulate coal mining on non-federal lands. State

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[143] As explained in the Conference Report:

> The Secretary of the Interior is given the discretion to invoke NEPA procedures after submission of a plan for the first development proposal in an area or region, or the second or third - so long as it is invoked at least once. The Conferees expect that NEPA will be invoked prior to approval of a plan when major or substantial development and production activities seem to be indicated for an area or region. In preparing, drafting, and revising the EIS, the Conferees expect the Secretary of the Interior to consider and address the cumulative effects of past and future OCS activities in an area or region.

H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. (1978), reprinted at 124 C.R. 25,549.

[144] At the risk of speculation, this statute may be a Congressional form of programmatic EIS requirement, suggesting that with a comprehensive environmental impact statement addressing cumulative impacts, the Secretary of the Interior could well decide that some individual lease authorizations will not have a significant impact on the quality of the human environment. See Kleppe v. Sierra Club, 427 U.S. 390, 96 S.Ct. 2718 (1976), which discusses the programmatic EIS. In that case, the Department of Interior performed a "Coal Programmatic EIS" in conjunction with a new national coal leasing program. As expressed by the Court, "The purpose of the program review was to study the environmental impact of the Department's entire range of coal-related activities to develop a planned system to guide the national leasing program." *Id.*, 96 S.Ct. at 2724. *See also* City of Tenahee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990). Programmatic EISs' are discussed in the CEQ regulations at 40 C.F.R. 1502.20 (tiering process).

[145] Pub. L. 95-87, Aug. 3, 1977, 91 Stat. 519, codified at 30 U.S.C. 1220 *et seq.*

programs were to include environmental standards and permitting requirements.[146] In the Act, Congress excluded two areas of Federal activity from the realm of major-Federal-actiondom.

First, the Act provided, that promulgation of interim regulations by the Secretary of the Interior covering interim regulatory procedures for surface coal standards was not a major Federal action.[147] Then in a section of the Act that correlated the SMCRA to other federal laws, Congress provided that:

> (d) Approval of the State programs, pursuant to section 1253(b) of this title, promulgation of Federal programs, pursuant to section 1254 of this title,[148] and implementation of the Federal lands programs, pursuant to section 1273 of this title, shall not constitute a major action within the meaning of section 102(2)(C) of [NEPA]. Adoption of regulations under section 1251(b) of this title shall constitute a major action within the meaning of section 102(2)(C) of [NEPA].

30 U.S.C. 1292(d).

Taken together, these two provisions suggest, that it was their temporary nature that precluded the interim regulations from being considered major Federal actions.[149] More

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[146] 30 U.S.C. 1251 and 1252, respectively.

[147] Section 501 of the Act provided, in part, as follows:

> (a) Not later than the end of the ninety-day period immediately following August 3, 1977, the Secretary [of the Interior; *see* 30 U.S.C. 1291(23)] shall promulgate and publish in the Federal Register regulations covering interim regulatory procedure for surface coal standards based on and incorporating the provisions set out in section 1252(c) [these are environmental protection standards] of this title. The issuance of the interim regulations shall be deemed not to be a major Federal action within the meaning of [NEPA].

30 U.S.C. 1251(a) (1995).

[148] This section provides for federal development of programs for non-federal lands when States fail to come up with their own approved program.

[149] Though section 1251(b), which discusses permanent procedural regulations, is itself

difficult to reconcile with the purpose and product of the action-forcing NEPA provisions is the exemption for the approval of State programs and promulgation of comparable Federal programs for surface mining operations. The comprehensive manner in which mining was reformed and the significant environmental impacts inherent in the mining process both strongly implicate the necessity of engaging NEPA. Alternatively, environmental protection is the unquestionable goal of these provisions. They demonstrate an instance where the DOI is tasked by Congress to execute an environmentally protective mission, not unlike EPA's.[150] Despite these competing and conflicting viewpoints, nowhere in the legislative history does Congress establish a consistent rationale for concluding that DOI activity in mining reform programs is not a major Federal action significantly affecting the quality of the human environment.[151]

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silent on the Secretary of the Interior's obligation to prepare appropriate environmental impact documentation, section 1292(d) makes it clear that promulgation of permanent regulations is a major Federal action. Alternatively, it may have been the short suspense which Congress gave the Secretary - 90 days from enactment - which limited NEPA's coverage of the interim regulatory directives.

[150] *See* discussion of functional equivalence, pp. 83-86, *infra.*

[151] The closest the record comes is a comment in the House Conference Committee Report which recommends reconciliation of the respective versions of the bills vis-à-vis NEPA:

> Additionally, consideration should be given to excluding from the requirements of NEPA certain of the environmental protective provisions of the bills, such as, for example, the promulgation of environmental protection standards ... or the issuance of permits for new or existing operations pursuant to a Federal program. Precedent for such an exclusion is provided by section 511 of the Federal Water Pollution Control Act. 33 U.S.C. 1371(c)(1).

H.R. Conf. Rep. No. 493, 95th Cong., 1st Sess. 164 (1977). Despite the suggestion of the Committee on Conference, the promulgation of environmental protection standards was not exempted from NEPA (as is seen in the above discussion of section 1251(b), *supra*). Nor was the issuance of a permit pursuant to a Federal program legislatively exempted. *See* 30 U.S.C. 1256 (1994).

Though devoid of a policy pronouncement, the legislative history does give a clue as to the origin of the exemption from NEPA found in section 1592(d). It appears to have been the result of pragmatic politics, rather than a considered integration of surface mining and national environmental policy.[152] Consequently, as a guide for Federal agencies to rely on in determining what is a major Federal action, the SMRCA is particularly unhelpful.

9. Disaster Relief

Another statutory decree that a particular form of Federal activity is not a major Federal action under NEPA is found in the 1988 amendments to federal disaster relief law.

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[152] During floor debate on the original version of H.R. 2, the SMRCA bill before the House of Representatives, an ardent opponent to the bill, Rep. Rudd of Arizona, explained one of his objections this way:

> Reasonable people should be staggered by the standards and controls which this bill will impose upon the surface mining of coal. They should also be numbed by the reality that the procedural impediments written into this legislation could indefinitely delay recovery and use of coal resources.
>
> Let us briefly review these requirements for overlapping and extremely time-consuming environmental impact procedures that will seriously impede and delay needed coal production:
>
> First, section 702(d) of this bill requires the preparation of three separate environmental impact statements under section 102 of the National Environmental Policy Act of 1969. These must be prepared before approval of State implementation programs under section 503 of this bill, before promulgation of a Federal program under section 504 of the bill, and before implementation of a Federal lands program under section 523 of the bill. But these three separate environmental impact statement requirements under H.R. 2 are only the beginning....

123 Cong. Rec. 12,640 (1977).

After Rep. Rudd's comments, the word "*not*" was inserted between "shall" and "constitute a major action..." Although there is no smoking gun in the Congressional Record, it is highly unlikely that coincidence explains why the three provisions mentioned by Rep Rudd were turned 180 degrees from explicit coverage as a major Federal actions to exemption as not being major Federal actions in the final version of section 702(d) of the Act.

Section 105(m)(1) of the Disaster Relief Act of 1974[153] provided that the following were not major Federal actions significantly impacting the environment:[154] general disaster assistance,[155] direct disaster relief by Federal agencies or contractors,[156] contributions to State and local governments for repair, restoration, or replacement of damaged or destroyed public facilities,[157] debris removal,[158] and emergency assistance to prevent catastrophe, protect property, and save lives.[159]

There was no debate on the NEPA-related provisions; no mention of them in the floor descriptions of the provisions of the Act. Their meaning in a search for a definition of a MFASAQHE would only be speculation. For example, in most cases, such Federal actions would be emergency situations requiring an immediate response. As implemented, the action-forcing provisions of Sec. 102(2)(C) are subject to an emergency exception.[160] Most of the federally assisted or conducted activity that would

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[153] Pub. L. 93-288, as amended by Pub. L. 100-707, Nov. 23, 1988, 102 Stat. 4694.

[154] Pertinent portion reads:

> An action which is taken or assistance which is provided pursuant to section 5170a, 5170b, 5172,5173, or 5192 of this title, including such assistance provided pursuant to the procedures provided for in section 5189 of this title, which has the effect of restoring a facility substantially to its condition prior to the disaster or emergency, shall not be deemed a major Federal action ... within the meaning of [NEPA]. Nothing in this section shall alter or affect the applicability of [NEPA] to other Federal actions taken under this chapter or under any other provisions of law.

42 U.S.C. 5159 (1994). The section 5189 procedures mentioned in the passage refer to 42 U.S.C. 5189. Those are simplified procedures to expedite recovery when the estimated Federal share of a relief activity is less than $35,000.

[155] 42 U.S.C. 5170a (1994).

[156] 42 U.S.C. 5170b (1994).

[157] 42 U.S.C. 5172 (1994).

[158] 42 U.S.C. 5173 (1994).

[159] 42 U.S.C. 5192 (1994).

[160] 40 C.F.R. 1506.11. However, the CEQ regulations do not altogether exempt Federal agencies from environmental consideration even in emergencies. Instead, they

have an environmental impact would be repair work and replacement of previously existing structures. But for the disaster, the environmental impact of those structures would already be extant.[161]

10. Synthetic Fuel Production

Another place within the U.S. Code in which a Congressional finding that a particular set of Federal agency actions are not major for NEPA Section 102(2)(C) purposes deals with the development of synthetic fuels for national defense. In order to assure sufficient capacity to meet defense needs, the Federal Government had a program to encourage and assist private industry in developing and producing synthetic fuels. This program, originally implemented by the Defense Production Act of 1950,[162] was significantly amended in 1980 by the Energy Security Act.[163] This comprehensive Act addressed NEPA's action-forcing provisions in three ways.[164]

The Act established the United States Synthetic Fuels Corporation (USSFC).[165] Section 175 of the Act spelled out how NEPA applied to the Corporation:

(b) No action of the Corporation except the construction and

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truncate such considerations to the extent possible in emergency situations. *See* Valley Citizens For a Safe Environment v. Vest, 22 Environmental Law Reporter 20,335 (D.C. MA 1991).

[161] *See* note 64 and accompanying text, *supra*. A similar result was reached in Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981), where the court ruled that Federal disaster relief action of rebuilding a bridge destroyed in a hurricane did not require preparation of an EIS under regulations then in effect. But consider that construction processes may do irreparable damage to ecosystems already damaged by the disaster.

[162] Act of Sep. 8, 1950, Chap. 932, 64 Stat. 798.

[163] Pub. L. 96-294, June 30, 1980, 94 Stat. 619.

[164] One of these sections is discussed elsewhere at p. 50, *infra*.

[165] 42 U.S.C. 8711 (repealed). The USSFC was a "Federal entity of limited duration". 42 U.S.C. 8701(b)(2)(C) (1983). It was dissolved a few years later.

> operation of synthetic fuels projects pursuant to [this Act] shall be deemed to be a "major Federal action ..." for purposes of section 102(2)(C) of [NEPA], and with respect to Corporation construction projects, the Corporation shall be deemed to be a Federal agency for purposes of such Act.

Pub. L 96-294, [Title V], sec. 175(b), June 20, 1980, 94 Stat. 619, 676, codified at 42 U.S.C. 8775 (1983); repealed by Pub. L. 99-272, Apr. 7, 1986, 100 Stat. 143.

