a. Impacts

Railroad abandonment generally occurs after the quantity of freight available to a rail carrier over a particular line has diminished to the point that continued operations are economically infeasible and the operator determines that its opportunity costs--"the real economic loss an entity experiences when it must forego some other, more profitable use of its resources"[67]--require liquidation of wasting assets, including track, ties, appurtenances, and real estate. Most likely candidates for abandonment are light density branch lines, viewed by Congress as "the most economically exposed part of the rail system and most vulnerable to competition from other modes."[68]

Abandonment is a statutory option available to the railroad industry so that it will "not be forced to continue to internalize all losses from branch line operations, thereby further jeopardizing the industry's already precarious economic health."[69] In providing the abandonment option to railroads, Congress was not insensitive to the needs of shippers who rely on railroad service or to state government programs and local communities.[70] To satisfy concern for the rail system's ability to meet unforeseen future transportation demands[71] and the current needs of shippers, state and local governments, and the public, Congress enacted several statutory alternatives to railroad abandonment, each of which is explained briefly below.

Railroad abandonment also has great potential to affect the quality of the human environment. Principal impact-producing phenomena, all of which occur following abandonment authorization by ICC, include diversion of rail traffic over active lines to other transportation modes--primarily truck; salvage of track, ties, bridges, and other appurtenances; and disposal of the right-of-way, normally through sale or reversion.[72]

Aspects of environmental quality that may be affected by railroad abandonment are as varied as the terrain crossed by the railroad and include prime and unique farmlands, wetlands and water quality, historic and cultural resources, endangered species and habitat, as well as energy efficiency, air quality, and transportation safety. Abandonments, therefore, are often subject to multiple permitting and environmental review requirements.

b. **Statutory Alternatives**

Foremost among statutory alternatives to railroad abandonment are provisions of the Interstate Commerce Act (ICA)[73] under which any financially responsible person may offer to subsidize or acquire for continued operations a line of railroad approved by ICC for abandonment. The offer must be submitted within ten days of notice in the Federal Register that an abandonment has been approved.[74] If ICC finds that the offer meets certain minimum requirements, issuance of abandonment certification is postponed to allow the parties time to negotiate an agreement.[75] If agreement is reached or if, upon request of either party, ICC establishes acceptable terms and conditions,[76] then the line is not abandoned. This provision contemplates a forced sale or subsidy to continue railroad operations over the line.[77]

Section 8(d) of the National Trails System Act was amended by Congress in 1983[78] to achieve a two-fold purpose. First, the amendment seeks to put aside or bank for future reactivation transportation corridors of presently unproductive rail lines approved for abandonment. "Rail banking" is consistent with "the National policy to preserve established railroad rights-of-way for future reactivation of rail service, to

protect rail transportation corridors, and to encourage energy efficienct transportation use."[79] Second, the amendment provides that any such corridor not remain idly preserved awaiting future reactivation but that it be employed as an adjunct to the system of national trails for recreational purposes. A state, political subdivision, or qualified private organization willing to assume responsibility for trails management, legal liability, and taxes may attempt to invoke the provisions of section 8(d). If the abandoning railroad consents, ICC will issue an instrument that allows the parties 180 days in which to negotiate transfer of the right-of-way for trails use and will not permit abandonment inconsistent or disruptive of interim trails use.[80] This statutory scheme safeguards the linear integrity of the right-of-way, preventing reversionary interests, if any, from taking effect,[81] while permitting the railroad to achieve its objective--discontinuing service over an otherwise unprofitable line and salvaging track, ties, and other appurtenances not necessary to support a trail.[82]

Finally, ICA provides an alternative to abandonment that would not necessarily lead to continued railroad operations but would encourage more effective public use of abandoned rights-of-way which, Congress found, "constitute a unique resource," the future public use of which is a necessary consideration in abandonment proceedings.[83] Accordingly, ICC determines for each abandonment proposal whether rail properties

> are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission.[84]

The condition ICC customarily imposed on abandonment authorizations, but only upon

substantiated request, prohibits a railroad from disposing of its property for a period of up to 180 days unless the properties are first offered, on reasonable terms, for sale for public purposes.[85] A condition to this effect provides a negotiating preference but has never been interpreted to require a railroad to enter into negotiations.[86]

In providing statutory alternatives to abandonment that could result in continued rail service, Congress has not let social and economic concerns overshadow environmental policy objectives. On the contrary, Congress has always viewed rail service and rail transportation as offering "economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest."[87] At the same time, however, ICA's abandonment procedures--especially the time constraints that govern application processing--do not make it very easy for affected interests or the public to avail themselves of statutory alternatives to abandonment.

c. Interstate Commerce Act Procedures

NEPA *supplements* existing agency authorizations. Any attempt to integrate in a meaningful way consideration of environmental factors and alternatives into agency decisionmaking requires that agency authorizations first be examined very closely.

ICA Prefiling Requirements. For prospective purchasers of about-to-be abandoned railroad lines, whether by lease or purchase for continued operations, "banking," or public use, the preliminary work--feasibility study preparation, securing necessary capital, shipper backing, and the like--can be quite costly and time-

consuming.[88] For this reason, railroads have been required by statute since 1976 to maintain and update complete diagrams of their operating systems that must "include a detailed description of each of its railroad lines potentially subject to abandonment; and ... identify each railroad line for which the carrier plans to file an application for a certificate [of abandonment]...."[89] ICC is prohibited from granting an application for railroad abandonment that is opposed by a shipper or significant user of the line, or a state or political subdivision in which any part of the line is located until "the railroad line has been described and identified in the diagram or amendment to the diagram of the rail carrier that was submitted to the Commission at least 4 months before the date on which the application was filed."[90] But just because a rail line is listed in a system diagram as potentially subject to abandonment does not mean that an application is imminent or must be filed at all.

Immediately before filing an abandonment application with ICC a carrier must provide advance public notice. The "notice of intent" must describe the abandonment for which the carrier will apply, supply reasons for seeking abandonment, and advise interested persons of their right to participate.[91] The notice must also include

> (i) a statement that the line is available for subsidy or sale in accordance with section 10905 of this title, (ii) a statement that the carrier will promptly provide to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in operation ... and (iii) the name and business address of the person who is authorized to discuss sale or subsidy terms for the carrier.[92]

The carrier is further required to send a copy of its notice to the governor of any state directly affected; to post a copy of the notice in each terminal and station on the line; to publish the notice for three consecutive weeks in newspapers of general circulation in

each county where the line is located; and to mail a copy of the notice to all shiipers that made significant use of the line in the preceding 12 months.[93]

ICA Application Procedures. To facilitate the rail transportation policy's objective of requiring "fair and expeditious regulatory decisions when regulation is required,"[94] ICA provides for accelerated processing of railroad abandonment applications. If protests to an application are not filed within 30 days, a decision to grant the application is required within 45 days after the application is filed.[95] If protests are timely filed, a decision whether or not to investigate the matter is required within that same time period.[96] Further proceedings would follow a decision to investigate, whereas a decision not to investigate would require a decision on the merits within 75 days after the application is filed.[97] No circumstance would compel investigation of any abandonment application.[98]

d. **Statutory Conflicts Dilemma**

ICA time constraints on the processing of railroad abandonment applications impinge on the ability of ICC to fulfill the requirements of applicable environmental review laws. The forty-fifth day after an abandonment application is filed--the day on which the first decision under the ICA must be made--is crucial for purposes of the NEPA process which requires that substantive decisions--here the granting of abandonment--be made only after the agency has taken a "hard look" at environmental factors.[99] To accommodate this requirement, environmental documentation must be completed and submitted to the decisionmaker well in advance of the forty-fifth day after an abandonment application is filed. Protests to an abandonment application, which would provide slightly more time for completing the NEPA process, generally are

not submitted in advance of the thirtieth day after an application has been filed and cannot be counted on to provide additional processing time. For these reasons, environmental documentation prepared for abandonment applications is normally made available to the ICC decisionmaker within 33 calendar days of application filing.

The environmental effects of most proposed railroad abandonments, some of which may extend 200 miles or more,[100] could not possibly be completely evaluated by ICC in a month's time. The section 106 National Historic Preservation Act process, which is almost always involved in railroad abandonments, may itself take much longer than a month to complete.[101] Add to that required considerations under other federal statutes often involved in railroad abandonments, including section 7 of the Endangered Species Act, the Clean Water Act, the Coastal Zone Management Act, and many, many more, as well as state and local requirements that frequently come into play, and the tremendous demands of the environmental process on the ICC rail abandonment licensing function become readily apparent. To cope with those demands and at the same time fulfill the rail transportation policy's requirement for fair and expeditious decisionmaking, ICC has sought to integrate all environmental considerations into the prefiling planning processes of prospective applicants.

Under ICC environmental procedures, an "environmental report" addressing more than a dozen areas of environmental concern normally associated with railroad abandonments must accompany application filings.[102] In meeting those environmental reporting requirements, prospective applicants must calculate the impact of proposed abandonments on the affected natural and physical, as well as the social and economic, environment. ICC procedures also require carriers to undertake extensive prefiling

consultations with federal, state, and local officials and planners for the purpose of ascertaining in advance of filing what other permitting (such as Corps of Engineers under section 404 of the Clean Water Act) or review (such as cultural resource surveys under section 106 of the National Historic Preservation Act) requirements may apply and to begin satisfying those requirements so that *all* permitting and review functions can be completed simultaneously. But the ICC does not expect or require prospective applicants to fend for themselves in fulfilling reporting or consultation requirements; instead, "[i]nformation ... and other forms of assistance [are] made available upon request" to rail applicants and others under the agency's environmental procedures.[103]

ICC has attempted to further offset limiting provisions of ICA where that act provides "some latitude to set timeframes for the filing of pleadings."[104] Thus, ICC *requires* prospective applicants for railroad abandonment to submit historic resource data to responsible state officials at the same time that they file their notice of intent to "assure the Commission the maximum time to make the appropriate determinations."[105] In establishing this requirement, ICC noted "that the early submission of historical data may ultimately speed the processing of some proceedings by encouraging the earliest resolution of environmental matters. While some applicants may be required to alter their current data collection practices, the benefits of this proposal outweigh this minor detriment to carriers."[106] A programmatic memorandum of agreement, designed to tailor the section 106 National Historic Preservation Act requirements to railroad abandonment proceedings under ICA, was also negotiated by ICC in 1987 but never signed.[107]

The notice of intent, an early-warning device second only to the system diagram

requirements, is the vehicle that ICC has settled on, insofar as rail abandonment application proceedings are concerned, to invigorate the NEPA process. Statutory notice of intent requirements, which contemplate widespread advance public notice, have been enlarged by ICC to embrace every alternative to abandonment as well as other environmental concerns. ICC procedures invite would-be participants specifically to address, in protests to or comments on abandonment applications, issues that include the following:

- Any intention to offer financial assistance for continued operations;
- Environmental effects;
- Impacts on rural and community development;
- Suitability of rail properties for other public purposes; and
- Prospective use of rights-of-way for interim trail use and rail banking.[108]

Comments submitted in response to a carrier's notice of intent, together with the environmental report that must accompany the abandonment application and any additional data gathered by ICC, form the database for environmental evaluation.

ICC environmental procedures classify railroad abandonments for NEPA purposes as actions normally requiring preparation of an environmental assessment.[109] Although, consistent with CEQ regulations, railroad applicants could be allowed to submit environmental assessments with their applications,[110] that approach to document preparation is not reflected in ICC procedures, apparently because the agency has found that it can efficiently prepare concise environmental assessments (well within the 10 - 15 page limit prescribed by CEQ[111]) while reviewing and verifying data contained in environmental reports. Whether the statutory scheme for rail abandonment applications

can accommodate the EIS process depends on a number of factors,[112] although ICC recently prepared an environmental impact statement for a 10-mile rail abandonment in the metropolitan Washington D.C. area.[113] But the demands of the environmental assessment process for railroad abandonment applications offer more than sufficient challenge, especially with respect to consideration of alternatives.

e. Considering Alternatives

Every environmental assessment must "include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, along with a listing of agencies and persons consulted."[114] Consideration of alternatives, which is viewed as the heart of the NEPA process,[115] requires rigorous exploration and objective evaluation of all reasonable alternatives to a proposed action,[116] particularly those that would avoid or mitigate adverse environmental effects.[117] This requirement assures "that alternatives are explored in the initial decision-making process and to provide an opportunity to those removed from that process also to evaluate the alternatives."[118]

In targeting available alternatives for evaluation, an agency may not focus exclusively on the limited objectives of an applicant for a federal license; nor may the agency consider only those alternatives that are within its jurisdiction or power to bring about.[119] Instead, "NEPA case law on this issue requires consideration of both public and private purpose and need. The agency may properly focus its evaluation of alternatives based upon the applicant's goals, but it must also exercise independent judgment regarding the appropriate articulation of the objective purpose and need and

the reasonableness of various alternatives."[120]

Broad-based agency evaluation of alternatives to railroad abandonment is consistent with the public interest. For these valuable and unique resources, Congress specificially has provided several alternatives, each of which promotes the rail transportation policy. Since these alternatives generally contribute to the maintenance and enhancement of environmental quality, the objectives of NEPA and ICA in this regard are mutually reinforcing. Seldom, however, will an environmental assessment prepared for an abandonment application contain an "evaluation" of alternatives. But evaluation of alternatives to railroad abandonment may not be as important as providing notice of their availability.

Statutory alternatives to abandonment are not within the discretion of either ICC or the abandoning rail carrier to effectuate, a fact which by itself would not necessarily excuse a failure to consider such alternatives.[121] But here ICC is not in a position, prior to any concrete expression of interest--or a "proposal" as that term is understood for NEPA purposes[122]--to evaluate an alternative's feasibility or likelihood of success at the state or local level where, according to Congress, "responsibility [belongs] for making the decisions on the essentiality of ... rail service...."[123] Short of undertaking a programmatic examination of the nation's rail transportation system for the purpose of anticipating long-term needs and opportunities, ICC can do little more than it has done in individual abandonment application proceedings to further pursuit of alternatives, namely, to integrate notice of their availability into the prefiling requirements of abandoning rail carriers and to provide a process for reviewing subsequent negotiated transfers of rights-of-way. If a state, political subdivision, or an interested person expresses interest in

pursuing one or more of the statutory alternatives, ICC will be aware of that interest before resources are irretrievably committed and will order follow-up proceedings consistent with the statute.

The carefully constructed ICC environmental review system for rail abandonment applications has proven itself on many occasions. A 1985-1986 abandonment application proceeding involving a segment of the Boston and Maine Railroad's Hillsboro Branch in Bennington, New Hampshire, will serve briefly to illustrate the point. The rail line proposed for abandonment in that proceeding provided service to the Monadnock Paper Mills, the operations of which dated to 1819, making it the oldest continuously operating paper mill in the country.[124] Not only was the line's principal customer a historical landmark, eligible for listing in the National Register, but it was also the nucleus of commercial and social life in Bennington for nearly two centuries.

ICC was alerted to the paper mill's historical significance and its importance to the local economy by John Flanders, New Hampshire's historic preservation officer, who had received the railroad's notice of intent containing historic resource data, a description of available alternatives to keep the line in operation, and other pertinent information weeks before the application was actually filed.[125] Timely notification of the planned abandonment and opportunity to comment resulted in preparation of a cultural resource survey which ICC was able to complete prior to the statutory deadline for decision on the application. Because the survey determined that abandonment's principle adverse effect on the historical integrity of the mill complex could be avoided only through continued operation of the railroad, all statutory alternatives for continuing rail service to the mill or "banking" the line for future reactivation were fully explored.[126]

Although abandonment of the rail line ultimately was authorized by the ICC because no entity cared to acquire, operate, or "bank" the line, the interest generated by the environmental process induced the railroad to keep the line intact. Recently, proposals to reinstitute service over the line to the historic mill complex have surfaced and are now being actively considered.[127]

The environmental process that ICC painstakingly fashioned for abandonment applications was not extended to include the other, larger (now accounting for the majority of rail line abandonments[128]) component of the rail abandonment program that involves so-called "exempt" transactions. Exempt abandonment transactions, which are not subject to the stringent statutory time constraints that govern abandonment applications,[129] must also comply with the requirements of NEPA and other environmental review laws.[130] But widespread advance public notice of such exemptions and of statutory alternatives to abandonment is not effectively provided;[131] nor is environmental documentation prepared prior to exemption approval.[132] As a consequence a genuine opportunity to promote environmental and rail transportation policies may be missing from a substantial number of abandonments.[133] And although the disjointed, add-on environmental process that ICC adopted for exempt rail abandonments has been sanctioned by one federal appeals court,[134] not all intended beneficiaries of statutory alternatives to abandonment are entirely satisfied with the outcome. The National League of Cities has called on Congress to

> require a railroad to notify elected officials and local citizens of all abandonments, including exempt abandonments, in sufficient time for local officials and citizens to exercise all remedies before the ICC to preserve a rail corridor for alternative public uses, including recreation, public transit

> and utility corridor. Currently, ICC and railroads provide essentially no notice in half or more of rail abandonment proceedings. A minimum of eight weeks should be required.[135]

The policies, statutes, and procedures that govern or affect railroad abandonment applications demonstrate the complexities involved in integrating environmental considerations into agency decisionmaking, especially when that decisionmaking is accomplished by means of adjudication. NEPA, however,

> was not intended to accommodate conventional licensing and regulatory procedures. It was not intended to draw nice distinctions between agency discretion and the public concern for the environment. It was intended to modify fundamentally the basis of ... decision making on matters affecting the quality of the environment; legal technicalities of agency procedure were to accommodate its policy objectives--not vice versa.[136]

That accommodation is seldom easy. And as the number and scope of authorities that apply to agency decisionmaking increase, the difficulty in accommodating the objectives of NEPA increases proportionately. But the CEQ regulations, purposefully applied, will overcome that difficulty and promote effective, efficient integration of environmental considerations into agency decisionmaking.

Case Study

NEPA: Preserving the Nation's Cultural Heritage

Although an objective of NEPA is to "preserve important historic, cultural, and natural aspects of our national heritage,"[137] the effects of federal agency decisionmaking "on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register,"[138] must also be considered under section 106 of the National Historic Preservation Act (NHPA).[139] Implementing regulations of the Advisory Council on Historic Preservation develop what is known as the section 106 process, under which effects of federal decisionmaking on resources included in or eligible for inclusion in the National Register are taken into account.[140] And while the "judgments of historical significance made by the Advisory Council on Historic Preservation, the expert regulatory body concerned with preserving, restoring, and maintaining the historic and cultural environment of the Nation ... deserve great weight ... compliance with the NHPA, even when it exists, does not assure compliance with NEPA. Each mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected."[141] Even the "[e]xecution of a 'Memorandum of Agreement' with the Advisory Council on Historic Preservation ... does not relieve a federal agency of the duty of complying with the impact statement requirement 'to the fullest extent possible,' 42 U.S.C. § 4332."[142] But "[c]urrent regulations envision [and encourage] that both [NEPA and NHPA] may be applied simultaneously, and provide procedures by which a single document may often satisfy an agency's responsibilities under both [statutes]. *See* 36 C.F.R. § 800.9 [1990]; 40 C.F.R. §§ 1502.25, 1506.4 [1990]."[143]

2. Minerals Management Service: Outer Continental Shelf Lease Sales

The Outer Continental Shelf (OCS) oil and gas lease sale program offers a contrasting study with respect to integration of environmental factors into agency decisionmaking, one in which an extremely complex planning process is combined with the potential for uncertainty regarding environmental effects.

a. Challenges of the OCS Lease Sale Program

In many respects the OCS program represents the ultimate challenge to policy integration. The setting of policy conflict was described succinctly in a 1977 congressional report on proposed amendments to OCSLA:

> If the Santa Barbara oil spill raised the level of environmental consciousness about OCS operations, the shortfall of domestic energy production and the Arab oil embargo of 1973 had an equally dramatic impact. The potential oil and gas resources on the OCS could reduce the country's dependence on foreign energy supplies and thus its economic vulnerability in relation to the OPEC nations. Both trains of thought--environmental protection and the acceleration of OCS oil and gas development--competed for primary ranking in the list of national priorities.[144]

Resolution of this policy conflict, which continues in large measure today, is achieved under OCSLA by means of a multi-stage developmental program that "is to be balanced, considering all economic, social, and environmental impacts of oil and gas activities.[145]

Congressional concern for the effects of OCS oil and gas development on the quality of the human environment is evident throughout OCSLA which was amended extensively in 1978 "to promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf."[146] In OCSLA, Congress has provided that "the whole OCS process, from preparation of a leasing

program, selection of tracts for leasing, promulgation and enforcement of regulations, and review of activities must consider environmental consequences."[147] Specific reference is also made in OCSLA to NEPA.[148] OCSLA "does not limit NEPA's basic application, *see* 43 U.S.C. § 1866; instead, the two statutory schemes are complementary. ... At the lease sale stage, OCSLA implies [that the Secretary's] review must meet NEPA standards. *See* 43 U.S.C. § 1346(a)(1) ('The Secretary shall conduct a study ... in order to establish information needed for assessment and management of environmental impacts....')."[149]

Congress was concerned not only with effects of the OCS program on the environment but also that decisions concerning domestic energy production not be *needlessly* delayed by environmental considerations. To "[a]llow the [OCS] resources to become available for domestic use as rapidly as possible,"[150] Congress included several key provisions in the 1978 amendments to OCSLA. First, it divided the OCS program into four statutory stages, each of which "involves separate regulatory [including environmental] review that may, but need not, conclude in the transfer to lease purchasers of rights to conduct additional activities on the OCS."[151] Second, environmental studies were directed to be undertaken well in advance ("not later than six months prior to the holding of a lease sale"[152]) of decisionmaking. Finally, the Secretary was permitted in developing environmental studies to support his OCS decisionmaking to use information derived from other federal studies, including environmental impact statements, or from any state or local government or from any person.[153]

Many of the procedures that Congress incorporated into the 1978 amendments to

OCSLA anticipated the CEQ regulations which were then in the process of being developed. Congress was very much aware of the CEQ efforts at that time and had determined "that the NEPA impact statement process when applicable, should not unnecessarily delay [OCS decisionmaking]."[154] For this reason, Congress supported "the directive of President Carter to the Chairman of the Council on Environmental Quality, that he promulgate new guidelines designed to expedite the process."[155] But regardless of how integrated environmental review is ordained--whether by an agency's organic charter or through application of the CEQ regulations--it cannot assure that all pertinent values will be fully considered prior to decision. It may be that the full range of environmental impacts associated with a proposed action are beyond what science and technology are capable of ascertaining. The CEQ regulations cannot fill an evaluative void occasioned by missing data but they will permit decisionmaking to go forward in the face of uncertainty, even where different standards apply.

b. **Evaluating Effects on Endangered Species**

Although OCSLA makes no direct reference to ESA as it does to NEPA, the provisions of ESA apply of their own force and effect to the Secretary's OCS decisionmaking.[156] Moreover, ESA applies equally to each stage of decisionmaking, including the lease sale stage.[157] Thus, before the Secretary makes any lease sale decision under OCSLA, he must insure, consistent with section 7(a)(2) of ESA that his action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species...."[158]

Briefly a section 7 ESA consultation requires that the agency with jurisdiction

over an endangered species--either the Fish and Wildlife Service (FWS) of the Department of Interior or the National Marine Fisheries Service (NMFS) of the Department of Commerce--must be consulted by the action agency--the Minerals Management Service (MMS) has been delegated initial decisionmaking functions under OCSLA--to determine whether any likelihood exists of jeopardizing the continued existence of an endangered species. A "biological assessment," defined as "the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat,"[159] will normally be prepared when endangered species are determined to be present in the action area. Based on that assessment and following formal consultation, if required, FWS and/or NMFS, relying on "the best scientific and commercial data available,"[160] will issue a "biological opinion," which is defined as "the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."[161] Following issuance of the opinion, the federal action agency must "determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion."[162]

Consideration of OCS lease sale effects on species (whether or not endangered) and habitat under NEPA involves a much less structured inquiry. The essentially procedural requirements of NEPA are satisfied if, on balance, the administrative record, including the environmental impact statement and any accompanying consultative documents, discloses that the decisionmaker has taken a "hard look"[163] at the

consequences of its proposed action on species and habitat.

> NEPA requires that the EIS alert the decision maker to both the consequences of a proposal and alternatives to it, [but] the agency's responsibility under NEPA is guided by a rule of reason. The decision of how much detail to include is one for the agency itself. The discussion need not be exhaustive so long as it provides 'information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned.' ... NEPA obligates an agency to seek out the environmental consequences of a proposal and consider every significant aspect of its environmental impact....[164]

Endangered species that inhabit or migrate through lease sale areas are the subject of "program studies," some extending as much as four years or more.[165] These studies are not undertaken only in response to lease sale proposals; rather, consistent with section 20 of OCSLA,[166] implementing regulations call for a continual "environmental studies program to collect information to assess and manage environmental impacts of OCS oil and gas development on human, marine, and coastal environments."[167] Study needs are identified annually, "approximately 2 years in advance of when studies are expected to begin."[168] In these circumstances, the "best scientific and commercial data" concerning effects of the OCS program on endangered species and their habitat are in a perpetual state of development. Even after "conducting these studies, and any other tests and studies which are suggested by the best available science and technology, the most informed judgment of risk of jeopardy to an endangered species will still have a large component of estimate, its quantitative element being incapable of precise verification."[169] And although uncertainties generated by "program studies" and their subject matter affect ESA and NEPA analyses similarly, standards governing decisionmaking under each statute differ somewhat, thereby complicating

integration of environmental considerations.

c. **Proceeding with Decisionmaking in the Face of Uncertainty**

Section 7(d) of ESA provides that after consultation required by section 7(a)(2) is initiated "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."[170] Until a biological opinion is issued by the Service, the action agency, MMS, cannot proceed with its lease sale activities. It is entirely foreseeable that a biological opinion will not be able to evaluate with certainty what all the effects of a proposed action will be. This uncertainty could easily lead to decisional paralysis.