As stated in the statute, only the construction and operation of projects were to be scrutinized under NEPA.[166] These were projects which the Corporation owned in furtherance of the comprehensive master strategy.[167]

In another coordination of NEPA with the Energy Security Act, the Act stated that actions of the President in providing loans, guarantees, or purchase agreements to private business enterprises were not major Federal actions.[168] These provisions, in effect, prevented these funding mechanisms from imbuing otherwise private development projects with the mantle of a Federal activity for NEPA Sec. 102(2)(C) purposes. The legislative history does not explain away the potentially significant environmental impact that such programs may have.[169] These parts of the law seem to shirk the Federal

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[166] The USSFC was to be involved in other actions such as financial assistance mechanisms that would develop the nation's synthetic fuel production capacity. Examples were the development of a comprehensive strategy for synthetic fuel production, solicitation of projects, loans and loan guarantees, joint ventures, and purchase agreements. *See, generally*, 42 U.S.C. Sections 8722 and 8731 through 8736.

[167] 42 U.S.C. 8741(a) (1983).

[168] Pub. L. 96-294, Title II, Sec. 104, June 30, 1980, 94 Stat. 619. This was true for both the general development and production of synthetic fuels (50 U.S.C. App. 2095(h)) and development and production when there was determined to be a national energy supply shortage of defense fuels (50 U.S.C. App. 2096(i)).

[169] Only one reference in the legislative history gives us a clue as to Congress' purpose in enacting this provision. The Conference Committee Report on the Act included this:

> In regard to Federal requirements for environmental impact impact statements, the [relevant provision] stipulates that no action in providing any loan, guarantee, or purchase agreement under [this section

government's professed responsibility as a leader in environmental consciousness in these Federal funding actions that often attach NEPA Section 102(2)(C) protections to non-federal activity.[170] Suffice it to say that agency officials are not given any useful Congressional guidance in these provisions to help them fashion a meaningful handle on what actions are major and environmentally significant.[171]

11. Planning Provisions

Tucked within the bowels of the FY 1992 and 1993 National Defense Authorization Act was a law which directed the DOE to produce and annually update an environmental restoration and waste management five-year plan.[172] The express goal of the statute was to plan the design and completion of environmental cleanup at each DOE facility by the year 2019.[173] The statute included a provision expressly stating that the development and adoption of such a plan was not a MFASAQHE.[174]

> of the Act] shall be determined to be a major Federal action significantly affecting the quality of the human environment. The conferees firmly believe that the vulnerability of U.S. national security to current and possible fuel shortages requires the development of the synthetic fuel industry as quickly as possible. Even so, the conferees believe that environmental impact statements should be undertaken where applicable, for individual projects made possible under this program

H.R. Conf. Rep. No. 1104, 96th Cong., 2d Sess. 194 (1980).

[170] *See, e.g.*, Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979); and Como-Falcon Coalition, Inc. v. U.S. Dept. of Labor, 465 F. Supp. 850 (D.C. Minn. 1978), *affirmed*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2154.

[171] While these provisions could be aligned and reconciled with CEQ and judicial decisions which hold that actions of the President do not fall under NEPA, this is not what the Conference Committee said was the reason for their enactment. *See* note 82, *supra*, and accompanying text. Both code sections 2095 and 2096 address action taken directly by the President. *See* 50 U.S.C. App. Sections 2095(a) and 2096(a), respectively.

[172] Pub.L. 102-190, Div. C, Title XXXII, Dec. 5, 1991, 105 Stat. 1575.

[173] 42 U.S.C. 7274g(a)(1) (1994).

[174] The specific language is as follows:

This subsection, limited the application of its NEPA waiver to the development and adoption of the plan, not to actions taken to implement the plan. This is understandable, since the DOE was to revise the plan every year and to perform an EIS would take at least that long, if not longer.[175] Additionally, the mechanical act of planning has no per se impact on the physical environment at all.[176] It is the implementation of restoration and waste management plans which may produce an effect on the environment. In any event, Congress did not debate that aspect of the planning requirements, nor did committee reports mention it. Whether Congress would consistently find planning requirements to not be major Federal actions is impossible to say based on this provision.

Congress pronounced another type of planning requirement to not be a major Federal action in a portion of the Energy Security Act of 1980 The Act directs the President to submit biennial energy targets to Congress discussing imports, domestic production, and consumption on a national scale.[177] Congress did not want preparation and transmission of the targets and reports to it to be considered major Federal actions.[178] Development of this data is readily comparable to data development for budget submissions, and is also to be accomplished by the President.[179]

> The development and adoption of any plan (including any preliminary form of any such plan) ... shall not be considered a major Federal action for the purposes of [NEPA]. Nothing in this subsection shall effect the [DOE]'s ongoing preparation of a programmatic

42 U.S.C. 7274g(b) (1994).

[175] *See* note 127, *supra.*

[176] Not taking into consideration the consumption of resources such as paper and midnight oil.

[177] Pub. L. 96-294, Title III, June 30, 1980, 94 Stat.619.

[178] *Id.*, Sec. 304(c).

[179] *See* notes 82, 103 and accompanying text, *supra.* Energy targets themselves are not proposals for action. Rather, they are general goals for substantive agency actions to achieve. While implementation of those actions may require environmental impact

12. Miscellaneous Statutes

There are three other instances where Congress has declared a Federal action to not be a major Federal action under NEPA. In all three of these, Congress made the finding with no explanation of that determination on the legislative record.

The Navajo-Hopi Land Dispute Settlement Act [180] enacted means by which territorial claims and competing interests of Native Americans were to be settled.[181] Section 640d-26 states that "No action taken pursuant to, in furtherance of, or as authorized by this subchapter, shall be deemed a major Federal action for purposes of [NEPA]." Such actions countenanced by this section include those described above taken by the Secretary of the Interior, by his delegates, and by those charged with facilitating an agreement.[182] The environmental impacts of these activities, which deal with land and water use issues in the arid Southwest, normally would be considered significant. But nothing in the legislative record explains the rationale for finding them to not be subject to NEPA's action-forcing provisions.[183]

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assessment, the collection and transmission of data used to plan for and develop energy targets is not and has no per se environmental significance.

[180] Pub. L. 96-305, July 8, 1980, 94 Stat. 934, codified at 25 U.S.C. 640d *et seq.*

[181] Among the provisions were resettlement plans for the Navajo tribe, with life estates given to those older men and women so they would not have to leave their homeland. The Act incorporates the appointment of a mediator and negotiating teams to resolve details and implement agreements (see 25 U.S.C. 640d through 640d-3). The Act provides for partitioning of land for Navajo resettlement (see 25 U.S.C. 640d-9 and 640d-10) and determination of grazing rights and other interests attendant to the land (see 25 U.S.C. 640d-13 through 640d-20).

[182] A Commission was also established by the Act for this purpose at Sec. 640d-11.

[183] However, a statement prepared for insertion into the record by Representative Don Marriot of Utah, suggests that Congress acted for reasons other than a no-significant-impact rationale:

> Exemptions from NEPA and FLPMA are included in section

In the Federal Lands Policy Management Act1976[184] Congress established that the use and distribution of range betterment funds by the Bureau of Land Management (BLM) is not to be deemed a major Federal action under NEPA.[185] No legislative history specifies whether the "distribution and use" of range betterment funds is merely the application to and expenditure of these funds on projects or the establishment and execution of the projects as well.[186]

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11 to avoid any possibility that those two acts would be raised to obstruct relocation or reclamation of the lands in question.

Text prepared for insertion in the record at 126 C.R. 16,824, June 25, 1980.

184 Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2744.

185 The statute reads:

> Congress finds that a substantial amount of the Federal range lands is deteriorating in quality, and that the installation of additional range improvements could arrest much of the continuing deterioration and could lead to substantial betterment of forage conditions with resulting benefits to wildlife, watershed protection, and livestock production. Congress therefore directs that 50 per centum ... of all moneys received by the United States as fees for grazing domestic livestock on public lands ... shall be credited ... for the purpose of on-the-ground range rehabilitation, protection, and improvements on such lands. ... Such rehabilitation, protection, and improvements shall include all forms of range land betterment including, but not limited to, seeding and reseeding, fence construction, weed control, water development, and fish and wildlife habitat enhancement as the respective Secretary may direct direct after consultation with user representatives. The annual distribution and use of range betterment funds authorized by this paragraph shall not be considered a major Federal action requiring a detailed statement pursuant to [NEPA].

43 U.S.C. 1751(b)(1) (1995).

186 If the former, this is certainly in line with the concept that the funding process does not constitute a major Federal action for NEPA purposes. *See, e.g.,* Andrus v. Sierra Club, 442 U.S. 34, 99 S.Ct. 2335 (1976). If the latter, then the impact of this legislation is far broader. It would then encompass agency activity that might be part of a newly developed program that was not subject to NEPA environmental assessment per se. The implementation of this provision has not been challenged in court.

13. Congressional Findings Of Major Federal Actions

There are three areas of statutory law where Congress has pronounced Federal activity to constitute a major Federal action significantly affecting the quality of the human environment. As is true for those laws discussed above where the finding was the opposite, Congress fails to elaborate on the definition of a MFASAQHE for the benefit of Federal officials and those who their actions impact. No legislative history shares Congressional insight into these pronouncements.

In legislation dealing with uranium enrichment facilities[187] and ocean thermal energy conversion facilities[188] Congress positively announced that licensing for construction and operation of those facilities is a major Federal action for the Department of Energy

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[187] Pub. L. 101-575, Nov. 15, 1990, 104 Stat. 2835 and redesignated by Pub. L. 102-486, Sec. 902(a)(8), Oct. 24, 1992, 106 Stat. 2935, 2944, codified at 42 U.S.C. 2243(a)(1). This provision definitively states that the issuance of a license for the construction and operation of a uranium enrichment facility is a major Federal action significantly affecting the quality of the human environment. Given the public debate on atomic energy uses, and the unique nature of both the process and the product, it is no wonder that such a conclusion was drawn by Congress. It is also not surprising that the matter was not the subject of any discussion on the floor of either house, lost in the far more populist debate on nuclear fuel development and waste disposal. The same considerations also explain, in part, another NEPA-related decision of Congress pertinent to the development of atomic energy and the United States Enrichment Corporation (USEC).

[188] The Ocean Thermal Energy Act of 1980 (Pub. L. 96-320, Aug. 3, 1980, 94 Stat. 984) provided a Federal program for developing and promoting the use of ocean thermal energy by conversion to electricity and energy-intensive products. Because neither the industry nor the technology was yet established, the environmental assessment of the program was a key ingredient in the program's overall strategy. The statute included a provision declaring that:

> The issuance of any license for ownership, construction, and operation of an ocean thermal energy conversion facility or plantship shall be deemed to be a major Federal action ... for purposes of [NEPA]....

42 U.S.C. 9117(e) (1995).

and the NOAA,[189] respectively. Both kinds of activity are unique, and deal with sensitive aspects of the environment - atomic fuel production and the ocean. It is easy to recognize that such activities, on the cutting edge of energy resource technology, have potential adverse environmental impacts that proposing officials must anticipate and identify. To plan ahead to protect against untoward results of such activity before commitment of resources was the very nucleus of national environmental policy in the first place. Nevertheless, as with the findings of non-major Federal activity explored above, this positive pronouncement leaves Federal officials without a definition or formula which can be carried over to other forms of Federal action.

Radioactive waste disposal is another area where Congress has attempted to balance economic interests with the interests of health, safety, and the environment. In a host of segments in the national search for a way to dispose of high-level radioactive waste, Congress made determinations regarding NEPA compliance. In most of those statutes, Congress has directed the appropriate Federal agency on what form of environmental assessment is needed, and what factors can (or must) be excluded.[190]

In only three instances, however, has Congress specified that a step in the process is a major Federal action for NEPA purposes.[191] They are: (1) the Nuclear Regulatory

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[189] 42 U.S.C. 9102(2) (1995)

[190] *See* note 61, *supra.*

[191] Unlike all previous instances where Congress has addressed the issue, in no case dealing with radioactive waste disposal does Congress ever make the legislative conclusion that something is not a major Federal action. Each time Congress excludes a step or series of steps from an EIS requirement, it is by specific exemption of those steps. By such language as "No such activity shall require the preparation of an environmental impact statement," (found at 42 U.S.C. 10132(d) (1994)) Congress excludes from the NEPA Section 102(2)(C) process certain activities without holding them out to be less-than-major Federal actions with less-than-significant impacts upon the environment. A palpable inference is that nothing about finding a permanent

Commission's issuance, to the Secretary of Energy, of a construction authorization for a repository or monitored retrievable storage facility, to be considered after an exhaustive site selection, characterization, and recommendation process; [192] (2) the Secretary of Energy's decision to recommend Yucca Mountain, Nevada to the President as the right site on which to ask Congress to authorize the construction of a permanent high-level radioactive waste burial site;[193] and (3) proposals to provide 300 or more metric tons of storage capacity, which may presently be available at any one Federally owned facility, for use in storing spent nuclear fuel from civilian reactors.[194]

Without relevant discussion recorded in the legislative history, there is no articulated basis establishing why Congress drew the conclusions it did about Federal actions and EIS requirements. Given the controversial nature of the topic, it is not surprising that detailed environmental analysis was ordered at virtually every juncture.

14. Summary

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repository or monitored retrievable storage facility for high-level radioactive waste is minor or insignificant for NEPA purposes. Yet, because of overlapping environmental assessment requirements (*compare, e.g.* 42 U.S.C. 10132(b)(1)(D) with 42 U.S.C. 10244(a) and (b)), and the building of steps one upon the other (*see, e.g.* site characterization requirements found at 42 U.S.C. 10133), Congress deems some major Federal actions to be subsumed in the environmental protection afforded by other directives.

[192] 42 U.S.C. 10247(a) (1995).

[193] 42 U.S.C. 10134(f) (1995).

[194] 42 U.S.C. 10155(c)(1) (1995). Note, however, that storing radioactive waste may always be a MFASAQHE. Note that in the latter of the three instances cited, proposals to provide less than 300 metric tons (mt) of storage capacity at a Federal facility required an environmental assessment to determine whether or not they would also be a major Federal action significantly affecting the quality of the human environment (*see* 42 U.S.C. 10155(c)(2)). Again, there is no recorded explanation of what magic the 300 mt figure has that makes it always a MFASAQHE, but it is clear that Congress did not expect that any amount of storage capacity less than 300 mt would automatically be too insignificant to trigger NEPA Section 102(2)(C).

This inspection of these post-NEPA pronouncements on the kinds of major Federal actions Congress categorically excluded from the NEPA process reveals little substantive guidance for Federal agency officials to use in deciding when a proposed action requires investing scarce time, money, and manpower resources in the EIS process.[195] These provisions, in result, frequently mirror principles that have been announced by the courts. Even if one was lead to give Congress the credit for these principles,[196] Congress' failure to articulate them in the legislative history makes it difficult to embrace them as Congressional policy rather than the preferences of a committee or minority caucus.

But in many instances, such as the approval of coal mining programs under SMCRA, or any Federal action under the CAA, there is no judicially espoused principle that comfortably explains a Congressional decision to find some actions to not be a MFASAQHE. Neither does Congress give an explanation to create for Federal agencies a consistent policy that helps define what that phrase means. Congress has not altered or embellished its initial policy direction as to when an EIS must be prepared, and consequently, has not helped agency officials avoid wasteful use of limited resources

Federal agencies, then, are left to their own devices in developing a uniform policy on the parameters of a MFASAQHE. However, a vital consideration for a functional reevaluation of the NEPA process is the extent to which the same purposes and obligations are imposed by Congress, either expressly or implied through its specific subsequent substantive environmental legislation. Is there a parallel universe of Sec. 102(2)(C) requirements, directing planning for consequences and alternatives, requiring

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[195] Unless the proposed action is one of the 27 specifically mentioned!
[196] This paper does not address this chicken-or-the-egg issue.

consultations with other agencies, and invoking public access and/or participation, embodied in other environmental laws?

IV. NEPA-LIKE PROVISIONS IN SUBSTANTIVE ENVIRONMENTAL STATUTES

Since the passage of NEPA in 1969, Congress has passed a number of other statutes to address substantive environmental law. Most of these statutes, unlike NEPA, include substantive restrictions on Federal agency conduct that may have (or threatens to have) an adverse impact on the physical environment - the land, air, water, or human health. In these statutes Congress gives copious and specific guidance to Federal agencies (as well as private industry) on how their actions must conform to environmental protection, including the same protective measures that the action-forcing provisions of Sec. 102(2)(C) of NEPA require. In addition, they mandate foresight, coordination of effort, and opportunity for public involvement into activities that impact upon their subject matter. This Part examines some of those substantive statutes to compare how they parallel those same NEPA requirements.

A. Media and Substance Oriented Statutes

1. Permitting Requirements

Since 1972, Congress has established a compliance and enforcement mechanism within media and substance-oriented statutes that closely controls the conduct of the regulated community - both public and private. First established comprehensively under the Federal Water Pollution Control Act of 1972 (CWA),[197] permit programs are well grounded

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[197] 33 U.S.C. 1251 *et seq.*

under the National Pollution Discharge Elimination System (NPDES) and, for operation of a hazardous waste treatment, storage, or disposal (HWM) facility, under RCRA. The 1990 Amendments to the Clean Air Act instituted Subchapter V[198] which establishes a comprehensive permit program for air emissions which is patterned after the NPDES program.

In order to obtain a permit to discharge wastes into a water body, emit pollutants into the air, or treat, store, or dispose of hazardous wastes, a facility must be able to specify the parameters of its discharge in terms of substance, quantity, vicinity, and duration. Any such release will be permitted only to the extent that it will not violate water or air quality standards. Any unpermitted release, or, in the context of hazardous waste, any unpermitted treatment, storage, or disposal of hazardous waste, will subject the perpetrator to a panoply of administrative, civil and criminal enforcement sanctions. [199] These sanctions apply to Federal facilities through statutory waivers of federal sovereign immunity found in all three statutes.[200] In all three cases, federal law delegates these environmental programs to the States to administer. Consequently, the specific forethought and planning requirements that must go into obtaining a permit for a major Federal action that concerns these statutes will depend on the particular State program. However, some generalities may be observed.

First, there is a cost associated with air/water pollution or a hazardous waste management operation. States generally charge fees to cover the costs of implementation of their programs.[201] These fees are usually tied to the amount of waste generated.[202]

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[198] 42 U.S.C. 7661 through 7661f.
[199] CWA: 33 U.S.C. 1319; CAA: 42 U.S.C. 7413; RCRA: 42 U.S.C. 6928.
[200] CWA: 33 U.S.C. 1323; CAA: 42 U.S.C. 7418; RCRA: 42 U.S.C. 6961.
[201] Charles Davis, *Approaches to the Regulation of Hazardous Wastes*, 18 Envtl. L. 505,

Compliance with a permit entails, monitoring, record-keeping, and pre-release treatment,[203] such as smokestack scrubbers, to ensure that releases do not exceed permit amounts. Costs for constructing and operating a HWM facility can be high.[204] Proper disposal of hazardous waste is very expensive and tightly controlled.[205] Theses costs must be factored into any proposed action involving air/water pollution or hazardous waste regardless of where the facility will be located.

Second, any Federal facility will have to plan out its proposed waste streams to be able to complete its initial permit application.[206] This will entail studying the consequences of its proposed permitted releases to see whether or not they clearly exceed pollution control requirements, and, if so, what alternative measures are available to bring them into conformity.[207] In terms of initial applications for permitted releases or a HWM facility,[208] the facility cannot begin to operate (or, at least, discharge a waste stream)

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522 (Spring 1988).

[202] *Id.*, p. 521.

[203] 33 U.S.C. 1342(b)(8) (1994).

[204] Omar Saleem, *Overcoming Environmental Discrimination: The Need For a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 Colum. J. Envtl. L. 211, 239 (1994); David Schnapf, *State Hazardous Waste Programs Under The Federal Resource Conservation and Recovery Act*, 12 Envtl. L. 679, 722 (Spring 1982).

[205] Arnold W. Reitze, Jr., and Andrew N. Davis, *Regulating Municipal Solid Waste Incinerators Under the Clean Air Act: History, Technology, and Risks*, 21 B.C. Envtl. Aff. L. Rev. 1, 31 (Fall 1993).

[206] *See* respective regulations for each concerning permit application requirements; *e.g.*, for CWA: 40 C.F.R. Part 122(g) (requires information on outfalls, flows and treatment, effluent characteristics, *etc.*); CAA: 40 C.F.R. Parts 70.5 (requires emission characteristics, rates in tons per year, and the raw data on which calculations were made, *etc.*); and RCRA: 40 C.F.R. Part 270 (*see* note 210, *infra*, and accompanying text).

[207] *Id.*

[208] Permits are generally for 5 years. They must be renewed by application process, and substantial changes in operation require modifications to the permit. See, for example, the requirements at 33 U.S.C. 1342(b)(1)(C).

until the permit is at least provisionally approved. Thus, to some extent, examination of consequences and alternatives are inherent in the permitting process.

The permit application process imposes further planning requirements. For example, a RCRA Part B permit[209] application must contain:[210]

- analyses of all hazardous waste streams to be handled at the facility;
- emergency preparedness and prevention requirements implementation;[211]
- a contingency plan;[212]
- explicit descriptions of hazard prevention during unloading, flooding, equipment failure, power outages, etc.;[213]
- traffic patterns and flow around the facility, including access road surfacing and load bearing capacity;
- information to establish a seismic standard - a threat of seismic activity which might damage the facility and precipitate a release - to include statements as to geographic faults, aerial photographs,[214] and published geologic studies;
- 100 year floodplain information, and if in one, either: (1) detailed statements as to how the facility can withstand a flood, or (2) detailed procedures describing how the hazardous wastes will be evacuated from the facility before flooding occurs, where the wastes will go, assurances that the receiving facility can legally and physically

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[209] Required for all HWM facilities, regardless of the specific purpose - treatment, storage, or disposal - the facility is planned for.

[210] 40 C.F.R. 270.14. This list is not exhaustive. It is for illustrative purposes only.

[211] *See also* 40 C.F.R. Part 264.

[212] Guidelines for these plans are found in 40 CFR Part 264, Subpart D.

[213] 40 C.F.R. 270.14(b)(8)

[214] 40 C.F.R. 270.14(b)(11). It further requires an analysis of photographs for an area extending to beyond a mile from the proposed facility.

handle wastes from the applicant's facility, and planning for possibilities of release during movement;

- details of introductory and ongoing training to be provided to employees of the facility;
- a closure plan to include cost estimates;
- insurance and other liability protection information, such as a State run "mini-Superfund;"
- groundwater monitoring data; and
- "such information as may be necessary to enable the Regional Administrator to carry out his duties under other Federal laws."[215]

The RCRA permitting process has been specifically held to replace the NEPA process as a legislative safeguard of the environment. In Alabama ex rel. Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990), the court held that EPA was not required to produce an EIS assessing the impacts resulting from issuing an operation permit for the Emelle Hazardous Waste Facility, the largest commercial HWM facility in the U.S.[216] The court found that the permit process was the functional equivalent[217] of the NEPA process even though RCRA does not require as expansive a review as is entailed in an EIS under CEQ's regulations. The court keyed on the fact that RCRA was enacted after NEPA and was the "later and more specific statute directly governing EPA's process for issuing permits to [HWM] facilities."[218] The court noted that specific statutes prevail over

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[215] 40 C.F.R. 270.14(b)(20). An example might be the presence of an endangered species or critical habitat under the ESA.