Congress, however, did not intend that the directives of ESA should be interpreted to cause program gridlock in the face of uncertainty. In the process of amending ESA in 1979, Congress made clear its intention that the act "not be interpreted to force the [Services] to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species or adversely modify its critical habitat."[171] Instead, the wildlife agencies would be permitted "to frame their section 7(b) opinions on the best evidence that is available or can be developed during consultation. If the biological opinion is rendered on the basis of inadequate information then the Federal agency has a continuing obligation to make a reasonable effort to develop that information."[172]

Special provision has also been made for consultations under section 7 of ESA on

multi-stage projects, such as those authorized by OCSLA. Regulations implementing section 7 of ESA provide that "[w]hen the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action."[173] Upon issuance of such biological opinion, the action agency may then proceed conditionally with the incremental step. Conditions include that the incremental step itself not violate section 7(a)(2) or 7(d) of ESA; that consultation continues for the entire project and each succeeding incremental step; that the action agency continue to secure data in support of biological opinions; and that a reasonable likelihood exists that the entire project will not violate section 7(a)(2).[174]

Regulations implementing ESA accommodate the structure and demands of OCSLA in terms of fulfilling the consultation requirements of section 7 for lease sale activities that may have speculative effects on endangered species and their habitat but they do not completely satisfy the requirements of NEPA.[175] Strict limits are placed by NEPA on actions that may be taken prior to completing the EIS process. The CEQ regulations provide that "[u]ntil an agency issues a record of decision ... no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives."[176] Unlike ESA, however, segmentation of actions under NEPA is generally not recognized as a legitimate means of accomplishing the act's mandates.[177] The only exception to this rule involves interim action that is part of a program for which an EIS is being prepared and such action is "justified independently of the program [and is] itself accompanied by an adequate

environmental impact statement,"[178] an exception for which lease sale decisions would not qualify because every significant aspect of their environmental impact on species and habitat could not be fully considered under incremental-step biological opinions.[179]

But Congress recognized in formulating a national policy for the environment that all risk to that environment could not possibly be eliminated from the decisionmaking process; that civilization has advanced by taking risks with the environment, risks that must continue to be taken despite a lack of complete foreknowledge of the consequences of many activities.[180] The CEQ regulations address the need for risk-taking when information necessary to environmentally informed decisionmaking is incomplete or unavailable and also strive to accommodate Congress' desire to provide an "early warning system" for unwanted consequences.[181] Proceeding with decisionmaking in the face of uncertainty concerning potentially significant environmental effects was the subject of a 1986 amendment to the CEQ regulations that sought to avoid "distorting the decision making process by overemphasizing highly speculative harms"[182] while seeking to promote integration of analyses and data generated in pursuit of more specific environmental/scientific inquiries. That amendment, which replaced the so-called "worst-case" requirement, directs that "federal agencies, in the face of unavailable information concerning a reasonably foreseeable significant environmental consequence, prepare 'a summary of existing credible scientific evidence which is relevant to evaluating the ... adverse impacts' and prepare an 'evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.'"[183]

In the case of lease sales for which incremental-step biological opinions have

been prepared, development of an "adequate environmental impact statement" need not be postponed or even delayed appreciably. Under the CEQ regulations governing EIS preparation, where necessary information is incomplete or unavailable, the incremental-step biological opinion together with any other relevant scientific data that may be available constitute the "existing credible scientific evidence" which only then has to be summarized for incorporation into the environmental document. By applying to that "evidence" an accepted predictive methodology, the action agency, MMS, will be able to provide an "evaluation" of the potential impacts of its lease sales on species and habitat that satisfies NEPA standards without requiring redundant analyses or otherwise delaying the decisionmaking process.

The value of NEPA as a *comprehensive* environmental review authority is especially evident in circumstances such as those presented in the foregoing example where two or more statutes combine to focus attention and concern on a single environmental factor. NEPA and the CEQ regulations[184] stand as a constant reminder to the action agency that other environmental factors must be considered and integrated into the decisionmaking process. At the same time, evaluation under NEPA of uncertain effects, whether to endangered species and habitat or to any other aspect of the environment does not stop with issuance of the EIS because the act also requires "that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval."[185]

d. Striking a *Balance*

The OCS program provides a major portion of the nation's natural gas and oil

supplies and contributes to economic growth and to the federal treasury. But the program can also affect the coastal and marine environments. In some highly sensitive environments, the risks of environmental damage may be too great for development to proceed. On June 26, 1990, the President decided to delay leasing decisions in certain sensitive OCS areas pending collection and consideration of additional environmental information. The President also called for strengthening the OCS program to achieve the goal of a "much more carefully targeted OCS program, one that is responsive to local concerns, to environmental concerns, *and* to the need to develop prudently our nation's domestic energy resources."[186] At the same time, however, the President has expressed his belief "that there are significant offshore areas where we can and must go forward with resource development ... [but in a manner designed] to achieve a *balance* between the need to provide energy for the American people and the need to protect unique and sensitive coastal and marine environments."[187] And when the decision to go forward with resource development in those areas is made, NEPA and the CEQ regulations will foster the effective, efficient integration of scientific and technical information regarding the resource potential of each area considered for leasing and the environmental, social, and economic effects of oil and gas developmental activities.

E. The Future of Integration

For this nation to respond meaningfully and efficiently to existing as well as emerging environmental problems, future environmental management efforts must revolve around the concept of integration. This observation is as sound today as it was 20 years ago when the late Senator Henry Jackson, the driving force behind formulation and enactment of NEPA, remarked that

> [t]he contemplative consideration of general directions, the anticipation of emerging problems, and the design of new decision criteria are critically important; though they are not dramatic and, thus, seldom newsworthy. Fulfilling these functions will not capture public attention the way the latest pronouncement on mercury poisoning, a major oil spill, or the Alaska pipeline can. In the final analysis, however, man's ability to survive on this earth and to enjoy quality social, cultural, and aesthetic conditions and experiences will not turn upon our handling of a single contaminant, or our decision on a particular oil spill or construction proposal. It will turn on our ability to develop policies and decision-making models which *integrate* environmental concerns along with the full range of other important human values.[188]

A recent U.S. EPA Science Advisory Board report addressing the environmental challenges that confront society today reached essentially the same conclusion that Senator Jackson did 20 years ago, namely, that to meet those challenges "national policy affecting the environment must become more integrated and more focused on opportunities for environmental improvement than it has in the past."[189] The report continued:

> The environment is an interrelated whole, and society's environmental protection efforts should be integrated as well. Integration in this case means that government agencies should assess the range of environmental problems of

> concern and then target protective efforts at the problems that seem to be the most serious. It means that society should use all the tools--regulatory and non-regulatory alike--that are available to protect the environment. It means that controlling the end of the pipe where pollutants enter the environment, or remediating problems caused by pollutants after they have entered the environment, is not sufficient. Rather, waste-generating activities have to be modified to minimize the waste or to prevent the waste from being generated at all. Most of all, integration is critically important because significant sources of environmental degradation are embedded in typical day-to-day personal and professional activities, the cumulative effects of which can become serious problems. Thus protecting the environment effectively in the future will require a more broadly conceived strategic approach, one that involves the cooperative efforts of all segments of society.[190]

Has the nation come full circle in the evolution of its thinking about the environment? Or was it simply overwhelmed to the point of distraction in the 1980s by a series of discrete environmental problems (such as toxic waste and pesticide residues) that collectively represented a severe threat to human health, a threat that always "arouses a much more intense interest than any esthetic, economic, or social impact?"[191] Whatever the explanation, the nation has come to recognize anew that "response to human health risks as compared to ecological risks is inappropriate, because, in the real world, there is little distinction between the two. Over the long term, ecological degradation either directly or indirectly degrades human health and the economy."[192]

What the United States discovered in the 1960s--that people must deal with the environment as a comprehensive, integrated whole--the nation is rediscovering in the 1990s and--at last--beginning to practice. Integrating the multitude of environmental laws and policies that govern and affect every citizen will mean becoming reacquainted with NEPA, not just as a "process" to be reckoned with, but as the United States'

"comprehensive national policy on environmental management."[193]

From the standpoint of the "process" as applied to federal agency decisionmaking, however, the CEQ implementing regulations supply the integrative tools that are needed to balance the objectives of all applicable policies. But as the case studies developed in this chapter reveal, the effective application of those tools to federal programs requires considerable effort and forethought. In mid-1991, CEQ, in cooperation with EPA, will sponsor a workshop to identify opportunities for and possible barriers to more effective integration of NEPA with other environmental review requirements. The workshops will focus on problems arising in the energy, transportation, commercial development, and natural resource areas. The knowledge gained from those proceedings should assist in furthering the goal of integrated environmental management and decisionmaking.

II. SELECTED NEPA CASES--1990

A. United States Supreme Court

"Standing" in NEPA Litigation: Lujan v. National Wildlife Federation

In *Lujan* v. *National Wildlife Federation*[194], the United States Supreme Court was asked to confer standing on plaintiffs who had alleged in affidavits the use of public lands "in the vicinity" of land that was the subject of 2 out of 1,250 Bureau of Land Management (BLM) orders. These orders, plaintiffs claimed, would open public lands up to mining activities, thereby destroying their natural beauty. Plaintiffs challenged all of the 1,250 BLM orders, claiming violations of the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA).

The district court, ruling on defendants' motion for summary judgment,[195] found that plaintiffs had no standing to seek judicial review. Specifically the court held that even if the affidavits claiming use of lands "in the vicinity" of lands that were the subject of two BLM orders were sufficient to challenge those two particular orders, they were not sufficient to allow a challenge to each of the 1,250 individual orders.[196] The Court of Appeals for the District of Columbia Circuit reversed, finding the affidavits sufficient to confer standing to challenge the two individual orders and that standing to challenge those orders conferred standing to challenge all 1,250 orders.[197]

Reversing the Court of Appeals in a 5-4 decision authored by Justice Scalia, the Supreme Court acknowledged that neither NEPA nor FLPMA provides a private right of action for violations of its provisions. Rather an injured party must seek relief under the Administrative Procedure Act (APA). To demonstrate standing under APA, a

plaintiff must identify some final agency action that affects him or her *and* must show he or she has suffered a legal wrong because of the agency action or is adversely affected by that action within the meaning of a relevant statute. To be "adversely affected within the meaning of a statute," a plaintiff must be within the "zone of interests" sought to be protected by the statutory provision that forms the basis of the complaint.

Using this test of standing, the Court found that plaintiffs' interest in recreational use and aesthetic enjoyment of the federal lands were within the "zone of interests" protected by NEPA and FLPMA. However the Court concluded that plaintiffs, by simply claiming use "in the vicinity" of immense tracts of land managed by BLM, had not shown they would be "adversely affected" by the BLM actions. Moreover the Court found that plaintiffs were attempting to challenge BLM operation of its land management program generally, not a final agency action in particular. Given these findings, the Court ruled that plaintiffs had not set forth "specific facts" in their affidavits sufficient to survive defendants' motion for summary judgment.

A dissent authored by Justice Blackmun noted that the showing required to overcome a motion for summary judgment is more extensive than that required for a motion to dismiss, but concluded that the allegations in the affidavits were adequate to defeat a summary judgment motion. The dissent emphasized that the question was not whether plaintiffs had demonstrated standing, but whether the affidavits before the district court established that a genuine issue existed for trial.

B. Circuit Courts

1. Timber Harvesting

a. Tenakee Springs v. Clough

Again in 1990 the United States Court of Appeals for the Ninth Circuit was asked to resolve disputes concerning timber harvesting in the Pacific Northwest and Alaska. In *Tenakee Springs* v. *Clough*,[198] plaintiffs sought a preliminary injunction to stop timber harvesting in the Tongass National Forest under the terms of a 50-year contract between the U.S.D.A. Forest Service and Alaska Pulp Company that was entered into in 1956. Plaintiffs alleged that the supplemental environmental impact statement (EIS) prepared by the Forest Service for the harvest failed to consider harvesting alternatives beyond what was required under the contract and had failed to consider cumulative impacts. The Forest Service asserted that such alternatives could not be considered because they would result in a violation of the terms of its contract with Alaska Pulp.

The district court denied the request for a preliminary injunction, finding that plaintiffs had failed to demonstrate any likelihood of success on the merits. The Ninth Circuit reversed the district court's holding and remanded the case back to that court.

In its decision, the court of appeals noted that the contract had been amended 11 times in the course of its history and that the Forest Service had not explained in its supplemental EIS why the contract could not be amended further, particularly in light of Forest Service regulations allowing it to modify or cancel any contract that would result in "serious environmental degradation or resource damage."[199] The court held that the Forest Service's failure to discuss or evaluate the consequences of terminating, suspending, or amending its contract raised a serious question of NEPA compliance.

The court also concluded that the Forest Service had not adequately assessed the cumulative impacts of harvesting under the Alaska Pulp contract and other foreseeable timber sales in the area. For these reasons the court found that plaintiffs had demonstrated a likelihood of success on the merits warranting the issuance of a preliminary injunction.

b. **Marble Mountain Audubon Society v. Rice**

The Ninth Circuit examined a fire-recovery timber sale in Oregon's Klamath National Forest in *Marble Mountain Audubon Society* v. *Rice*.[200] After a forest fire in 1987, the Forest Service began to plan the salvage and rehabilitation of the damaged area, and prepared a draft and final EIS that considered the environmental impacts of nine alternative salvage and harvest proposals. The alternative selected called for logging of some green timber as well as the fire-killed timber and for the addition of six miles of logging roads.