[216] Siegelman, 911 F.2d at 505.

[217] *See* discussion of functional equivalence, *supra*, at pp. 83-86.

[218] *Id.* This same result was reached as applied to EPA procedures for permitting the underground injection of wastes under the Safe Drinking Water Act, 42 U.S.C. 300f *et seq*. In Western Nebraska Resource Council v. EPA, 943 F.2d 867, 871-872 (8th Cir. 1991), the court explained it's decision:

general statutes, and Congress has had opportunities to amend NEPA to erase the functional equivalent doctrine, and has not seen fit to.[219] It seems to be a logical next step to realize that just as RCRA procedures do the job of NEPA Sec. 102 (2)(C) for EPA's review of data and information pertaining to the operation of a HWM facility, so it ensures environmental impact assessment for development of that data by Federal facilities applying for such a permit.

Although not as detailed, permits under Part V of the CAA require similar information to accompany an application.[220] Applicants may be required to include "alternative operating scenarios" [221] in the application. These would include different times of day and hours of emission, varying by pollutant or unit. Additionally, affected sources[222] under Part IV, the Acid Rain Program,[223] must include with permit applications both plans for compliance with local SIP requirements and reduced utilization plans.[224]

While the NPDES permit system does require detailed applications for its approval of point source discharges, it does not spell out as explicitly as other regulatory schemes the

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> We agree with the many circuits that have held that EPA does not need to comply with the formal requirements of NEPA in performing its environmental protection functions under "organic legislation that mandates specific procedures for considering the environment that are functional equivalents of the impact statement process." [citing *Siegelman*] ... . We further agree that the SDWA is such legislation and that the procedures employed and the analysis undertaken by EPA in this proceeding covered the core NEPA concerns.

[219] *Id.*

[220] 40 C.F.R. Part 70.

[221] 40 C.F.R. 70.5(c)(7).

[222] Primarily, electrical power plants. Although not themselves Federal facilities subject to NEPA, any Federal activity related to their operation or expansion will likely trigger the NEPA process.

[223] 42 U.S.C. 7651 through 7651o.

[224] 40 C.F.R. Part 72.

detailed data required in the application. The grandfather of modern pollution permitting systems, it instead requires new sources to prepare environmental impact statements in accordance with the CEQ NEPA process when initial assessments indicate a significant environmental impact.[225] This EIS will then be part of the application.

Restrictions placed within the permit can also prevent the adverse environmental effect of a proposed action. In other cases, the permit limits may reduce, rather than eliminate, the adverse effect. This is frequently the result of the NEPA process as well.[226] An example of permit limits forcing mitigation of an action can be found in the regulations governing 404 permits.[227] 40 C.F.R. 230.10 directs that for all 404(b)(2) permits, specific methods of mitigating impacts will be spelled out in the permit and must be complied with by the applicant.

This inclusion of mitigation efforts into a 404 permit has been adjudged to obviate the need for compliance with NEPA. In Abenaki Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D.C. Vt 1992), *affirmed*, 990 F.2d 729 (2nd Cir. 1993), the Village of Swanton, Vermont sought to increase the holding capacity of a hydroelectric dam. In accordance with General Permit (GP) 38[228] issued by the U.S. Army COE, the COE required applicants to prepare a mitigation plan for their proposal that incorporated 23 special conditions that GP 38 required applicants to satisfy. Failure of the mitigation plan

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[225] 40 C.F.R. 122.21(l)(3). This is an exception to the general rule (*see* discussion at p. 22, *supra*) that EPA does not have to comply with NEPA. *See also* functional equivalency discussion, pp. 83-86, *infra*.

[226] During an environmental assessment, required under the NEPA process if it is unclear whether or not an EIS must be performed (*see* 40 C.F.R. 1501.3), mitigation measures may be identified and added to the project which will eliminate the adverse environmental effects. This is known as a "mitigating EA."

[227] Named for Section 404 of the FWPCA of 1972.

[228] A general permit covering all of a certain category of small hydroelectric generators in most New England States.

to satisfy those conditions would mean the project might have significant environmental impacts and trigger the NEPA process. Satisfaction of those conditions, however, meant the opposite; that there would be no significant adverse impacts and, therefore, no need to engage the NEPA process. The court held that these mitigation efforts were in fact sufficient to ensure that no adverse environmental impact would result from the project, and denied Plaintiff's challenge that NEPA required the COE to perform a NEPA assessment.[229]

Whatever inclination local regulators may have to be lax in permit limitations, Congress has placed strict provisions to prevent less stringent effluent limitations in modifications and changes to NPDES, air, and RCRA permits.[230] Once limits have been set, getting them changed, to the extent it will have a negative impact on the environment, is difficult[231] It is clear, then, that careful planning at the initial stage of a proposed action cannot be circumvented by a feigned environmental conscience and glib, reckless assurances in a permit application followed by a modification request that practical

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[229] The court explained:

> NEPA's EIS requirement is governed by the rule of reason, and an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. To require an EIS in such circumstances would trivialize NEPA and would 'diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment."

Abenaki Nation, at 245, citing Cabinet Mountains Wilderness v. Peterson, 685 F.2d. 678, 682 (D.C. Cir. 1982).

[230] 33 U.S.C. 1342(o) (1994).

[231] *See* for CWA: 40 C.F.R. 122.62 and 122.63; CAA: 40 C.F.R. 70.7; and RCRA: 40 C.F.R. 270.41 and 270.42.

experience shows is a more realistic assessment of adverse environmental consequences - exactly the kind of shortsighted, shortcut conduct that NEPA was designed to prevent.

The permitting process also provides generally for consultation with other agencies as necessary.[232] As a general rule, statutory and regulatory consultation requirements are directed at the EPA or State agency considering the permit, not the Federal agency seeking to obtain it.[233] The CAA directs that applications for new emission sources in Class I PSD[234] areas[235] be coordinated with the appropriate Federal land managers who may[236] block granting of the permit if he/she demonstrates a deterioration of air quality in that area.

The provisions of the 404 permit program are also a good example of consultation and coordination requirements in the CWA. The U.S. Corp of Engineers has the authority to issue permits for dredge and fill material discharges in U.S. waters. All such permits must be coordinated with the Administrator of the EPA who can prohibit such discharge.[237] Additionally, before the Secretary of the Army can issue a general dredge and fill permit under the 404 permitting program, he must first consult with the Secretary of the Interior.[238]

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[232] *See, e.g.*, 40 C.F.R. 270.14(b)(20).

[233] Examples in the CAA are: 42 U.S.C. 7421 - consultation with Federal land managers; 42 U.S.C. 7422 - consultation with the NRC regarding radioactive pollutants; and 42 U.S.C. 7504 - consultations among state officials concerning multi-state nonattainment AQCRs.

[234] Prevention of Significant Deterioration; *see* 42 U.S.C. 7470 - 7479.

[235] Under 42 U.S.C. 7472(a), Federal lands in areas that have attained NAAQS.

[236] 40 C.F.R. 124.42. The regulation uses "may" and indicates the Federal land manager has discretion whether or not to participate. However, the statute imposes an affirmative duty on the Federal land manager to protect the air quality of those lands. See 42 U.S.C. 7475(d)(2)(B).

[237] 33 U.S.C. 1344(c) (1994).

[238] 33 U.S.C. 1344(m) (1994). Consultations are actually carried out through the

The permitting process must be open to the public. The EPA has developed public notice and hearing procedures for all forms of permitting.[239] State permitting programs must have similar procedures in order for the State to be approved to run the program.[240]

2. State and Federal Planning Provisions in the CAA

a. Implementation Plans

The CAA pursues elimination of air pollution from the criteria pollutants[241] by breaking the nation down into artificial airsheds called Air Quality Control Regions (AQCRs). Sometimes these AQCRs are unified for some pollutants to cover mega-airsheds like the Northeast Transportation Control Region.[242] Each AQCR is responsible to the State to develop an implementation plan, collectively establishing the State Implementation Plan (SIP).[243] These plans lay out a blueprint for either achieving the NAAQS, or preventing significant deterioration (PSD) of air quality once the NAAQS are achieved. Federal activities inhabiting that AQCR must comply with these plans.[244] These plans must strive for a reduction of air pollution or maintain acceptable air quality. A proposed Federal action will have to compare its air emissions to the SIP to determine if it will result in a significant adverse impact on air quality. If so, the proposed action

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Director, U.S. Fish and Wildlife Service.

239 40 C.F.R. 124.10 through 124.14.

240 CWA: 33 U.S.C. 1342(b)(3) and (j); CAA: 42 U.S.C. 7661a(b)(6); and RCRA: 42 U.S.C. 6926(f).

241 CO, O3 and its precursors, VOCs, NOx, SO2, Pb, and PM-10. 42 U.S.C. 7408(a).

242 Comprised of 12 northeastern states from VA to ME; includes D.C.

243 42 U.S.C. 7410 (1994).

244 42 U.S.C. 7418 (1994). *See* discussions of sovereign immunity, *infra*, p. 86, and conformity, *infra*, pp. 68,69.

may not be allowed unless it conforms to standards of performance for new sources[245] or uses another mechanism, such as procurement of emission credits.[246]

In a similar fashion, mobile sources of pollutants, particularly in larger urban areas, are the subject of extensive transportation planning under the Intermodal Surface Transportation Efficiency Act.[247] The various provisions of this statute provide for a whole scheme of urban transportation planning which effects all related projects. It mandates that transportation projects[248] be a part of a integrated approach to air quality in that AQCR.[249] Because these projects must contribute to meeting air quality goals and milestones, and because the plans that propose and implement them must be developed years in advance,[250] careful forethought by local, State[251] and Federal officials is critical as to the air quality impacts (consequences) and options (alternatives) for maximizing the motor vehicle emissions budget.[252] These planning agendas will, in turn, effect projects by Federal agencies within those AQCRs. Congress has ensured that this will be true by enacting the conformity provisions of the CAA.

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[245] 42 U.S.C. 7411 (1994).

[246] *See e.g.*, the SO4 emission credit system under Subchapter IV of the CAA; 42 U.S.C. 7651 through 7651o.

[247] Pub.L. 102-240, Sec. 1025, Dec. 18, 1991, 105 Stat. 1914.

[248] Through the conformity provisions, discussed *infra*, these include various Federal agency oversight activities, such as approval and funding, of otherwise non-federal projects.

[249] Note that environmental impacts other than air pollution must also be considered. Arnold W. Reitze, Jr., *Air Pollution Control Law II*, (unpublished manuscript on file with the National Law Center (NLC) at George Washington University (GWU), Washington, D.C.), Chapter 15, p. 53 (1995).

[250] Transportation plans are for 10 or more years; transportation improvement plans (TIP) are for at least 3 years. *Id.*, pp. 16, 17.

[251] State implementation plans must include TIPs. *Id.*, p. 18.

[252] That portion of projected emissions that can be allowed and still meet that AQCRs goals or milestones necessary for CAA compliance.

b. Conformity

The CAA insists that before a Federal agency can engage in or support any activity[253] it must affirmatively ensure that the activity conforms to the applicable SIP.[254] In order for an agency head to fulfill their affirmative duty to ensure conformity, that official must conduct a careful review of the proposed action to determine what the consequences of the action will be relative to the ambient air in that location.[255] If a proposed action will not conform, the official may do one of two things: either drop the idea or consider alternatives such as a different location or a different process that will result in different (or reduced) emissions. How will that official discover the impact of the proposed action on the local NAAQS? He or she will have to consult with those having legal jurisdiction

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[253] This covers *every* activity of a Federal agency or official, presumably a broader net than what will cover actions requiring NEPA procedures.

[254] The language of the statute is as follows:

> (1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved ... under section 7410 of this title. ... The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality.
>
> Conformity to an implementation plan means -
>
> (A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
>
> (B) that such activities will not -
>
> (i) cause or contribute to any new violation of any standard in any area;
>
> (ii) increase the frequency or severity of any existing violation of any standard in any area; or
>
> (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

42 U.S.C. 7506(c) (1994).

[255] 40 C.F.R. Part 93, Subpart B. For a more detailed analysis, see Major Teller, USA, *The EPA's New Conformity Rule*, 1994-March, Army Lawyer 37.

over the NAAQS or technical/scientific expertise on the effects of the proposed action - or both. With regard to the specific conformity requirements of transportation controls planning, the statute explicitly directs such coordination with not only the Federal officials with the know-how, but also the ones with the checkbook.[256] The conformity regulation also requires the agency to provide public notice and comment of draft conformity determinations.[257]

The conformity requirements build environmental impact consideration directly into the planning process. But with the added protection that after informed decision-making, the agency is not free to take the least environmentally protective measures - as it would be under the NEPA process - if there will, in fact, be a significant impact on the quality of the air component of the human environment.

3. Planning Provisions in the CWA

a. Areawide Waste Treatment

Section 208 of the CWA[258] directs the EPA to determine those areas of the country having "substantial water quality control problems" due to "urban-industrial concentrations and other factors."[259] Those areas are then to develop areawide waste treatment management plans to serve as a comprehensive set of guidelines for all

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[256] 42 U.S.C. 7506(c)(4)(B) and 40 C.F.R. 51.402.
[257] 40 C.F.R. 93.156.
[258] 33 U.S.C. 1288 (1994).
[259] 33 U.S.C. 1288(a)(1) (1994).

activities that do (or could) contribute to the water quality control problems.[260] These plans must include, among other details:

- identification and prioritization of waste treatment works necessary to address the problem, looking ahead 20 years into the future;[261]
- a way to identify and address nonpoint sources of pollution such as mines;[262] agricultural and silvicultural activities,[263] and construction sites;[264]
- *alternatives for waste treatment management*;[265] and
- " the identification of measures necessary to carry out the plan (including financing), ... the costs of carrying out the plan, ... and the economic, social, *and environmental impact* of carrying out the plan...[266]

Once the plan is in place, no NPDES permits can be issued that conflict with the it.[267] Nor can EPA approve or fund POTW works that conflict with it.[268] Though out of favor and funding since the Carter administration, this section exemplifies legislative application of planning tools and pre-action, NEPA-like scrutiny to a particular environmental problem - in this case, point source and nonpoint source discharges in poor water quality areas. This same watershed approach has been applied to planning designed to improve water quality and prevent deterioration in many areas of the country, such as the Great Lakes,[269] and the San Francisco Bay.[270] Federal activities within those

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[260] 33 U.S.C. 1288(b) (1994).
[261] 33 U.S.C. 1288(b)(2)(A)and(B) (1994).
[262] 33 U.S.C. 1288(b)(2)(G) (1994).
[263] 33 U.S.C. 1288(b)(2)(F) (1994).
[264] 33 U.S.C. 1288(b)(2)(H) (1994).
[265] 33 U.S.C. 1288(b)(1)(A) (1994).
[266] 33 U.S.C. 1288(b)(2)(E) (1994).
[267] 33 U.S.C. 1288(e) (1994).
[268] 33 U.S.C. 1288(d) (1994).
[269] 33 U.S.C. 1268 (1994).
[270] John H. Cushman, Jr., *U.S. and California Sign Water Accord*, N.Y. Times,

watersheds will have to be conformed to those plans and programs.[271] Parameters of the action that effect water quality or quantity in those watersheds will have to be planned in advance to avoid prohibited levels.[272] Other CWA planning provisions have no current impact because they lack enforcement. But in the future they may serve as a springboard for creating express limitations on the degree of impact that a proposed project - federal or not - may be allowed to exert on its local watershed include:

- the comprehensive program planning directives in 33 U.S.C.1252;
- the continuous planning process requirements of 33 U.S.C. 1313(e) which integrates water quality standards and area-wide treatment planning;
- nonpoint source management planning under 33 U.S.C. 1329;
- development of a comprehensive conservation and management plan under the National Estuary Program at 33 U.S.C. 1330; and
- the requirements that POTWs be the most economical and cost effective systems available; this applies to municipal POTWs[273] and federal facility POTWs.[274]

b. Contingency Plans

The CWA, directs EPA and the U.S. Coast Guard to jointly oversee the establishment and implementation of a National Contingency Plan addressing the rapid response to unplanned releases of oil and other hazardous substances to the waters of the U.S.[275] This same scheme is used to respond to sudden releases under CERCLA as well. In

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December 16, 1994.

271 *See* discussion of sovereign immunity, p. 86, *infra.*

272 *Id.*

273 33 U.S.C. 1298(a) (1994).

274 33 U.S.C. 1323(b) (1994).

275 33 U.S.C. 1321(d); as amended by the Oil Pollution Act of 1990, P.L. 101-380, Aug. 18, 1990, 104 Stat. 486.

conjunction with this master plan, regions, as designated by the President, are to develop Area Contingency Plans[276] adequate to address the worst case scenario of a release, "or to mitigate or prevent a substantial threat of such a discharge."[277] Finally, a facility that " because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters [or] adjoining shoreline..."[278] must prepare a facility response plan.[279] These plans, like the broader area and national plans, must provide for immediate response and clean up of the worst case scenario spill or release. They must identify:

- how the clean up will be accomplished - by contract or in-house;
- training, equipment testing, and drills conducted to practice the response; and
- those individuals vested with authority to take charge and make resource commitments.[280]

For Federal facilities that may fit into the category of an off-shore or onshore facility[281] forethought and planning of consequences will be necessary when proposing an action that modifies or establishes an additional process or activity and that includes the possibility of a catastrophic release or threatened release. Failure to do so will result in liability under the CWA for noncompliance.[282] Anticipating and minimizing the

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276 33 U.S.C. 1321(j)(4) (1994).
277 33 U.S.C. 1321(j)(4)(C)(i) (1994).
278 33 U.S.C. 1321(j)(5)(B)(iii) (1994).
279 *Id.*
280 33 U.S.C. 1321(j)(5)(C) (1994).
281 As defined in 33 U.S.C. 1321(a) (1994): an "onshore facility" means "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land"; an "offshore facility" means "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or public vessel."
282 See 33 U.S.C. 1323(a) (1994) which waives sovereign immunity for Federal

likelihood of adverse consequences is an important logical outgrowth of contingency planning.

B. Pollution Remediation and Prevention Statutes

A genre of Federal environmental statutes deal with preventing pollution and mechanisms for cleaning up pollution that threatens human health or welfare.[283] The goal in the former is to prevent pollution from happening; in the latter, to attempt to lessen the adverse impact which has already occurred. Congress is not alone in imposing duties on Federal agencies to engage in pollution prevention programs. For example, President Carter issued Executive Order (EO) 12088, *Federal Compliance With Pollution Control Standards*, on October 13, 1978. In it, besides directing all Federal facilities to comply with pollution control standards, he ordered all agencies to develop pollution control plans and to ensure that they seek adequate funding for pollution control compliance in all budget requests. In order to perform these tasks, pollution control *planning* was required of the responsible Federal officials. Whether this requirement had any teeth to make it effective is not pertinent; the point is that this EO is another example of forethought in environmental protection being infused into Federal agency activity.

CERCLA is currently the most visible pollution remediation statute, with its Superfund trust for clean up of often decades-old waste dumps where the responsible party is unknown or insolvent. There is an on-going debate about whether Federal facilities,

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facilities.

[283] Some statutes, such as RCRA, include media related, pollution prevention, and pollution remediation provisions.

responsible for clean-ups administered under CERCLA,[284] must comply with the NEPA impact assessment process before committing to a remedial action.[285] An examination of CERCLA provisions that parallel NEPA's action-forcing Sec. 102(2)(C) rudiments are an essential consideration in this debate.

Congress expressly applied CERCLA to Federal facilities in Sec. 120[286] of the Act. Subsections (b) - (d) of Sec. 120 obligated Federal facilities to actively look for and docket hazardous waste sites requiring clean up. In coordination and consultation with the EPA and/or State agencies under an approved program, the facility must perform a remedial investigation/feasibility study[287] to gather complete data about the nature of the substance and its location (e.g., the contours of any underground plumes of contamination).[288] Upon completion of this RI/FS and review by EPA or State official, the facility[289] and EPA[290] have six months to enter into an Interagency Agreement (IA) which establishes a plan for remedial action.[291] This IA must include:

> (A) A review of *alternative remedial actions and selection of a remedial action* by the head of the relevant department ... and the Administrator or, if unable to reach agreement on selection of a remedial action, by the [EPA].
> (B) A schedule for the completion of each such remedial action.
> (C) Arrangements for *long-term operation and maintenance* of the [site].

42 U.S.C. 9620(e)(4).

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[284] Including specific offshoots, such as the DOD Installation Restoration Program, found at 10 U.S.C. 2701 *et seq.*

[285] Professor Laurent R. Hourcle, lecture at the NLC at GWU (January 12, 1995).

[286] Pub. L. 99-499, Oct.17, 1986, 100 Stat. 1666, codified at 42 U.S.C. 9620 (1994).

[287] For sites paced on the National Priorities List (NPL). But note that the procedures for non-NPL sites are made very similar by regulation.

[288] 42 U.S.C. 9620(e)(1) (1994).

[289] Responsibility for agreement actually rests with the head of the "department, agency, or instrumentality" to which the facility belongs. 42 U.S.C. 9620(e)(2) (1994).

[290] State and local officials are also entitled to some participation. *See* 42 U.S.C. 9620(f) and 9621.

[291] If remedial action is necessary. The RI/FS may conclude none is needed.

In selecting an appropriate remediation plan, the parties must carefully consider consequences of each alternative.[292]

The CERCLA clean up standards, including the criteria for selecting a remedial action set forth above, are made applicable to Federal facilities by Sec. 120.[293] In addition, CERCLA Sec. 120 explicitly directs that there will be opportunity for public review of the Interagency Agreement, including the "review of alternative remedial action plans and selection of remedial action,"[294] in accordance with the public participation provisions of CERCLA.[295]

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[292] The statute requires:

> In assessing alternative remedial actions, the President shall, at a minimum, take into account:
> (A) the long-term uncertainties associated with land disposal;
> (B) the goals, objectives, and requirements of [RCRA];
> (C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;
> (D) short- and long-term potential for adverse health effects from human exposure;
> (E) long term maintenance costs;
> (F) the potential for future remedial action costs if the alternative remedial action in question were [sic] to fail; and
> (G) the potential threat to human health and the environment impacts associated with excavation, transportation, and redisposal, or containment.

42 U.S.C. 9621(b)(1).

[293] 42 U.S.C. 9620(a) (1994).

[294] 42 U.S.C. 9620(e)(2) (1994).

[295] 42 U.S.C. 9617 (1994). Those provisions require notice and opportunity to comment on proposed plans and a public meeting with a transcript kept of the proceedings. Notice of the final plan must also be given to the public, highlighting, with an explanation, those significant changes made from the proposal presented earlier and a response to oral or written comments submitted by the public. These notices must be, at a minimum, published in a "major local newspaper of general circulation." 42 U.S.C. 9617(d) (1994).

Cleanup under CERCLA, consequently, entails comprehensive study of alternatives, planning, coordination, and public involvement parallel to those same aspects of NEPA.