Alleging that the final EIS failed to adequately consider the unique value of the area as the only significant biological corridor between two wilderness areas, plaintiffs sought declaratory and injunctive relief. The district court granted summary judgment in favor of the Forest Service, stating that the NEPA claims were barred by Section 312 of Pub. L. No. 101-121[201] and, alternatively, that the final EIS adequately addressed the biological corridor issue.

The Ninth Circuit reversed. Recognizing the "strong presumption in favor of judicial review of administrative action" and "narrowly construe[ing]" Section 312's prohibition against judicial review,[202] the court found that the biological corridor issue was not a generic issue that would enable plaintiffs to challenge the entire Timber

Management Plan for the Klamath National Forest in contravention of Section 312.

The court also concluded that, based on the record before it, the Forest Service had not taken a "hard look" at the impact of the selected salvage and harvest alternative on the biological corridor. The court found that the Forest Service's conclusion that the preservation of a 1/2 mile corridor would be sufficient was "without supporting documentation" and found "no discussion" of the corridor issue in either of two underlying documents relied upon by the Forest Service (a 1967 Multiple Use Plan and a 1974 Klamath National Forest Timber Management Plan and accompanying EIS).[203] Having issued an order enjoining any logging or road building, the court remanded the case to the district court for further proceedings.

c. **Seattle Audubon Society v. Robertson**

In another case involving commercial logging, *Seattle Audubon Society* v. *Robertson*,[204] the Ninth Circuit considered a consolidated challenge to BLM and Forest Service forest management activities under NEPA and other statutes. The Portland Audubon Society had originally brought suit against BLM in 1987, and the Seattle Audubon Society had challenged Forest Service decisions in 1989. Congress, attempting to resolve the issues raised in these cases, passed Section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990,[205] which went into effect on October 23, 1989.

While Section 318 sets a limit on timber sales, sets out a timber management plan for national forest and BLM land in Oregon and Washington, and prohibits sales in identified spotted owl habitat areas, it also

"determines and directs that management of areas according

> to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls *is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases* captioned Seattle Audubon Society et al. v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al. v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al. v. Manuel Lujan, Jr., Civil No. 87-1160-FR." Section 318(b)(6)(A) (emphasis added).

Based on Section 318, the district court in *Seattle Audubon* vacated its preliminary injunction, and the district court in *Portland Audubon* granted the government's motion to dismiss.

On appeal plaintiffs in the consolidated cases challenged Section 318 as violative of the separation of powers doctrine and thus unconstitutional. The Ninth Circuit agreed.

The court stated that, for the first time, Congress in enacting Section 318 had endeavored to instruct the federal courts to reach a particular result in specified pending cases. The judicial power of the United States, however, lies in the federal courts and not in Congress. The court held that although Congress could modify the law underlying pending cases, it could not direct the courts to decide the cases in a particular way without first repealing or amending the underlying laws.

2. Declaratory Judgment Act: Collin County, Texas v. Homeowners Association for Values Essential to Neighborhoods (HAVEN)

In *Collin County, Texas* v. *Homeowners Association for Values Essential to Neighborhoods (HAVEN)*[206], the Court of Appeals for the Fifth Circuit was asked to review a district court's grant of summary judgment in favor of the plaintiff county under

the Declaratory Judgment Act. The Texas State Department of Highways and Public Transportation, in conjunction with the Federal Highway Administration, prepared an EIS for an eight-lane highway project outside of Dallas known as SH 190. The defendant citizen's group opposed the project claiming adverse impacts to their community, and indicated their intention to challenge the adequacy of the EIS in court.

Collin County, through which the highway would pass and which sought to have the highway built as soon as possible, asked the district court to issue a judgment declaring that the final EIS was sufficient as a matter of law. The county's motion was granted.

On appeal, however, the court of appeals found that the county could not use the Declaratory Judgment Act to forestall potential litigation by a citizen's group that might delay construction of the highway when the citizen's group has no cause of action against the county:

> "We recognize the local governments' interests in the outcome of potential litigation between HAVEN and the appropriate highway authority over SH 190. However, these interests are not adverse legal interests vis-a-vis HAVEN's potential NEPA claim--the only substantive issue in this case."[207]

The declaratory judgment was vacated and the action dismissed.

3. "Small Federal Handle": Macht v. Skinner

The District of Columbia Court of Appeals examined the extent to which federal involvement in a non-federal project may "federalize" the project for purposes of NEPA compliance in *Macht* v. *Skinner*[208]. In this case, the Maryland Mass Transit Administration decided to build a 22.5 mile light rail line near Baltimore, to be financed

solely by state and local governments. There was, however, some federal involvement. First, the state needed to obtain a Section 404 permit[209] from the Army Corps of Engineers for 3.58 acres of wetlands. Further, using federal funds, Maryland began consideration of three extensions to the rail line. The federal grant, from the Urban Mass Transit Administration (UMTA), was provided to the state for assistance in preparing alternative analyses and draft EISs for the contemplated extensions.

The plaintiffs sued the federal agencies, claiming that there was sufficient federal involvement in the rail project to constitute a "major federal action" requiring compliance with NEPA. Affirming the lower court, the court of appeals held that neither the Army Corps wetlands permit nor the UMTA grant was enough to transform the entirely state-funded project into a federal action.[210]

With respect to the UMTA grant for the preliminary environmental analyses, the court stated that "NEPA does not require UMTA to prepare an EIS until it proposes or decides to participate in a project that will affect the environment."[211] Addressing the Army Corps permit issue, the court noted that the plaintiffs "correctly assert that federal involvement in a nonfederal project may be sufficient to 'federalize' the project for purposes of NEPA."[212]

The court characterized the issue as "whether the federal participation in the project is so substantial that the state should not be allowed to go forward until all the federal approvals have been granted in accordance with NEPA."[213] In this case, the court found that the Army Corps had discretion only over a negligble portion of the entire project, that the only federal involvement in the 22.5 mile state portion of the project was the wetlands permits, and that the state had not entered into a financial

partnership with the federal government. "NEPA therefore provides no basis for enjoining Maryland's construction of the Light Rail Project."[214]

4. Cumulative Impacts: National Wildlife Federation v. Federal Energy Regulatory Commission

The Court of Appeals for the District of Columbia Circuit also addressed cumulative impacts in *National Wildlife Federation* v. *Federal Energy Regulatory Commission*,[215] and upheld a license issued by FERC for the first phase of a hydroelectric plant in Arkansas. The EIS prepared for the project looked only at the environmental impacts of Phase I, although construction of Phase II, while not inevitable, was reasonably foreseeable. The plaintiffs had challenged the issuance of the license for Phase I, asserting that FERC violated NEPA by not assessing the potential impacts of Phase II in deciding whether to approve Phase I. The court reasoned that Phase II of the project was not yet proposed and that "NEPA merely requires an agency to consider all other *proposed* actions that may, along with the proposed action in issue, have a cumulative or synergistic impact on an environment."[216]

It should be noted that the court seems to have confused the requirement to consider all connected or cumulative *actions* together in the same comprehensive EIS,[217] with the requirement to assess the cumulative *impacts* of the proposal and other reasonably foreseeable future actions.[218] Only actual proposals, as defined in the Council on Environmental Quality (CEQ) regulations,[219] need be considered together in one EIS. Once the scope of the EIS has been determined, however, the agency is required to look at cumulative impacts of "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person

undertakes such other actions."[220]

5. **Functional Equivalence and EPA Compliance with NEPA**

a. **State of Alabama ex rel. Siegelman v. Environmental Protection Agency**

In *State of Alabama ex rel. Siegelman* v. *Environmental Protection Agency*,[221] the Court of Appeals for the Eleventh Circuit was asked to review whether the Environmental Protection Agency's (EPA) compliance with the Resource Conservation and Recovery Act (RCRA) was the "functional equivalent" of compliance with NEPA. Plaintiffs had brought suit against EPA for issuing a final operating permit to a hazardous waste management facility without preparing an EIS. The district court had ruled that EPA was not required to comply with NEPA when discharging its permitting duties under RCRA since RCRA placed requirements on EPA that were functionally equivalent to the requirements of NEPA.

The court of appeals, while acknowledging that NEPA applies to all federal agencies, noted that most circuits have recognized that EPA does not have to comply with NEPA, inasmuch as its own legislative mandate sets forth specific procedures for considering environmental issues that are the functional equivalent of the EIS process. The court found that RCRA is the functional, although not the structural or literal, equivalent and more specific counterpart of NEPA, and held that EPA did not have to comply with NEPA in deciding whether to issue a RCRA permit.

b. **Schalk v. Reilly**

Another case involving EPA compliance with NEPA is *Schalk* v. *Reilly*.[222] There, plaintiff asserted that EPA violated NEPA by failing to prepare an EIS for a proposed removal action under the Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA). Under CERCLA and the 1986 Superfund Amendments and Reauthorization Act (SARA), EPA is authorized to undertake or to order removal or remedial actions to protect public health, welfare, or the environment when it determines that release of a hazardous substance poses an imminent and substantial danger.

To facilitate expeditious cleanups of hazardous waste sites, however, CERCLA/SARA limits the availability of citizen suits to challenge particular cleanup actions:

> "No Federal court shall have jurisdiction under Federal law...to review any challenges to removal or remedial action selected... except...
>
> > (4) An action...alleging that the removal or remedial action taken...or secured...was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."[223]

The court, citing the "obvious meaning" of the statute, concluded that when a CERCLA remedy has been selected, no challenge, including a NEPA challenge, to the cleanup may be made prior to completion of the remedy.[224]

C. District Courts

1. Condemnation Actions

a. United States v. 27.09 Acres of Land

District courts in Illinois and New York examined the United States Postal Service's (USPS) NEPA compliance for condemnation actions. In *United States* v. *27.09 Acres of Land*[225], the USPS brought a condemnation action to acquire land owned by Westchester County, New York, for a postal facility. The county resisted, arguing that the USPS could not condemn the land until it had completed its NEPA process. An environmental assessment (EA) had been prepared for the site, but the USPS had begun the condemnation proceeding for the property prior to completing the public comment period as required by USPS regulations and prior to issuing a finding of no significant impact (FONSI) as required by the CEQ regulations.

The county argued that the attempted condemnation of the site represented a commitment of resources ($10 million) that precluded unbiased consideration of other, less damaging alternative sites and predetermined the outcome of the NEPA review. The USPS responded that, while it must comply with NEPA prior to actual construction of the facility, such compliance need not precede condemnation because the agency may resell the land or put it to a different use if it decides not to construct the facility there.

The district court sided with the USPS, stating that the condemnation action did not represent an irretrievable commitment of resources and that if, once the NEPA process had been completed, the USPS decides not to build, the agency could dispose of the land or use it for a different purpose. The court found that a condemnation action was separable from the issue of the use to which the land would be put.

b. **Village of Palatine v. United States Postal Service**

However the decision in *Village of Palatine* v. *United States Postal Service*[226] demonstrates the difficulty of pre-decisional acquisition of property. There the village sought to enjoin the USPS from constructing a mail distribution center on land the USPS had purchased from a private owner. In 1987, before conducting any environmental analysis, the USPS purchased an option on the parcel of land in question for a non-refundable $400,000; if the option were exercised, the purchase price was to be $9.5 million.

The option was good until March 31, 1988. The USPS issued a draft EA on March 23; the option was exercised on March 31; and a final EA and FONSI were issued in May 1988.

At the urging of the village, the USPS agreed in late 1988 to consider an alternative site. As the court stated, although the USPS agreed to study another site and even conceded that the alternative was viable, the agency indicated that it wanted to proceed at the original site because of the time and money it had already invested in that location.

The village filed suit, seeking to enjoin the USPS from constructing the facility on the site it had acquired until after it had complied with NEPA and other pertinent statutes and regulations. In ruling on the USPS motion to dismiss, the court recognized that the USPS had substantially modified the proposed facility after issuance of the EA in May 1988, and concluded that the record did not demonstrate that the USPS had fully considered all the relevant environmental factors in its EA.

Further the court stated that the USPS was obligated to evaluate a range of

alternatives, including alternative sites. While the EA indicates that the USPS has considered 28 sites, it failed to adequately explain why the USPS had rejected those alternative sites. The USPS motion to dismiss was denied.

2. **Injunctive Relief: Elliott v. U.S. Fish and Wildlife Service**

The Vermont district court was asked in *Elliott* v. *U.S. Fish and Wildlife Service*[227] to issue a temporary restraining order and a preliminary injunction to halt release of chemical "lampricides" into streams feeding into Lake Champlain. After preparing an EIS and a record of decision in accordance with NEPA, the Fish and Wildlife Service had decided to release the chemicals in order to reduce the population of sea lampreys--a species of parasitic fish that preys on sports fish--in the lake. The plaintiffs claimed that FWS had violated NEPA and moved to enjoin the project, arguing that the alleged procedural violation of NEPA demonstrated "irreparable injury." The court disagreed:

> "Violations of the procedures required by NEPA do not by themselves constitute irreparable harm sufficient to justify injunctive relief. The alleged harm must stem from the government action sought to be enjoined and must be of the sort that the statutes relied upon are designed to avert."[228]

The motion for a temporary restraining order and an injunction was denied.