C. Resource Protection Statutes

Federal law is replete with a number of statutory mechanisms vesting Federal land managers, as public trustees for our national natural resources, with authority and responsibility to protect those resources while, at the same time, providing the public access to them for the multiple uses which we Americans have so long enjoyed. These resource protection programs include a planning process to guide the managers in carrying out the multiple use - sustained yield concept by which these resources are enjoyed today while being preserved for tomorrow. For the illustrative purposes of this Part, two such statutes will be examined for NEPA characteristics; the Federal Land Policy and Management Act of 1976 (FLPMA), [296] and the Endangered Species Act (ESA).[297]

1. FLPMA

FLPMA governs the means by which the Department of the Interior, largely through the Bureau of Land Management (BLM), manages public lands.[298] The statute directs BLM to develop land use plans in order to accomplish the mix of uses that public lands are to be available for: mining, grazing, wilderness, and timber harvest to name a few. The

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[296] 43 U.S.C. 1701 *et seq.*

[297] 16 U.S.C. 1531 *et seq.*

[298] These lands are mostly the vast holdings of public land out West that have not been absorbed by the National Forests, National Parks, and other federal reserves. They can include National Monuments and some Wilderness Areas.

standard is to be multiple use - sustained yield as much as is possible.[299] The agency is further directed to ensure that:

> the public lands be managed in a manner that will *protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values*; that, where appropriate, *will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals*; and that will provide for outdoor recreation and human occupancy and use.[Emphasis added]

43 U.S.C. 1701(b)(8).

FLPMA Sec. 202[300] sets forth the requirement that the agency establish land use plans. Among the criteria to be used in developing these plans are items identical to the factors Federal agencies must consider in the NEPA process:

- a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;[301]
- a priority is to be given to the designation and protection of areas of critical environmental concern;
- consideration of "the relative scarcity of the values involved and the availability of *alternative* means (including recycling) and sites for realization of those values";
- provision *for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans*; and
- *coordination of these plans with land use planning and management programs of other Federal, tribal, state, and local agencies* within which the lands are located.

43 U.S.C. 1712(c)(1)-(9).

Congress insisted that this planning process include public participation. Section 202(f) requires the agency to give the public opportunity for involvement, including a public hearing "where appropriate,"[302] to give "the public adequate notice and opportunity to

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[299] 43 U.S.C. 1701(a)(7) (1994).
[300] 43 U.S.C. 1712 (1994).
[301] Words strikingly similar to NEPA Sec. 102(2)(A).
[302] 43 U.S.C. 1712(f) (1994).

comment upon and participate in the formulation of plans and programs relating to the management of public lands."[303]

Once developed, these plans are to be the basis for management decisions respecting the lands. Congressional direction as to their use in management decisions includes the sale of public lands,[304] the acquisition of interest in other lands,[305] and the issuance of grazing permits or leases.[306]

The above analysis can also be performed on other statutes which legislate land use plans for Federal land managers with very similar results. For example, the National Forest Service and Fish and Wildlife Service both are required to prepare land use plans for lands in their domain. The statutes directing land use planning are even more detailed in their guidance than those governing the BLM.[307]

2. ESA

One Federal resource protection statute is unique in that the public trustee duties prescribed by its provisions are imposed on all U.S. citizens, including private landowners. This is the Endangered Species Act, and the delicate resources that are its object are the endangered plant and animal life in the U.S. and beyond our shores. This broad coverage, however, belies the rigorous demands imposed upon Federal agencies.

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[303] *Id.*

[304] 43 U.S.C. 1713(a) (1994).

[305] 43 U.S.C. 1715(b) (1994).

[306] 43 U.S.C. 1752(b) (1994). The land use plans referred to in this subsection are those generated pursuant to Sec. 1712, and should not be confused with the allocation management plans described in subsections (d) through (f) of this section.

[307] George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 University of Colorado Law Review 307, 309 (1990).

The statute requires that before undertaking any action, Federal agencies must consult with the expert in the field of endangered species and critical habitat - the Secretary of the Interior - to "insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize" any endangered species or critical habitat. [308] This includes action on permits by non-federal parties.[309] A detailed procedure ensues to determine whether or not a proposed action is likely to adversely effect an endangered species or habitat. The action agency is obliged to conduct biological assessments[310] and acquire the best scientific and commercial data[311] in order to fully assess the potential impact of their proposed activity on the protected species/habitat.

The final result of this extensive research is a conclusion by the Secretary of the Interior on the "reasonable and prudent measures ... necessary or appropriate to minimize such impact" if there are any, and "the terms and conditions that must be complied with by the Federal agency or [permit] applicant, or both, to implement those measures.[312] If the Secretary opines that no mitigation will avert the prohibitions of the Act respecting the taking[313] of a species or habitat, the agency may not conduct the proposed activity unless it obtains an exemption from the Endangered Species Committee.[314] This is a laborious process,[315] only implemented four times since its inclusion in the ESA in 1987.

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[308] 16 U.S.C. 1536(a)(2) (1994).
[309] 16 U.S.C. 1536(a)(3) (1994).
[310] 16 U.S.C. 1536(c) (1994).
[311] 16 U.S.C. 1536(a)(2) (1994).
[312] 16 U.S.C. 1536(b)(4) (1994).
[313] Broadly defined at Sec. 1532(19) as anything bad!
[314] 16 U.S.C. 1536(e) (1994). *See* discussion at pp. 32-35, *supra*.
[315] The process is found at Sec. 1536(e) through (p).

It is clear from this law that any proposed Federal agency action must involve significant planning in order to avoid the possibility of violating the Act as well as determining alternatives that will allow it to proceed with the blessing of the Secretary of the Interior. Thus, both consequences and alternatives relative to the ESA must be an integral part of action planning and forethought - two of the key goals of NEPA. Likewise, there is a clear need for consultation with scientific and commerce experts on adverse effects, their avoidance, and mitigation in order for agency officials to avoid violating the ESA with its civil and criminal penalties.

The ESA also provides for public participation in two key aspects. First, if an exemption is sought to authorize an activity which will have adverse effects on an endangered species or critical habitat, the ESC is directed to hold hearings on that application[316] and prepare a report[317] all of which are to be open to the public.[318] Second, the Secretary is directed to develop and implement recovery plans[319] for the recovery and survival of endangered or threatened species.[320] Before going final with a plan, it must be made available for public notice and comment. The Secretary is directed to consider all the information presented during the public comment period prior to approving the plan.[321]

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[316] 16 U.S.C. 1536(g)(4) (1994).
[317] 16 U.S.C. 1536(g)(5) (1994).
[318] 16 U.S.C. 1536(g)(8) (1994).
[319] Note that the propagation of these plans are themselves Federal actions which could be the subject of a NEPA comparison analysis to discover parallels. Because this paper is intended to suggest a framework for such comparisons, rather than an exhaustive performance of that task, I have not fully detailed the NEPA-like qualities of this particular Secretarial obligation.
[320] 16 U.S.C. 1533(f) (1994).
[321] 16 U.S.C. 1533(f)(4) (1994).

V. ANALYSIS

A. Comparison and Contrast

The sampling of substantive command and control statutes examined in Part IV above demonstrates explicit, parallel taskings between virtually all of those statutes and the statutory elements of NEPA Sec. 102 (2)(C). These statutes, enhanced by regulations having the full force and effect of law promulgated under their authority , mandate comprehensive action to minimize harmful environmental impacts. This action ranges from specific planning goals, such as the BLM land management plans required by FLPMA,[322] to extensive prepatory activity, such as is required for CAA, CWA, and RCRA permit applications,[323] to outright environmental protection activity, such as is commanded in the ESA's prohibition against the taking of an endangered species.[324] These actions frequently force Federal agencies to examine environmental consequences, as typified by the CAA conformity provisions,[325] and identify less adverse alternatives, as, for example, in the case of CWA areawide waste treatment management planning.[326] These duplicate two of the purposes for enacting NEPA.

These substantive environmental statutes mandate coordination between responsible Federal officials and other appropriate agencies, like the EPA (or State environmental officials administering EPA-approved programs), whose expertise and experience will ensure maximum environmental protection. In many cases, this coordination is pre-

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[322] *See* pp. 76,77, *supra.*
[323] *See* pp. 59-62, *supra.*
[324] *See* pp. 78,79, *supra.*
[325] *See* pp. 68-70, *supra.*
[326] *See* pp. 69,70, *supra.*

imposed by environmental protection agencies through regulations like the permitting requirements for RCRA HWM facilities,[327] or the State Implementation Plans promulgated pursuant to the CAA.[328] In other cases, the statutes not only require coordination, but also specify with whom the action has to be coordinated. Previously discussed examples of this include coordination of NSPS in PSD Class I areas with Federal land managers,[329] and consultation with the Secretary of Interior concerning potential endangered species.[330]

The final purpose of NEPA is also accomplished by these substantive environmental statutes. As demonstrated in Part IV, they all invect public participation at one or more key steps in agency performance. The notice and comment provisions of these statutes generally give the same public access protection as that afforded by CEQ regulations[331] - an opportunity to review proposed actions at key stages of their development and an opportunity to be heard on the matter. This is more than NEPA itself requires.[332]

Having examined many of the planning, consultation and public participation requirements of the above statutes, it is important to observe any differences between them and the essential elements of the EIS process as required by Congress.

First, the obligation to act - i.e., to consult, to assess alternatives and consequences, or to hold a hearing - in some cases may rest with another Federal agency, usually the EPA (or the EPA's designee as is the case in permitting programs under CWA, CAA, and

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[327] *See* pp. 60-63, *supra.*
[328] *See* pp. 66,67, *supra.*
[329] *See* p. 65, *supra.*
[330] *See* p. 79, *supra.*
[331] 40 C.F.R. 1506.6.
[332] See the discussion at pp. 8-12, *supra.*

RCRA, where States are delegated authority to administer programs approved by EPA and under its oversight authority). But this does not alter the ultimate result. Consultations engaged in by EPA, as opposed to the action agency, still meet the spirit and intent of NEPA. The fact that information obtained by EPA through consultations with other appropriate agencies or entities should first pass through the EPA does not diminish the value of that information in the hands of the ultimate user - the action agency. In fact, it enhances it. The EPA, or appropriate State regulatory body, can review the information with the action agency to ensure that responsible officials correctly understand and can apply the fruits of the consultation or public hearing process. The EPA can then serve as a clearinghouse[333] for that information and can pass it to other prospective actors who will not have to "reinvent the wheel". Finally, if the consultation or public participation process provides evidence that the project will be environmentally adverse, the EPA can relay that to the action agency. It can also take steps within its authority, virtually uniform throughout the substantive environmental statutes, to block the project by denying the permit or other disapproval action. Thus the fact that another agency, the regulating agency, may actually accomplish the NEPA-like activity does not affect this comparative analysis.

The second difference between NEPA elements and their counterparts in substantive environmental statutes is that those substantive environmental statutes carry with them enforcement mechanisms such as administrative orders, civil penalties, and criminal prosecution.[334] Federal officials must comply or potentially face accountability for their agency and possibly for themselves personally.[335] NEPA, on the other hand, has no such

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[333] Most substantive environmental statutes specifically direct the EPA to perform this function. *See, e.g.*, 33 U.S.C. 1254 (CWA).

[334] *See* notes 199 and 200, *supra*, and accompanying text.