3. **Climate Change Impacts: Foundation on Economic Trends v. Watkins**

The issue of assessing climate change impacts in the NEPA process was presented in *Foundation on Economic Trends* v. *Watkins*.[229] In that case, plaintiffs filed suit against the departments of Energy, Interior, and Agriculture, seeking to enjoin certain actions taken by those agencies that, plaintiffs stated, contribute to the problem of global warming. Plaintiffs alleged that the agencies were required to assess the impacts of those actions and their contributions to the "greenhouse effect" in NEPA documents.

Ruling on the defendants' motion to dismiss on procedural grounds, the district court held that plaintiffs were not seeking an advisory opinion, that the actions challenged were ripe for review, and that plaintiffs did have standing to sue.

With respect to the standing issue, plaintiffs asserted that the injury they suffered was deprivation of information resulting from the defendants' failure to comply with NEPA. The court noted that "the concept of informational standing is well-recognized in this circuit",[230] and found that

> "the Plaintiffs have specifically identified federal actions which they allege fail to comply with NEPA. Moreover, they have specifically identified the environmental zone, the global atmosphere, which is affected by the government's actions."[231]

Defendants' motion to dismiss was denied.[232]

4. **Extraterritorial Application of NEPA: Greenpeace USA v. Stone**

In *Greenpeace USA* v. *Stone*[233], the United States District Court for the District of Hawaii examined the application of NEPA to the removal of U.S. chemical munitions stored in the Federal Republic of Germany (FRG) and transport of the munitions to Johnston Atoll, a U.S. territory in the Pacific Ocean, for subsequent destruction. Pursuant to commitments that President Reagan and President Bush had made to German Chancellor Kohl to remove the munitions, and also in accordance with a congressional mandate that the munitions be destroyed, the Department of the Army undertook a joint plan with the West German Army to remove the chemical munitions from FRG territory. The United States would then transport the munitions to Johnston Atoll for destruction at the Johnston Atoll Chemical Agent Disposal System (JACADS).

The Army had previously prepared two EISs for JACADS, one for its

construction and its operation to destroy a stockpile of chemical munitions already stored on Johnston Atoll, and one for the disposal of the solid and liquid wastes that the facility would produce. Following the President's decision and commitment to remove the munitions from the FRG, the Army proposed to use JACADS to destroy them and prepared a third JACADS EIS addressing the impacts associated with the handling, storage, and destruction of those munitions at the Johnston Atoll facility.

In addition, pursuant to Executive Order No. 12114 (Environmental Affects Abroad of Major Federal Actions), the Army prepared a Global Commons Environmental Assessment analyzing the environmental impacts of the tranoceanic shipment of the munitions from an FRG port to Johnston Atoll. In accordance with the Executive Order's provisions regarding major federal actions abroad in which the host nation is participating, the Army did not undertake analysis of the environmental impacts of movement of the munitions within the FRG.

Plaintiffs argued that the Army was required by NEPA to prepare a single, comprehensive EIS covering the removal, shipment, and destruction of the munitions, and sought to enjoin removal of the munitions from the FRG. In ruling on plaintiffs' motion for a preliminary injunction,[234] the district court stated that "it is not convinced NEPA applies extraterritorially to the movement of munitions in Germany or their transoceanic shipment to Johnston Atoll."[235]

The court recognized that "the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems," but that actions under NEPA "should be taken 'consistent with the foreign policy of the United States.'"[236] "Congress intended to *encourage* federal agencies to

consider the global impact of domestic actions and *may* have intended under certain circumstances for NEPA to apply extraterritorially."[237] However, "the court *must* take into consideration the foreign policy implications of applying NEPA within a foreign nation's borders to affect decisions made by the President in a purely foreign policy matter."[238]

With respect to the need to assess the environmental impacts of its actions within the FRG, and in the circumstances of this case, the court concluded that:

> "Imposition of NEPA requirements to that operation would encroach on the jurisdiction of the FRG to implement a political decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of expeditiously ridding West Germany of obsolete chemical unitary munitions."[239]

Further the court found that "[t]he transoceanic movement of the munitions is a necessary consequence of the stockpile's removal from West Germany," and thus "implicates many of the same foreign policy concerns which affect the movement of the weapons through West Germany..."[240]

For the transoceanic phase of the action, the Army did prepare an environmental assessment under Executive Order No. 12114. Although the court "cannot conclude...that Executive Order 12114 preempts application of NEPA to *all* federal agency actions taken outside the United States,"[241] the court was persuaded, again under the circumstances of this case, that NEPA did not require the Army to consider the global commons portion of the action in the same EIS that covers the Johnston Atoll facility.

Based on these findings, the court concluded that plaintiffs had not demonstrated

a likelihood of success on the merits sufficient for the imposition of a preliminary injunction. Plaintiffs motion for such injunctive relief was denied.

III. Notes and References

Key to Legal Citations and Explanation of Abbreviations

Reported Decisions, Notices, and Debates

North Slope Borough v. *Andrus*, 486 F.Supp. 332, 345 (D.D.C. 1979), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980). The decision in the case of North Slope Borough versus Andrus is reported at volume 486 of the Federal Supplement reporter (reporting decisions of the U.S. District Courts, in this case, a 1979 decision of the U.S. District Court in the District of Columbia beginning at page 332; succeeding page numbers, if any, contain the specific passage or proposition for which the citation is being offered; the decision was upheld (or affirmed) in part and overturned (or reversed) in part on other grounds unrelated to the proposition for which the citation to the earlier opinion is being offered at volume 642 of the Federal Reporter, Second Series (reporting decisions of the U.S. Courts of Appeals, in this case, a 1980 decision of the Court of Appeals for the District of Columbia Circuit) beginning at page 589.

The following authorities are similarly cited by volume, page number(s) and date of issuance:

[Vol.]	**U.S.** [Page]	United States Reports--decisions of the U.S. Supreme Court
	S.Ct.	West Publishing Co.'s report of cases decided by the U.S. Supreme Court
	Cong. Rec.	Congressional Record--compilation of Congressional debates
	Fed. Reg.	Federal Register--daily compilation of public regulations and legal notices of the federal government
	I.C.C.	Interstate Commerce Commission Reports--decisions of the Interstate Commerce Commission
	Envtl. L. Rptr.	Environmental Law Reporter--unofficial compilation of reported decisions and other material

Congressional Reports

S. Rep. No. 296, 91st Cong., 1st Sess. 4 (1969). Cited material appears in U.S. Senate Report Number 296, published during the 91st Congress, 1st Session in 1969, at page 4. H.R. Rep. No. indicates the U.S. House of Representatives' counterpart.

Statutory and Regulatory Authorities

42 U.S.C. § 4321 (1982). The statute or statutory language being cited, in this case the National Environmental Policy Act of 1969, is codified at title 42 of the main 1982 volume of the United States Code (containing the compilation of statutes currently in force), in section 4321; (West 1985) in a citation references the 1985 edition of West Publishing Co.'s annotated code.

40 C.F.R. § 1508.21 (1990). The regulation or regulatory language being cited is published in the 1990 edition of title 40 of the Code of Federal Regulations (containing the compilation of regulations currently in force), at section 1508.21.

Legislative Histories

[1976] U.S. Code Cong. & Admin. News 14, 58. The cited material, which generally has been drawn directly from Congressional reports and hearings, also may be found in the 1976 edition of the United States Code Congressional and Administrative News (containing a compilation of legislative histories and other such materials), beginning at page 14. Succeeding page numbers, if any, contain the specific passage or proposition for which the citation is being offered.

1. 42 U.S.C. § 4321 *et seq.* (1982).

2. Hardison, O.B., Jr., *Disappearing Through the Skylight: Culture and Technology in the Twentieth Century* 184 (New York: Penguin Group, 1989), p. 184.

3. Hayes, D., "Earth Day: one view," *EPA Journal* (Jan./Feb. 1990), 16(1): 24.

4. Compare S. Rep. No. 296, 91st Cong., 1st Sess. 4 (1969) ("We see increasing evidence of this inadequacy [to deal with environmental problems] all around us: ... critical air and water pollution problems; diminishing recreational opportunity; continuing soil erosion; the degradation of unique ecosystems; needless deforestation; the decline and extinction of fish and wildlife species ... and many, many other environmental quality problems") with 135 Cong. Rec. H6836, H6837 (daily ed. Oct. 10, 1989) ("We are concerned now--as we were when NEPA was enacted--about polluted rivers, dirty air, and unplanned development. But we did not worry then that Earth might someday suffer an even greater loss--the loss of the very features that distinguish it from its interplanetary neighbors: A healthy ozone layer; a proper balance between oxygen and carbon dioxide in the atmosphere; the ability to sustain human life") (statement of Congressman Studds).

5. Compare 115 Cong. Rec. 3698, 3700 (1969) ("What we should be doing is setting up institutions and procedures designed to anticipate environmental problems before they reach crisis stage. ... It is far cheaper in human, social, and economic terms, to anticipate these problems at an early stage and to find alternatives before they require the massive expenditures we are now obligated to make to control air, water, and oil pollution") (statement of Senator Jackson) with Reilly, "Aiming Before We Shoot: The Quiet Revolution in Environmental Policy," Address to the National Press Club, Sept. 26, 1990 (U.S.EPA, Office of Communications and Public Affairs at p. 5) ("We need to take a broader, more integrated look at the range of environmental programs we administer, and the response tools available to us, with an eye toward finding the most efficient and effective ways to reduce risk. Among the tools identified by [EPA's] Science Advisory Board are research, public education and information, technical assistance, and market incentives. And above all, we need to mobilize a national effort to *prevent* pollution before it's created in the first place") (emphasis in original).

6. 115 Cong. Rec. 40,416 (1969) (statement of Senator Jackson).

7. 115 Cong. Rec. 29,059 (1969) (statement of Senator Church).

8. *Staff of Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics*, 90th Cong., 2d Sess., *Report on Managing the Environment* 30 (Comm. Print 1968).

9. 115 Cong. Rec. 29,056 (1969) (statement of Senator Jackson).

10. *Library of Congress, Congressional Research Service, Environmental Policy Division, Congress and the Nation's Environment: Environmental Affairs of the 91st Congress, prepared for Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. xv (Comm. Print 1971).

11. See *Senate Comm. on Interior and Insular Affairs and House Comm. on Science and Astronautics*, 90th Cong., 2d Sess., *Congressional White Paper on A National Policy for the Environment* 11 (Comm. Print 1968): "The ultimate responsibility for protecting the human-serving values of our environment rests jointly with the legislative, executive, and judicial branches of our government."

12. See S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969): NEPA "will also provide a model and a demonstration to which State governments may look in their efforts to reorganize local institutions and to establish local policies conducive to sound environmental management."

13. *Congressional White Paper*, page 16:

> The system of free enterprise democracy must integrate long-term public interests with private economic prosperity. A full range of incentives, inducements, and regulations must be used to link the public interest to the marketplace in an equitable and effective manner. Manufacturing, processing, and the use of natural resources must approach the goal of total recycle to minimize waste control and to sustain materials availability. Renewable resources of air and water must be maintained and enhanced in quality for continued use. A broad base of technologic, economic, and ecologic information will be necessary. The benefits of preventing quality and productivity deterioration of the environment are not always measurable in the marketplace. Ways must be found to add to cost-benefit analyses nonquantifiable, subjective values for environmental amenities (which cannot be measured in conventional economic terms).

14. See 42 U.S.C. § 4331(c) (1982): "[E]ach person has a responsibility to contribute to the preservation and enhancement of the environment."

15. *Environmental Affairs of the 91st Congress*, page xv.

16. *Environmental Affairs of the 91st Congress*, page 12.

17. *Environmental Affairs of the 91st Congress*, page 245.

18. *Environmental Affairs of the 91st Congress*, page 245.

19. See for example, Fish and Wildlife Coordination Act of 1958, 16 U.S.C. § 661 *et seq.*; National Historic Preservation Act of 1966, 16 U.S.C. § 470 *et seq.*; Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*; and American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996.

20. *Report on Managing the Environment*, page 5 (emphasis supplied).

21. See S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969): "[T]he need to rationalize and better coordinate existing policies" for the environment extends not only to those areas afflicted by "the lack of a policy" but also to the "many specific and specialized legislative policies on some aspects of the environment."

22. Statement of CEQ Chairman Russell Train in *Hearings on Organizational Plans of the Council on Environmental Quality before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess. 37 (1970): "[W]e are dealing with a new animal here and there is a great deal of uncertainty on the part of agencies as to just what is required ... and these things are going to take a bit of time to get over."

23. See Library of Congress, Congressional Research Service, *Workshop on the National Environmental Policy Act prepared for the Subcomm. on Fisheries and Wildlife Conservation and Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 2 (Comm. Print 1976).

24. H.R. Rep. No. 316, 92d Cong., 1st Sess. 13 (1971) (emphasis in original).

25. H.R. Rep. No. 316, page 13 (emphasis in original).

26. H.R. Rep. No. 316, page 13.

27. See for example, *Calvert Cliffs Coordinating Comm.* v. *AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

28. *Ely* v. *Velde*, 451 F.2d 1130, 1138-1139 (4th Cir. 1971): "With regard to NEPA, the statutory requirement of a 'detailed statement ... on the environmental impact of the proposed action' places a heavy burden on the LEAA. To enable a court to ascertain whether there has been a genuine, not a perfunctory, compliance with NEPA, the LEAA will be required to explicate fully its course of inquiry, its analysis and its reasoning."

29. *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 422 (2d Cir.), *cert. denied* 409 U.S. 849 (1972).

30. H.R. Rep. No. 316, 92d Cong., 1st Sess. 16 (1971).

31. H.R. Rep. No. 316, page 38.

32. H.R. Rep. No. 316, page 38: "For example, the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) involves agency review and comment on projects which have an impact on wildlife resources; how can NEPA be effectively worked into the Act? Could existing procedures be used to facilitate the implementation of NEPA?"

33. 325 F.Supp. 728, 739 (E.D. Ark 1972).

34. See for example, H.R. 14103, 92d Cong., 2d Sess. (1972). This bill would have amended the National Environmental Policy Act to provide a temporary partial exemption from the requirements for the issuance of environmental impact statements.

35. See for example, *Hearings before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on National Environmental Policy Act Oversight*, 94th Cong., 1st Sess. (1975).

36. See for example, General Accounting Office, *Report to the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, Improvements Needed in Federal Efforts to Implement the National Environmental Policy Act of 1969* (May 1972).

37. See for example, Statement of Congressman Dingell in *Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries on Temporary Exemption from Sec. 102 Statements*, 92d Cong., 2d Sess. 28 (1972): "In perfect fairness, 102 requires really no specific amount of detail. It says you shall address yourself to certain questions, but it does not set out the amount of detail you have got to adhere to--does it?"

38. *Report to the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, Workshop on the National Environmental Policy Act*, 94th Cong., 2d Sess. 18 (Comm. Print 1976).

39. *1976 Workshop Report*, page 2. See also Statement of New Jersey DOT Commissioner Alan Sagner in *1975 Oversight Hearings*, page 141: "[There is] insufficient reliance on and duplication of State environmental assessments [in the EIS process]."

40. *1976 Workshop Report*, page 2.

41. *1976 Workshop Report*, page 11.

42. *1976 Workshop Report*, page 17.

43. General Accounting Office, *Report to the Senate Committee on Environment and Public Works, The Environmental Impact Statement--It Seldom Causes Long Project Delays But Could Be More Useful If Prepared Earlier* 5 (CED-77-99 August 1977).

44. See for example, *Senate Comm. on Interior and Insular Affairs, The Council on Environmental Quality -- Oversight Report*, 94th Cong., 2d Sess. 20 (Comm. Print 1976): "[T]here is a perceived need for integrating NEPA's substantive policy goals into the impact statement procedures required under 102(2)(C)."

45. Statement of CEQ Chairman Russell Peterson in *1975 Oversight Hearings*, page 208. Peterson also observed, perhaps somewhat optimistically, that "today these backlog problems have largely disappeared, and federal agencies have established procedures to integrate their EIS preparation into their planning and decisionmaking processes."

46. 3 C.F.R. § 123, 42 Fed. Reg. 26,967 (1977).

47. 40 C.F.R. § 1502.22, 51 Fed. Reg. 15,625 (1986). This provision deals with incomplete or unavailable information.

48. 40 C.F.R. § 1508.21 (1990).

49. 40 C.F.R. § 1502.7 (1990).

50. 40 C.F.R. § 1502.2(a) (1990).

51. 40 C.F.R. § 1501.2 (1990).

52. 40 C.F.R. § 1502.5 (1990).

53. 40 C.F.R. § 1500.2(c) (1990); see also 40 C.F.R. § 1502.25(a) (1990).

54. 40 C.F.R. § 1506.2(b) (1990); see also 40 C.F.R. § 1506.2(C) (1990).

55. 40 C.F.R. § 1500.2(d) (1990); see also 40 C.F.R. § 1506.6 (1990).

56. See 40 C.F.R. § 1501.7 (1990).

57. See 40 C.F.R. § 1502.21 (1990).

58. See 40 C.F.R. § 1506.3 (1990).

59. 40 C.F.R. § 1501.2(d) (1990).

60. Executive Office of the President, Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,028 (1981).

61. See 40 C.F.R. § 1506.5(a) (1990).

62. See 40 C.F.R. § 1506.5(b) (1990).

63. See CEQ, *Forty Most Asked Questions*, page 18,031. "[T]he term 'third party contract' refers to the preparation of EISs by contractors paid for by the applicant. *** The consulting firm is responsible to [the agency] for preparing an EIS that meets the requirements of the NEPA regulations...."

64. CEQ, *Forty Most Asked Questions*, page 18,029.

65. See for example, 36 C.F.R. § 800.13 (1990). This provision relates to the section 106 National Historic Preservation Act process.

66. See for example, *Harlem Valley Transp. Ass'n* v. *Stafford*, 500 F.2d 328, 337 (2d Cir. 1974).

67. 44 Fed. Reg. 10,807 (1979).

68. S. Rep. No. 499, 94th Cong., 2d Sess. 44 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News 14, 58.

69. S. Rep. No. 499, page 44.

70. See S. Rep. No. 499, page 44: "Of paramount concern to the Committee is the impact of rail abandonments on local communities, mostly rural in character."

71. See S. Rep. No. 499, page 44: "[T]he rail system in this Nation must not be so irreparably reduced in size that this energy and environmentally efficient mode would be incapable of meeting future transportation demands."

72. See for example, Docket No. AB-19 (Sub-No. 112), *Baltimore and Ohio Railroad Co. et al.--Abandonment--Georgetown Subdivision Located in Montgomery County, MD and the District of Columbia* (ICC Environmental Assessment), served May 15, 1986.

73. See 49 U.S.C. § 10905 (1982).

74. See 49 U.S.C. § 10905(c) (1982).

75. See 49 U.S.C. § 10905(d) (1982).

76. See 49 U.S.C. § 10905(e) (1982).

77. See *Chicago and North Western Transp. Co.* v. *U.S.*, 678 F.2d 665, 666 (7th Cir. 1982).

78. 16 U.S.C. § 1247(d) *as amended* Pub. L. 98-11, § 208, 97 Stat. 48 (1983).

79. 16 U.S.C. § 1247(d).

80. See 49 C.F.R. § 1152.29 (1989).

81. See *National Wildlife Federation* v. *ICC*, 850 F.2d 694, 702 (D.C. Cir. 1988).

82. See H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), *reprinted in* [1983] U.S. Code Cong. & Admin. News 112, 115.

83. See S. Rep. No. 499, page 116.

84. 49 U.S.C. § 10906 (1982).

85. See 49 C.F.R. § 1152.28 (1989).

86. See *Conn. Trust for Historic Preservation* v. *ICC*, 841 F.2d 479, 483 (2d Cir. 1988).

87. Title I, § 101(a)(5), Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 (1974).

88. See for example, *Illinois Commerce Com'n* v. *ICC*, 848 F.2d 1246, 1262 (D.C. Cir. 1988): Congress believed that even state governments needed "at least four months' advance notice about potential abandonments in order to fulfill their role of protecting local economic and transportation needs." (Mikva, Judge, who concurred in part and dissented in part).

89. 49 U.S.C. § 10904(e)(2) (1982).

90. 49 U.S.C. § 10904(e)(3) (1982).

91. 49 U.S.C. § 10904(a)(A)--(B) (1982).

92. 49 U.S.C. § 10904(a)(2)(C) (1982).

93. 49 U.S.C. § 10904(a)(3)(A)--(D) (1982).

94. 49 U.S.C. § 10101a(2) (1982).

95. 49 U.S.C. § 10904(b) (1982).

96. 49 U.S.C. § 10904(c)(1) (1982).

97. 49 U.S.C. § 10904(c)(2)--(3) (1982).

98. See *Abandonment of R. Lines & Discontinuance of Serv.*, 365 I.C.C. 249, 252 (1981).

99. See *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975).

100. See for example, Docket No. AB-102 (Sub-No. 13), *Missouri-Kansas-Texas Railroad Company--Abandonment--In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO* (not printed) served March 16, 1987.

101. See 36 C.F.R. Part 800 (1989).

102. See 49 C.F.R. § 1105.7(c) (1989).

103. 49 C.F.R. § 1105.3 (1989).

104. *Abandonment of R. Lines*, page 250.

105. *Revision of Abandonment Regulations*, 367 I.C.C. 831, 841 (1983).

106. *Revision of Abandonment Regulations*, page 841.

107. See Letter of T. F. King, Director, Office of Cultural Resource Preservation, ACHP to W. R. Southard, Director, Office of Transportation Analysis, ICC dated January 21, 1987, transmitting PMOA approved by ACHP for execution by ICC. The OTA director is responsible for administration of ICC's NEPA rules. See 49 C.F.R. § 1105.2 (1989).

108. See 49 C.F.R. § 1152.21 (1989).

109. See 49 C.F.R. § 1105.6(b)(1) (1989).

110. See 40 C.F.R. § 1506.5(b) (1990).

111. See CEQ, *Forty Most Asked Questions*, page 18,037.

112. Compare *Flint Ridge Development Co.* v. *Scenic Rivers Association*, 426 U.S. 776, 787-88 (1976) with *Jones* v. *Gordon*, 792 F.2d 821, 826 (9th Cir. 1986).

113. See Docket No. AB-19 (Sub-No. 112), *Baltimore and Ohio Railroad Co.--Abandonment of the Georgetown Subdiv. Located in Montgomery County, Md. and the District of Columbia*, served May 27, 1986.

114. 40 C.F.R. § 1508.9(b) (1990).

115. See *Northwest Coal. for Altern. to Pesticides* v. *Lyng*, 844 F.2d 588, 591 (9th Cir. 1988).

116. See CEQ, *Forty Most Asked Questions*, page 18,027.

117. See for example, *Public Serv. Co.* v. *U.S. Nuclear Regulatory Com'n*, 582 F.2d 77, 81 (1st Cir. 1978). See also *Robertson* v. *Methow Valley Citizens Council*, 109 S.Ct. 1835, 1846 (1989): Consistent with the "requirement that an EIS contain a detailed discussion of possible mitigation measures [which] flows from both the language of the Act and, more

expressly, from CEQ's implementing regulations ... the EIS will discuss the extent to which adverse effects can be avoided."

118. *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

119. See CEQ, *Forty Most Asked Questions*, page 18,027.

120. Executive Office of the President, Council on Environmental Quality, *Environmental Quality 1986*, 17th Annual Report (Washington, D.C.: U.S. Government Printing Office, 1988), page 236.

121. See CEQ, *Forty Most Asked Questions*, page 18,027: "An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed ... *if it is reasonable*." (emphasis supplied).

122. See 40 C.F.R. § 1508.23 (1990).

123. S. Rep. No. 499, page 44.

124. See Docket No. AB-32 (Sub-No. 32), *Report Concerning the Effect of Abandonment of a Segment of the Hillsboro Branch, Boston and Maine Railroad, Upon the Historical Integrity of the Monadnock Paper Mills, Bennington, New Hampshire* 4 (served Jan. 22, 1986).

125. *Monadnock Paper Mills Report*, pages 1-2.

126. *Monadnock Paper Mills Report*, page 11.

127. See Finance Docket No. 31701, *Milford--Bennington Railroad Company, Inc.--Acquisition--Boston and Maine Corporation Hillsboro Branch*, filed June 21, 1990.

128. See Interstate Commerce Commission, *1989 Annual Report*, 103rd Annual Report (Wasgington, D.C.: U.S. Government Printing Office, 1990), page 118.

129. Compare 49 U.S.C. § 10505 with 49 U.S.C. § 10904 and 49 U.S.C. § 10327 (1982).

130. See *Illinois Commerce Com'n* v. *ICC*, 848 F.2d 1246, 1259-60 (D.C. Cir. 1988).

131. See 49 C.F.R. § 1152.50(d)(3). In Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377, 380 (1989), the ICC declared that it was "unwilling to expand our notice requirements for the exemption beyond Federal Register publication," currently provided within 20 days of the filing of a notice of abandonment exemption. See also *Illinois Commerce Com'n* v. *ICC*, page 1260.

132. ICC, consistent with the opinion in *Illinois Commerce Com'n* v. *ICC*, completes the environmental process prior to the *effectiveness* of any abandonment exemption decision. But see *Sierra Club* v. *Marsh*, 872 F.2d 497, 500 (1st Cir. 1989): "*When a decision to which*

NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." (emphasis in original).