[335] *Id.*

enforcement mechanisms. It is left to the general provisions of the APA which only affords after-the-fact review of an agency's final action.[336]

B. Planning Provisions

The planning provisions in the statutes examined in Part IV, if faithfully and diligently executed[337] should establish environmental forethought of alternatives and consequences in the use of resources, both public and private. In connection with land use planning for Federal lands, one distinguished expert in the field of natural resources law noted:

> Planning should eventually improve environmental quality on the federal lands. The federal land use planning statutes imitate NEPA to a considerable extent,... [.] ... With the additional statutory authority provided by Congress in the 1970's, the agencies now have adequate power to condition most projects in ways aimed at avoiding adverse environmental consequences. Planning should become the chief mechanism for insuring that the power is exercised. Every resource use must be formally considered in relation to all other present and prospective uses. The agencies can no longer ignore or finesse the cumulative effects of many independent developments if the plans contain general environmental protection standards. ... Planning, like NEPA, institutionalizes a degree of administrative foresight.[338]

C. Functional Equivalence

The idea that consideration of environmental impacts under substantive environmental statutes can serve as a procedurally sufficient alternative to formal compliance with the NEPA process is not a novel one.[339] Under the doctrine of functional equivalence, the

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[336] 5 U.S.C. 701 -706 (1994).

[337] Faithful and diligent execution is a prerequisite to a useful EIS as well.

[338] Coggins article, note 307, *supra*, at p. 351.

[339] *See, e.g.*, Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986) (statutory provisions of FIFRA superceded NEPA process and dual compliance was not necessary); Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981) (NEPA not applicable to

EPA can forgo strict compliance with NEPA when engaging in activities where " substantive and procedural standards ensure full and adequate consideration of environmental issues."[340] First articulated in Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), functional equivalency "requires (a) a balancing of environmental costs and benefits; (b) meaningful public participation at key points during the decision-making process; and (c) consideration of substantive comments received."[341] As expressed by one court: "An organization like EPA *whose regulatory activities are necessarily concerned with environmental consequences* need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement [Emphasis added]."[342] The most recent application of functional equivalence held that the permitting procedure under RCRA was a sufficient substitute for an EIS.[343]

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listing of endangered or threatened species under ESA); Warren County v. North Carolina, 528 F.Supp. 276 (D.C. E. D. N.C. 1981) (EPA procedures under TSCA were the functional equivalent to NEPA process); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663 (CAA); Wyoming v. Hathaway, 525 F.2d 66 (10th Cir. 1975) *cert. denied*, 426 U.S. 906, 96 S.Ct. 2226 (FIFRA); Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) (CAA); South Terminal Corp. v. EPA, 504 F.2d 646 (1st. Cir. 1974)(CAA); Environmental Defense Fund v. EPA, 489 F.2d 1247 (D.C. Cir. 1973) (FIFRA); Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S.Ct. 1991 (CAA); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973)(CAA); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973)(CAA); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973)(CAA); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973)(CAA); and Maryland v. Train, 415 F.Supp. 116 (D. MD 1976)(Ocean Dumping Act).

[340] Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

[341] Howard Geneslaw, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 Journal of Land Use and Environmental Law 127, pp. 136-137 (Fall 1994); citing Sandra P. Montose, *Comment - To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 Catholic University Law Review 861, 882, (1984).

[342] Wyoming v. Hathaway, 525 F.2d 66, 71-72 (10th Cir. 1975); *cert. denied*, 426 US 906 (1976).

[343] Alabama ex rel. Siegelman v. EPA, 911 F.2d 499 (11th Cir. 1990). *See* discussion at pp. 61,62, *supra*.

Application of the doctrine to Federal agencies other than the EPA has been rare and limited.[344] A recent case, however, suggests an erosion of judicial objection to applying functional equivalence principles to agencies other than EPA. In Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), the court held that designations of critical habitat for endangered species under the ESA did not require a NEPA process. Under the ESA, the Secretary of the Interior[345] must make designations of critical habitat for any species listed as endangered.[346] The process to accomplish this is clearly set forth in the statute.[347] The court upheld the DOI decision not to perform NEPA process on this Federal action, citing three separate grounds.[348] One of these grounds was that the ESA procedures had displaced NEPA requirements.[349] Favorably relying on Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986) the court followed the legislative history of the ESA's procedural requirements imposed on the DOI Secretary relative to critical habitat designations and found that:

> The procedures Congress chose, as in *Merrell*, make the NEPA

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344 In Texas Committee on Natural Resources v. Berglund, 572 F.2d 201 (5th Cir. 1978), *cert denied*, 439 U.S. 966 (1978), the court applied functional equivalence to the U.S. Forest Service's promulgation of interim guidelines for clearcutting in Texas. The court found two reasons why the Forest Service did not have to comply with the NEPA process, even though the enabling statute - 16 U.S.C. 1602 - called for NEPA review of forest management plans. First, Congress had already performed the environmental impact analysis, the requisite "hard-look", and had expressly authorized clearcutting. Second, the Forest Service had employed parallel notice and comment procedures which it used in developing an administrative record that supported its final action.

345 Much of this responsibility has been delegated to the Director of the U.S. Fish and Wildlife Service. Douglas County, at 1497.

346 16 U.S.C.1533(a)(3) (1994).

347 16 U.S.C. 1533(b)(4)-(6) (1994).

348 One grounds for the court's decision, not pertinent to this analysis, was its assertion that NEPA does not require an EIS when the Federal action preserves the physical environment. 48 F.3d at 1505.

349 Douglas County, at 1503.

> procedure seem 'superfluous'. Before the Secretary can issue a final critical habitat designation, he or she must now (1) publish a notice and the text of the designation in the Federal Register; (2) give actual notice and a copy of designation to each state affected by it; (3) give notice to appropriate scientific organizations; (4) publish a summary of the designation in local newspapers of potentially affected areas; and (5) hold public hearings if one is requested. ... This carefully crafted congressional mandate for public participation in the designation process, ... displaces NEPA's procedural and informational requirements.

Douglas County v. Babbitt, 48 F.3d 1495, 1503 (9th Cir. 1995).

Though specifically not addressing the functional equivalence issue, the court explained in a footnote[350] the difference between its holding and functional equivalence to be that in this case Congress "displaced" NEPA by the substitute statutory process within the ESA. The functional equivalence argument, the court observed, was that "one process requires the same steps as another."[351] This appears to be a distinction without a real difference.[352]

The basis cited by the courts for the functional equivalence doctrine is the statute establishing the action, not the actor. This fact is important. Courts have not held that the EPA is *per se* exempt from NEPA because of its charter to protect the environment; a purpose so distinct from other Federal agencies that it gives the EPA a natural environmental conscience transcending the need for the artificial one that NEPA

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[350] *Id.*, note 10 at 1504.

[351] *Id.*

[352] This observation is especially true in light of the court's third holding: that "NEPA does not apply to the designation of critical habitat because the ESA furthers the goals of NEPA without demanding an EIS. ... Requiring the EPA [sic] to file an EIS 'would only hinder its efforts at attaining the goal of improving the environment'. Id., at 1506. This language seems indistinguishable from the concept within functional equivalence that a substantive environmental law can accomplish environmental protection by equivalent procedures that satisfy NEPA's goals and purposes.

implants into other agencies.[353] Instead, the courts have examined the procedures used by EPA, whether established by substantive environmental statute or by the agency's procedural regulations, and pronounced those procedures to be the functional equivalent of NEPA. For example, in Portland Cement, the court found that Section 111 of the Clean Air Act,[354] when properly construed, required consideration of the same factors as an EIS.[355] It is the statute, not the implementing agency, that imparts the functional equivalence.

It is true that most Federal agencies have specific missions and purposes that focus primarily on things other than environmental impact. However, unlike the paradigm in which the Federal Government operated in 1969, it can no longer be said of any Federal agency that their activities can take place totally insulated from affirmative environmental obligations. The same substantive statutes that give EPA its marching orders give other Federal agencies requirements and restrictions as well. As shown above, some of them contain explicit direction and environmental purpose. Since the mid 70's, environmental statutes have been amended to broaden the waiver of sovereign immunity to all forms of proscriptive environmental control and regulation, whether by the EPA or a state environmental program.[356] Consequently, not only has Congress inserted environmental consequences into every agency's mission orientation by virtue of broad and sweeping pollution abatement statutes and waivers of sovereign immunity, but so have the regulations of the EPA and its state counterparts. These standards are also fully enforceable against Federal agencies.[357] As a result, the mandate to comply with

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353 Wyoming, note 330, *supra*, at p. 72.
354 New Source Performance Standards. 42 U.S.C. 7411 (1994).
355 Portland Cement, at 385.
356 *See, e.g.*, the 1977 CWA Amendments, Sec. 60, 61(a), P.L. 95-217, 91 Stat. 1597, 1598; and the 1977 CAA Amendments, Title I, Sec. 116, P.L. 95-95, 91 Stat. 711.
357 All waivers of sovereign immunity in the major substantive environmental statutes

environmental protection is as much a responsibility of the Department of Defense, for example, as it is of the EPA. For this reason alone, the rationale for insisting that functional equivalence under NEPA by limited to EPA activity is outdated.

D. Using Substantive Environmental Laws to Supplement NEPA

Having established the existence of provisions in substantive environmental statutes which duplicate for Federal agencies the procedural requirements of NEPA Sec. 102(2)(C), one important caution must be made. In most of the statutory provisions examined above, the focus was on a specific adverse environmental consequence; i.e., the emitting of a particular pollutant of some amount into the atmosphere or water. Even in the planning statutes, the provisions used parameters and criteria to isolate the subject of the plan.[358] Major Federal actions, however, are not usually limited to one form of significant environmental effect. They frequently encompass details and aspects which effect the environment in a variety of ways.

It will frequently be true that a proposed Federal action will be prevented from several aspects of significant environmental damage by application of various substantive

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include waivers of immunity against State enforcement of State standards promulgated in accordance with Federally approved programs. *See e.g.*, 33 U.S.C. 1323 (CWA) and 42 U.S.C. 6961 (RCRA).

[358] For example, the scope of the land use plans required by BLM are "tracts or areas". 43 U.S.C. 1712(a). To the extent that tract or area does not encompass an entire watershed or AQCR, a proposed action's impact on parts of that larger entity outside the tract or area may be overlooked. Another problem is that other than coordination with other agencies (*see* Sec. 1712(c)(9)) - Federal, tribal, and state - the statute does not establish a planning mechanism which will take all of the land uses of Federal public lands into account. Thus, the cumulative impacts of individual management's decisions, based on the land use plan for that particular tract or area, might not be considered.

statutes in a piecemeal fashion. But those statutes were typically enacted to address one kind of problem. It will also frequently be true that a project, either cumulatively or synergistically, may have environmental impacts that substantive environmental statutes cannot address because of their narrow focus. In those instances, the broad approach of the NEPA process will still be necessary to comprehensively ensure sound environmental protection.

Repealing NEPA Sec. 102(2)(C) is clearly not the remedy for alleviating Federal agencies from the duplicative use of resources that often stems from producing an EIS. This is because Federal activities are often so varied and complex that they cannot be categorized as only causing a water pollution problem or a hazardous waste stream. Rather, the answer is to use the substantive action-forcing provisions of substantive environmental laws in conjunction with the NEPA process. One way to do this would be to reexamine and redefine "major Federal action significantly effecting the quality of the human environment" to take into account the prophylactic impacts of substantive environmental laws and implementing regulations. A form of defining MFASAQHEs is done now by each agency within its own limited realm of experience through the creation of categorical exclusions.[359]

It should be the province of CEQ, however, to establish a uniform infrastructure for evaluating the ability of substantive environmental law to categorically prevent a Federal action from having an adverse environmental impact. It can then report its findings in the context of instructive guidance, a set of uniform categorical exclusion, to all Federal agencies as to what kinds of proposed actions do not force the NEPA process. Conversely, if, after its expert assessment, the CEQ determines that a particular

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[359] *See* 40 C.F.R. 1508.4.

substantive environmental statute fails to sufficiently satisfy the essential elements of the NEPA process for a particular type of project, it can pass that finding to other Federal agencies and thereby ensure that the NEPA process is applied as necessary.