133. S. Rep. No. 121, 101st Cong., 1st Sess. 122 (1989):

> The Committee is concerned that the ICC has tended to adopt narrow interpretations of such statutes as the 1983 Rail Banking Act.... ICC should consider and adopt new policies and procedures to foster the preservation of rail corridors for future transportation and alternative uses. * * * The Committee is interested in protecting existing rail corridors, especially those abandoned (or at risk) ones which may be lost to alternative uses.

134. See *Illinois Commerce Com'n* v. *ICC.*

135. National League of Cities, Policy Item No. 5(c), approved Dec. 7, 1988.

136. Caldwell, L., "The National Environmental Policy Act: retrospect and prospect, 6 Envirn. L. Rptr. 50,030 (December 1976).

137. 42 U.S.C. § 4331(b)(4) (1982).

138. 16 U.S.C. § 470f (West 1985).

139. 16 U.S.C. § 470f (West 1985).

140. See 36 C.F.R. Part 800 (1990).

141. *Preservation Coalition, Inc.* v. *Pierce*, 667 F.2d 851, 858-859 and note 2 (9th Cir. 1982): "Of course, Advisory Council decisions are of greater weight for NHPA purposes, where their role is prescribed by statute, than for NEPA purposes."

142. *Preservation Coalition, Inc.* v. *Pierce*, page 859.

143. *Morris Cty. Trust for Historic Preserv.* v. *Pierce*, 714 F.2d 271, 282 (3rd Cir. 1983).

144. H.R. Rep. No. 590, 95th Cong., 1st Sess. 89 (1977) 89; *reprinted in* [1978] U.S. Code Cong. & Admin. News at 1450, 1496.

145. H.R. Rep. No. 590, page 149.

146. H.R. Rep. No. 590, page 52.

147. H.R. Rep. No. 599, page 52.

148. See 43 U.S.C. §§ 1331(p), 1344(b)(3), 1346(a) (by implication), and 1351 (e)-(h), and (k) (West 1986).

149. *Village of False Pass* v. *Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

150. H.R. Rep. No. 590, page 122.

151. *Secretary of the Interior* v. *California*, 464 U.S. 312, 337 (1984).

152. 43 U.S.C. § 1346(a)(2) (West 1986).

153. See 43 U.S.C. § 1346(c) (West 1986).

154. H.R. Rep. No. 590, page 167.

155. H.R. Rep. No. 590, page 167.

156. See *Village of False Pass* v. *Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

157. *Village of False Pass*, page 609..

158. 16 U.S.C. § 1536(a)(2) (West 1985).

159. 50 C.F.R. § 402.02 (1989). The biological assessment "may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act." 50 C.F.R. § 402.06(a) (1989).

160. 50 C.F.R. § 402.14(g)(8) (1989).

161. 50 C.F.R. § 402.02 (1989).

162. 50 C.F.R. § 402.15(a) (1989).

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

164. *North Slope Borough* v. *Andrus*, 486 F.Supp. 332, 345 (D.D.C. 1979), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980).

165. See generally U.S. Department of the Interior, Minerals Management Service, *Protected Species Workshop* (Portland, ME: MMS, 1990).

166. 43 U.S.C. § 1346 (West 1986).

167. General Accounting Office, *Offshore Oil and Gas: Environmental Studies Program Meets Most User Needs but Changes Needed*, GAO/RCED-88-104 (Washington, D.C.: GAO, 1988), page 11.

168. *GAO*, page 11.

169. *Conservation Law Foundation* v. *Watt*, 560 F.Supp. 561, 572 (D.Mass. 1983), *aff'd* 716 F.2d 946 (1st Cir. 1983).

170. 16 U.S.C. § 1536(d) (West 1985).

171. H. Con. Rep. No. 697, 96th Cong. 1st Sess. 12 (1979), *reprinted in* [1979] U.S. Code Cong. & Admin. News 2572, 2576.

172. H. Con Rep. No. 697, page 12. Formal consultation concludes within 90 days after initiation unless extended by mutual agreement. See 50 C.F.R. § 402.14(e) (1989).

173. 50 C.F.R. § 402.14(k) (1989).

174. See 50 C.F.R. § 402.14(k)(1)--(5) (1989).

175. See for example, *North Slope Borough* v. *Andrus*, 642 F.2d 589, 609 (D.C. Cir. 1980): This opinion discusses "'uncertainty' as a problem an EIS must reckon with" apart from section 7 ESA requirements in OCS lease sale decisions.

176. 40 C.F.R. § 1506.1(a) (1990).

177. See for example, *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 446 F.2d 1013, 1027 (5th Cir. 1971), *cert. denied*, 701 U.S. 933 (1972).

178. 40 C.F.R. § 1506.1(c)(1)--(2) (1990). Additionally, such interim action must not "prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives." 40 C.F.R. § 1506.1(c)(3) (1990). See also *Commonwealth of Massachusetts* v. *Watt*, 716 F.2d 946, 952-53 (1st Cir. 1983).

179. See for example, *North Slope Borough* v. *Andrus*, 486 F.Supp. 332, 346-48 (D.D.C. 1979), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 589, 605-06 (D.C. Cir. 1980).

180. See Staff of Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics, 89th Cong., 2d Sess., *Report on Environmental Pollution* 5 (Comm. Print 1966).

181. See *Report on Environmental Pollution*, page 5.

182. *Robertson* v. *Methow Valley Citizens Council*, 109 S.Ct. 1835, 1849 (1989).

183. *Robertson*, page 1848, citing 40 C.F.R. § 1502.22.

184. See e.g., 40 C.F.R. § 1508.27 (1990).

185. *Marsh* v. *Oregon Natural Resources Council*, 109 S.Ct. 1851, 1859 (1989).

186. Statement of the President on Outer Continental Shelf Oil and Gas Development, 26 Weekly Comp. Pres. Doc. 1006 (June 26, 1990) (emphasis in original).

187. Presidential statement, page 1007 (emphasis in original).

188. Jackson, H., "Overview on Environmental Problems," Lecture at the University of Pennsylvania Engineering School in Philadelphia (Unpublished manuscript, March 31, 1971) (emphasis supplied).

189. U.S. Environmental Protection Agency, *Reducing Risk: Setting Priorities and Strategies for Environmental Protection* (Washington, D.C.: EPA, Science Advisory Board, September 1990), page 1.

190. EPA, *Reducing Risk*, pages 1-2.

191. *Report on Managing the Environment*, page 17.

192. EPA, *Reducing Risk*, page 9: "For example, as the extent and quality of saltwaterestuaries decline, both human health and local economies can suffer. As soils erode, forests, farmlands, and waterways can become less productive. And while the loss of species may not be noticed immediately, over time the decline in genetic diversity has implications for the future health of the human race."

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

194. 110 S. Ct. 3177 (1990).

195. The motion was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP). The plaintiffs had survived an earlier motion to dismiss under FRCP 12(b).

196. *National Wildlife Federation* v. *Burford*, 699 F. Supp. 327 (D.D.C. 1988).

197. *National Wildlife Federation* v. *Burford*, 878 F.2d 422 (D.C. Cir. 1989).

198. 915 F.2d 1308 (9th Cir. 1990).

199. 36 C.F.R. §§ 223.113, 223.116(a)(5).

200. 914 F.2d 179 (9th Cir. 1990).

201. Pub. L. No. 101-121, 103 Stat. 743 (1989). This section denies judicial review of Forest Service plans on the sole basis that the plans, in their entirety, are outdated.

202. 914 F.2d at 181.

203. 914 F.2d at 182.

204. 914 F.2d 1311 (9th Cir. 1990).

205. Pub. L. No. 101-121, 103 Stat. 701, 754-50 (1989).

206. 915 F.2d 167 (5th Cir. 1990).

207. 915 F.2d at 170.

208. 916 F.2d 13 (D.C. Cir. 1990).

209. 33 U.S.C. § 1344.

210. As a preliminary matter, the court also examined the plaintiffs' claim that Maryland improperly segmented the rail project to avoid preparing NEPA documents on the 22.5 mile segment. The court stated that "[t]he segmentation cases are distinquishable because they involve the question of whether a *federal* project has been illegally segmented to avoid compliance with NEPA." 916 F.2d at 16 n. 4 (emphasis in original).

211. 916 F.2d at 16.

212. 916 F.2d at 18.

213. 916 F.2d at 18-19.

214. 916 F.2d at 20.

215. 912 F.2d 1471 (D.C. Cir. 1990).

216. 912 F.2d at 1477 (emphasis in original).

217. See 40 C.F.R. § 1508.25(a).

218. See 40 C.F.R. §§ 1508.7, 1508.8, and 1508.25(c). See also *Fritiofson* v. *Alexander*, 772 F.2d 1225 (5th Cir. 1985).

219. See 40 CFR § 1508.23.

220. 40 CFR § 1508.7.

221. 911 F.2d 499 (11th Cir. 1990).

222. 900 F.2d 1091 (7th Cir. 1990).

223. 42 U.S.C. § 9613(h).

224. See also *Werlein* v. *United States*, 746 F. Supp. 887 (D. Minn. 1990).

225. 737 F.Supp. 277 (S.D.N.Y. 1990).

226. 742 F.Supp. 1377 (N.D. Ill. 1990).

227. 747 F.Supp. 1094 (D.Vt. 1990).

228. 747 F.Supp. at 1100 (citations omitted).

229. 731 F.Supp. 530 (D.D.C. 1990).

230. 731 F.Supp. at 532.

231. 731 F.Supp. at 532-33.

232. The United States Court of Appeals for the District of Columbia Circuit was also asked to address global warming in the context of a NEPA review. In a per curiam opinion on several consolidated cases captioned *City of Los Angeles and City of New York* v. *National Highway Traffic Safety Administration*, 912 F.2d 478 (D.C. Cir. 1990), the court found that petitioner, Natural Resources Defense Council, had standing under NEPA to challenge defendant's Corporate Average Fuel Economy (CAFE) standards for model year 1989 on the grounds that those standards could contribute to global warming which would adversely affect its members. On the merits, however, the court could not conclude that the agency had acted arbitrarily or capriciously in deciding not to prepare an EIS before issuing the CAFE standards.

233. 748 F. Supp. 749 (D. HI. 1990).

234. The court had earlier denied plaintiffs' motion for a temporary restraining order.

235. 748 F.Supp. at 757.

236. 748 F.Supp. at 759, citing NEPA, 42 USC § 4332(F).

237. 748 F.Supp. at 759 (emphasis in original).

238. 748 F.Supp. at 759 (emphasis in original).

239. 748 F.Supp. at 760.

240. 748 F.Supp. at 763.

241. 748 F.Supp. at 762 (emphasis in original).

Trends in NEPA Litigation

Over the past eight years the number of cases filed against federal departments and agencies on the basis of the National Environmental Policy Act (NEPA) has dropped consistently: 1989 was no exception. Table 5-1 indicates that during 1989 only 57 cases were filed, almost half the number of the prior year. The number of injunctions is down by nearly half with only five issued in 1989.

The Department of Agriculture and the Department of Transportation were the agencies with the largest number of NEPA cases filed against them; each with 15 lawsuits. Table 5-2 shows that other agencies had fewer cases filed against them.

Table 5-3 lists causes of action in NEPA cases filed. The lack of an environmental impact statement was the most frequent cause of action for most cases filed in 1989. Inadequate environmental impact statements were cited as the cause of a complaints in half the cases as in the 1988 survey.

Table 5-4 shows individual and citizen groups as the most frequent plaintiffs with 28 in 1989 cases. Environmental groups were not far behind with a total of 23. Once again the number has decreased from past years. Table 5-5 presents the number of plaintiffs and issues by agency.

See Table 5-6 for draft, final, and supplemental environmental impact statements filed by federal agencies during 1990. The total number of EISs filed in 1990 was 477.

Table 5-1. Cumulative NEPA Litigation Survey, 1970-1989.[1]

Year	Cases Filed	Injunctions	Most Frequent Defendant	Most Frequent Plaintiff	Most Common Complaint	Second Most Common Complaint
1974	189		DOT, HUD			
1975	152					
1976	119		DOT, DOI, HUD	Citizen and Environmental Groups	No EIS	Inadequate EIS
1977	108		DOT, DOD, DOI	Citizen and Environmental Groups	No EIS	Inadequate EIS
1978	114		DOT, DOD, DOI, HUD, EPA	Citizen and Environmental Groups Individuals	No EIS	Inadequate EIS
1979	139	12	DOT, HUD, DOI, USDA, DOD	Environmental Groups Citizen Groups and Individuals	No EIS	Inadequte EIS
1980	140	17	DOT, DOI, DOD, HUD, EPA	Individuals and Citizen Groups and Environmental Groups	No EIS	Inadequate EIS

1981	114	12	DOD, DOT, DOI, USDA, HUD, NRC	Environmental Groups Individuals and Citizen Groups	No EIS	Inadequate EIS
1982	17	19	DOI, COE, DOT, USDA, HUD, EPA	Individuals and Citizen Groups and Environmental Groups	Inadequate EIS	No EIS
1983	146	21	DOI, DOT, DOA, FERC, NRC	Individuals and Citizen Groups and Environmental Groups	No EIS	Inadequate EIS
1984	89	14	USDA, DOI, DOT	Environmental Groups and Individuals and Citizen Groups	Inadequate EIS	No EIS
1985	77	8	DOT, DOI, COE, FERC	Environmental Groups and Individuals and Citizen Groups	No EIS	Inadequate EIS
1986	71	16	DOT, DOI, USDA	Individuals and Citizen Groups and Environmental Groups	No EIS	Inadequate EIS

1987	69	3	DOI, DOT, USDA	Environmental Groups Individuals and Citizen Groups	No EIS	Inadequate EA and EIS
1988	91	7	COE, USDA, DOI, DOT	Environmental Groups and Indivduals and Citizen Groups	NO EIS	Inadequate EIS
1989	57	5	USDA, DOT	Individuals and Citizen Groups and Environmental Groups	NO EIS	Inadequate EIS

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[1] 1970 - 1975: A cumulative survey on these years was published in the 1976 Annual Report. By June 30, 1975, 332 NEPA cases had been completed, resulting in 54 injunctions. 322 cases were still pending with 65 injunctions. The most frequent defendants were the Departments of Transportation and Housing and Urban Development.