To say that an EIS or EA may no longer be required is not the same as saying that no environmental assessment will be documented. However, the impact assessment can be documented or supported in permits, permit applications, land use plans, or conformity determinations rather than a duplicate, lengthy, and expensive report.[360] In fact, requiring substitute documentation of the assessment process could be one of the criteria CEQ uses in the analysis suggested above for identifying substantive laws that make the NEPA process redundant in whole or in part.

E. Judicial Review

Judicial review of Federal agency actions, a significant byproduct of the NEPA process, will not be eliminated by extracting actions from the scope of NEPA under the framework outlined above. Indeed, almost all of the substantive environmental statutes provide for some form of judicial review of final Federal actions.[361] Plaintiffs have already recognized this fact. For example, regarding the Endangered Species Act:

> The planning, data gathering and analysis obligations imposed on federal agencies by [16 U.S.C. 1536] in many respects parallel requirements imposed by [NEPA]. For that reason, it has become routine to find ESA

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[360] This same concept underscores CEQ's response to Question #40 in CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (March 23, 1981). There CEQ suggested that if mitigation measures which negated adverse environmental impacts were established in a binding commitment upon a permit applicant, no EIS would be required for the Federal action of issuing of that permit.

[361] *See, e.g.*, 33 U.S.C. 1365 and 1369; 42 U.S.C. 7604 and 7607.

counts joined with counts alleging that a federal agency has failed to follow the environmental impact analysis obligations imposed by NEPA."[362]

In the same vein, legislatively imposed planning requirements should provide as good (if not better) a basis for judicial review requiring the agency to explain any significant departures from the land use plans than would the NEPA process.[363] Where there has been a careful planning process, the Federal actions implementing and executing that plan should not have a significant impact on the environment within the scope of that plan that has not already been thoroughly considered, consciously committed, and the subject of examination by the public.

The essential difference between using the substantive statute instead of NEPA to challenge an agency action is that the relief available under the substantive environmental law - unlike under NEPA - will be to truly prevent environmentally dangerous actions by the agency. For under NEPA review, if an agency is found to have failed to jump through all the necessary NEPA hoops, the court can only delay the project and require the agency to complete an environmental assessment. It cannot make the agency do the "environmentally" right thing.[364] Conversely, the conclusion that substantive environmental statutes are more valuable than NEPA to plaintiffs interested in effectively opposing Federal agency actions is made forcefully by reference to the famous Tellico Dam affair. There the Environmental Defense Fund brought suit

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[362] Rufus C. Young, Jr., *The Endangered Species Act: Impacts and Land Use*, C629 ALI-ABA 631,658 (1991). *See* also Douglas County, *supra,* at 1504, where the court said: "As for the concern that if the Secretary is not subject to the NEPA requirements, he or she will have unchecked discretion in making critical habitat designations, we believe that the procedural requirements of the ESA, combined with the review of decisions possible under the [APA], are adequate safeguards."

[363] Coggin article, note 307, *supra*, p. 309.

[364] Robertson v. Methow Valley Citizen's Council, 490 U.S. 332, 109 S.Ct. 1835 (1989).

attempted to stop the dam alleging a failure to comply with NEPA, and lost.[365] Afterward, it returned to court on behalf of the lowly snail darter under the ESA and the dam was stopped cold.[366] In short, the protection afforded by judicial scrutiny of agency actions will be as strong as ever. The issues, however, will truly be of environmental consequence, rather than whether agencies complete a procedural checklist.

VI. CONCLUSION

The spirit and intent of NEPA serve an historic and valuable purpose. The policy it espouses should serve as a fundamental basis for the attitude and vision of every Federal civil servant. However, its procedural requirements have mushroomed from the simple directive in Sec. 102(2)(C) to the present complicated, costly, and time-consuming EIS process set forth in CEQ regulations. These were ground-breaking requirements from 1969 and into the mid 1970"s. They were indispensable to prevent Federal officials from using budget constraints and mission mandates as an excuse to merely pay lip-service to, if not totally ignore, environmental impacts. But since then, the development of command and control environmental regulation, coupled with the broad waivers of sovereign immunity, have served to make the EIS process in many cases a burdensome ritual with little value added to Federal agency decision-making or action. The NEPA-like qualities in substantive environmental statutes accomplish the same protective purpose, only better.

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[365] Environmental Defense Fund v. Tennessee Valley Authority, 339 F.Supp. 806 (E.D. TN 1972), *affirmed*, 468 F.2d 1164 (6th Cir. 1973), and Environmental Defense Fund v. Tennessee Valley Authority, 371 F.Supp.1004 (E.D. TN 1973), *affirmed*, 492 F.2d 466 (6th Cir. 1974).

[366] Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978).

As the Federal Government evolves and as total quality management[367] concepts become serious business, it becomes increasingly important that we reexamine our present 25 year old paradigm which says Federal agencies can only effectively assess environmental impacts through the EIS process. It's right because we've always done it this way. It's necessary because it's the way we do it. The doctrines of functional equivalence and statutory displacement are already cracks in the paradigm. They need to be expanded to account for the fact that more and more, the full range of Federal agencies have become "environment-enhancing,"[368] are required to take steps that amount to environmental impact assessment, but must go beyond NEPA because they are required to implement the least harmful alternatives.

The present system for NEPA compliance leaves it up to each agency to define major Federal actions through the development of categorical exclusions.[369] Uncertainty and unnecessary waste of resources will be avoided if CEQ centrally develops exclusions through rule-making based on substantive environmental protections that apply across the board to all agencies. In order to accomplish this, CEQ must determine, statutory precept by statutory precept, what kind of Federal agency actions each statute gives comprehensive and total prophylaxis for. These substantive environmental statutes impose meaningful environmental obligations on Federal agencies that force them to make the same assessments that NEPA requires. If the substantive environmental statute does not sufficiently instill environmental protection into the Federal project or activity, then agencies will still need to perform the NEPA process for that project.

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367 *See, e.g.*, Barbara Boczar, *Toward a Viable Environmental Regulatory Framework: From Corporate Environmental Management To Regulatory Consensus*, 6 DePaul Business Law Journal 291, Spring/Summer 1994. Total Quality Management refers to the system developed by W. Edward Demming.

368 Note 69, *supra*.

369 40 C.F.R. 1508.4.

Another possible methodology for using substantive environmental statutes to eliminate duplicative procedural NEPA requirements would be to focus on types of Federal activity, rather than complete projects, which the EIS need not address. The rationale for (and criteria for selecting) this exclusion would be that those substantive environmental statutes ensure that subject portions of such an activity cannot have any significant environmental impact. And because those substantive statutes apply throughout the overall scope of a proposed agency activity, they also serve to ensure that there are no cumulative or synergistic environmental impacts. If there could be any such adverse impacts, NEPA must still be applied to the agency action because the substantive statutes do not serve as a functional equivalent of NEPA for that type of Federal agency activity.

An example of this use of the substantive laws would be a CEQ finding that, for the construction of a hazardous waste storage facility on a Federal reserve, the actual planning, development, siting, construction, and start-up processes need not be addressed in an environmental assessment. This is because the permitting process already provides ample planning and environmental protection. The NEPA process could instead be focused on how the presence of the HWM facility on that installation effects the local, off-installation environment in terms of transportation of wastes, possibilities of spill impacts on the routes used, and similar environmental circumstances beyond the scope of laws and regulations dealing with the construction and operation of such a facility. CEQ development of these exclusions from the process will mean that those officials performing the NEPA review on the rest of the project will be able to better focus the analysis, saving time and money. In turn, these resources will be used to identify and assess real consequences and necessary alternatives. Coordination with appropriate agencies and public participation will still exist in accordance with the substantive statute(s). This will also make the NEPA documentation truly useful in that the EIS or

EA will only address those areas where an action may actually have a significant impact on the environment, resulting in a shorter document, developed more rapidly, and providing timely, useful information to project decision-makers.

Implementing these truths to beneficial purpose in the Federal Government will not rip a hole in the NEPA "safety net". Nor will it shield agency officials from judicial scrutiny. Instead, it will bring the Federal Government up to date, making its public servants more efficient and effective in this era of reform.

APPENDIX

LIST OF STATUTES DECLARING A FEDERAL ACTION TO EITHER BE OR NOT BE A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT UNDER NEPA SEC. 102(2)(C)

The first part of this list is in the order in which the statutes appear in the United States Code. The second part lists uncodified statutes by order of Public Law number.

Part 1

U.S. Code Section	Public Law
1. 15 U.S.C. 793(c)(1)	Pub. L. 93-319, Jun. 22, 1974, 88 Stat. 259
2. 15 U.S.C. 793(c)(2)	" " "
3. 16 U.S.C. 544o(f)	Pub. L. 99-663, Nov. 17, 1986, 100 Stat. 4300
4. 16 U.S.C. 1536(k)	Pub. L. 95-632, Nov. 10, 1978, 92 Stat. 3752
5. 25 U.S.C. 640d-26	Pub. L. 96-305, Jul. 8, 1980, 94 Stat. 934
6. 30 U.S.C. 185(t)	Pub. L. 93-153, Nov. 16, 1973, 87 Stat. 584
7. 30 U.S.C. 226(b)(1)(B)	Pub. L. 100-203, Dec. 22, 1987, 101 Stat. 1330-256
8. 30 U.S.C. 1251(a)	Pub. L. 95-87, Aug. 3, 1977, 91 Stat. 519
9. 30 U.S.C. 1292(d)	Pub. L. 95-87, Aug. 3, 1977, 91 Stat. 519
10. 30 U.S.C. 1419(d)	Pub. L. 96-283, Jun. 28, 1980, 94 Stat. 568
11. 33 U.S.C. 1371(c)(1)	Pub. L. 92-500, Oct. 12, 1972, 86 Stat. 893
12. 42 U.S.C. 2243(a)(1)	Pub. L. 101-575, Nov. 15, 1990, 104 Stat. 2835
13. 42 U.S.C. 2297c-2(g)	Pub. L. 102-486, Oct. 24, 1992, 106 Stat. 2935
14. 42 U.S.C. 5159	Pub. L. 100-707, Nov. 23, 1988, 102 Stat. 4694
15. 42 U.S.C. 6239(h)(3)(A)	Pub. L. 97-229, Aug. 3, 1982, 96 Stat. 251

16. 42 U.S.C. 7274g(b)	Pub. L. 102-190, Dec.5, 1991, 105 Stat. 1575
17. 42 U.S.C. 8473	Pub. L. 95-620, Nov. 9, 1978, 92 Stat. 3346
18. 42 U.S.C. 8775 (repealed)	Pub. L. 96-294, Jun. 30, 1980, 94 Stat. 619
19. 42 U.S.C. 9102(2)	Pub. L. 96-320, Aug. 3, 1980, 94 Stat. 984
20. 42 U.S.C. 10247(a), 10134(f), & 10155(c)(1)	Pub. L. 100-202, Dec. 22, 1987, 101 Stat. 1329-121
21. 43 U.S.C. 1351(e)(1)	Pub. L. 95-372, Sep. 18, 1978, 92 Stat. 629
22. 43 U.S.C. 1751(b)(1)	Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2744
23. 50 U.S.C. App. 2095(h), & 2096(i)	Pub. L. 96-294, Jun. 30, 1980, 94 Stat. 619

Part 2

24. Pub. L. 96-294, Title III, Sec. 304(c), Jun. 30, 1980, 94 Stat. 619

25. Pub. L. 96-422, Sec. 501(c)(3), Oct. 10, 1980, 94 Stat. 1820

26. Pub. L. 100-203, Title V, Subtitle B, Sec. 5107, Dec. 22, 1987, 101 Stat. 1330-256

27. Pub. L. 101-628, Title IV, Nov. 28, 1990, 104 Stat. 4469