Table 5-2. NEPA cases by agency, 1989.

Agencies	Number of Cases Filed	Number of 1989 Cases Resulting in Injunctions	Number of Injunctions in 1989 from Pre-1989 Cases
Environmental Protection Agency	1	0	0
Federal Energy Regulatory Commission	1	0	0
Interstate Commerce Commission	5	0	0
National Aeronautics and Space Administration	1	0	0
Nuclear Regulatory Commission	3	0	0
Department of Agriculture	15	2	2
Department of the Army	1	0	0
Department of the Army: U.S. Army Corps of Engineers	5	1	1
Department of Commerce	2	0	0
Department of Energy	3	0	0
Department of Housing & Urban Development	3	0	0
Department of the Interior	9	1	0
Department of Transportation	15	1	0
Department of the Navy	2	0	0
Total	57	5	3

5-3. Types of complaints filed under NEPA, 1989.

Causes of action	Number for 1989 Cases	Number for Pre-1989 Cases Resulting in Injunctions in 1989
Inadequate Environmental Impact Statement	16	2
No Environmental Impact Statement, when one should have been prepared	34	1
Inadequate Environmental Assessment	17	0
No Environmental Assessment, when one should have been prepared	4	0
No Supplemental Environmental Impact Statement, when one should have been prepared	5	0
Other	4	0
Total	80	3

Table 5-4. Plaintiffs for NEPA lawsuits, 1989.

Types of Plaintiffs	Number for 1989 Cases	Number for Pre-1989 Cases Resulting in Injunctions in 1989
Environmental Groups	23	2
Individuals or Citizen Groups	28	1
State Governments	3	1
Local Governments	2	0
Business Groups	11	0
Property Owners or Residents	10	0
Indian Tribes	2	0
Total	79	4

Table 5-5. Statistics on plaintiffs and issues for 1989 cases, by agency.

AGENCY	EPA	FERC	ICC	NASA	NRC	USDA	ARMY COE	DOC	DOE	HUD	DOI	DOT	NAVY
PLAINTIFF													
Environmental Groups			1		1	8		2	3		6	1	1
Individual Citizen Groups			2	1	2	4	1	3		3	1	10	1
State Governments		1	1					1					
Local Governments												2	
Businesses	1	1	1			4						4	
Property Owners or Residents		1	2			1					1	5	
Indian Tribes								1			1		
TOTAL	1	3	7	1	3	17	1	5	2	3	3	9	22	2
ISSUE													
Inadequate EIS		1		1		4		1		1		4	3	1
No EIS	1				2	9	1	3	2	1		4	10	1
Inadequate EA		1	1			4	1	1			3	1	4	1
No EA			3										1	
No Supplemental EIS												3	2	
Other			1		1	1				1				
TOTAL	1	2	5	1	3	18	2	5	2	3	3	12	20	3

Table 5-6. Environmental impact statements filed by federal agencies during 1990.

Agency	Totals by Subject Matter	Totals
US Department of Agriculture		136
Natural Gas and Oil: Drilling and Exploration	3	
Natural Gas and Oil: Transportation, Pipeline, Storage	3	
Power Facilities: Fossil	2	
Power Facilities: Transmission	2	
Municipal and Industrial Water Supply Systems (not Multi-Purpose)	1	
Watershed Protection and Flood Control	9	
Road Construction	1	
Land Acquisition or Disposal, Management Jurisdiction Transfer	1	
Parks, Recreation Areas, Wilderness Areas, National Seashores	34	
Forestry and Range Management	70	
Mining (non-energy)	4	
Comprehensive Resource Management	1	
Pesticides, Herbicides use	2	
Weather Modification and Methodology	2	
Miscellaneous Information	1	
US Department of Commerce		8
Wetlands, Estuary and Ocean Use (Sanctuary, Disposal, etc.)	5	
Fisheries	3	
US Department of Defense (Other Than Below)		0
US Department of the Air Force		19
Military Installations (Conventional, Chemical, Nuclear, etc.)	17	
Space Programs	1	
Sewage Treatment and Sewage Facilities	1	
US Department of the Army		9
Defense Systems	1	
Military Installations (Conventional, Chemical, Nuclear, etc.)	5	
Munitions Facilities	2	
Housing Subdivisions and New Communities	1	

Agency	Totals by Subject Matter	Totals
US Department of the Army, Corps of Engineers		46
Military Installations (Conventional, Chemical, Nuclear, etc.)	1	
Beach Erosion, Hurricane Protection, River/ Lake Bank Stabilization	3	
Navigation	7	
Multi-Purpose Impoundments	5	
Dredge and Fill	6	
Watershed Protection and Flood Control	19	
Other Water Projects	3	
Bridge Permits	1	
Parks, Recreation Areas, Wilderness Areas, National Seashores	1	
US Department of the Navy		19
Power Facilities: Conservation and Other	1	
Military Installations (Conventional, Chemical, Nuclear, etc.)	14	
Dredge and Fill	2	
Road Construction	1	
Research and Development (not already covered)	1	
US Department of Energy		11
Nuclear Development (e.g. Fuel)	2	
Natural Gas and Oil: Transportation, Pipeline Storage	2	
Regulatory: Allocation, Pricing	1	
Power Facilities: Hydroelectric	1	
Power Facilities: Transmission	1	
Radioactive Waste Disposal	2	
Research and Development (Not Already Covered)	2	
US Environmental Protection Agency		31
Mining	3	
Power Facilities: Fossil	1	
Hazardous and Toxic Substance Disposal	2	
Sewage Treatment and Sewage Facilities	7	
Municipal and Industrial Water Supply Systems (Not Multi-Purpose Impoundments)	1	
Mining (Non-Energy)	1	
Regulatory Activities (Not Already Covered)	3	
Wetlands, Estuary, and Ocean Use (Sanctuary, Disposal, etc.)	13	
US General Services Administration		4
Buildings for Federal Use	4	

Agency	Totals by Subject Matter	Totals
US Department of Housing and Urban Development		5
Pesticides, Herbicides Use	1	
Housing Subdivisions and New Communities	4	
US Department of the Interior		68
Nuclear Development (e.g., Fuel Reactors)	1	
Mining	6	
Natural Gas and Oil: Drilling and Exploration	9	
Power Facilities: Hydroelectric	2	
Hazardous and Toxic Substance Disposal	1	
Municipal and Industrial Water Supply System (Not Multi-Purpose Impoundments)	1	
Irrigation, Desalination of Return Flows, Agriculture Water Supply	2	
Multi-Purpose Impoundments	1	
Watershed Protection and Flood Control	1	
Other Water Projects	1	
Road Construction	1	
Land Acquisition or Disposal, Management Jurisdiction Transfer	5	
Parks, Recreation Areas, Wilderness Areas, National Seashores	14	
Wildlife Refuges, Fish Hatcheries	3	
Forestry and Range Management	1	
Mining (Non-Energy)	7	
Comprehensive Resource Management	8	
Pesticides, Herbicides Use	2	
Housing Subdivisions and New Communities	1	
Miscellaneous Information	1	
US Tennessee Valley Authority		3
Mining	1	
Navigation	2	
US Department of Transportation		100
Road Construction	76	
Airport Improvements	13	
Bridge Permits	4	
Mass Transportation	7	
US Federal Energy Regulatory Commission		8
Natural Gas and Oil: Transportation, Pipeline, Storage	3	
Power Facilities: Hydroelectric	5	
US National Aeronautics and Space Administration		4
Space Programs	4	

Agency	Totals by Subject Matter	Totals
US Department of Justice		6
Prison Construction	6	
TOTAL FEDERAL EISs		477

"CORRESPONDENCE TRACKING"

TYPE: MEMO FOR SENIOR STAFF DOCUMENT NUMBER: 9120487

****

FROM: BRADY, Phillip D.

TO: DR. BROMLEY

DATE OF
CORRESPONDENCE: 02/21/91

SUBJECT: MATERIALS FOR THE PRESIDENT AND GUIDELINES FOR PRESIDENTIAL PROCLAMATIONS.

****

ASSIGNED TO: D. Allan Bromley

ACTION REQUIRED:

****

SENDER'S DUE DATE: OSTP DUE DATE:

DATE COMPLETED:

****

COPIES TO:

****

WHITE HOUSE TRACKING #: CONTACT PERSON:

REMARKS:

DATE RECEIVED: 02/22/91 FILE: WHITE HOUSE ~~SENIOR STAFF~~ Memo

9120487

THE WHITE HOUSE

WASHINGTON

February 21, 1991

MEMORANDUM FOR SENIOR STAFF

FROM: Phillip D. Brady

SUBJECT: Materials for the President and Guidelines for Presidential Proclamations

Please find below certain reminders with respect to materials prepared for the President and our guidelines for Presidential proclamations.

Materials for the President

All materials for the President are routed through the Office of the Staff Secretary. The White House Office Staff Manual and the White House Correspondence Manual set forth detailed guidance on the proper formatting of the materials. In general:

-- Briefing memoranda

"Briefing papers" should be prepared for all meetings and events on the President's public or private schedule. Each memo should be prepared, coordinated, and forwarded by the "project officer" -- the senior staff member who has been assigned lead responsibility for the meeting or event.

Briefing papers should be concise -- ordinarily a single page. Talking points, if appropriate, are to be provided on 4x6 cards or on speech cards as an attachment to the memo. (Please see the attachment for guidelines as to when to use each type of card.)

Briefing memos (with 16 copies) must be delivered to this office no later than 3:00 PM on the business day before the scheduled meeting or event. If briefing papers do not meet this deadline, meetings may be cancelled.

-- Decision memoranda

Decision memos are prepared for substantive matters requiring the President's decision. These may originate from any senior staff office. Decision memos should be provided to this office at least 48 hours before the desired time of the President's decision. This allows for appropriate senior staff

clearance and time for the President to review the matter personally at his convenience.

-- Signature memoranda

Documents requiring the President's signature -- most commonly letters -- should be forwarded to this office with a brief explanatory cover memo. This should indicate the nature of the action involved, its relationship to approved Presidential policy, and the clearances and nonconcurrences of appropriate reviewing parties.

-- Information memoranda

Information memos are intended simply to convey information, not to elicit Presidential action. As with all other materials, they should be submitted to this office.

-- Telephone calls

Recommendations for telephone calls by the President should be submitted to this office using the form provided in the White House Staff Manual. If the call is to be placed to an event or should take place at a specific time, a scheduling proposal should first be submitted for consideration.

Every effort will be made to ensure that materials are processed expeditiously. However, certain documents -- fact sheets, draft legislation, major decision memos, and the like -- usually require staffing and coordination among other offices. We like to have at least 24 hours for the staffing of documents for the President or for public release; we prefer 48 hours for lengthy or potentially controversial documents. This ensures that all relevant White House offices have a fair opportunity to comment before a decision is made.

The President's schedule should also be taken into consideration when submitting materials for the President. For example, when the President travels, it routinely takes longer for a decision to be reached or approval to be granted.

Presidential Proclamations

Ordinarily, the President will issue a proclamation only at the request of a joint resolution of Congress. Those that are issued traditionally, such as Thanksgiving Day and Armed Forces Day, are exceptions to this rule.

Occasionally, other exceptions are made, using as criteria the constituency requesting the proclamation, the importance of the proclamation itself, and the degree to which the subject fits with the President's agenda or his personal interests. Thus, in April 1989, the President issued a proclamation for "Crime Victims Week," even though this was not requested by Congress. Similarly, the President recently issued a proclamation for a "National Day of Prayer" on his own initiative.

Yet a Congressional request does not automatically mean that the President will issue a proclamation. Some requested proclamations are simply inappropriate. Subjects which are appropriate for Presidential proclamations include:

1. Those that in some way are designed to better the citizenry or the national life. This is the broadest category. Proclamations are appropriate for "National Cancer Awareness Week," "American Heart Month," or the "National Day of Prayer." Included in this category are proclamations which highlight ties to foreign countries or our nation's heritage, such as "Pan American Week," "Greek Independence Day," or "General Pulaski Memorial Day."

2. Those that are designed to recognize a particular industry, though without appearing to favor one industry at the expense of another -- for instance, "National Agriculture Day" or "World Trade Week."

3. Those that recognize certain groups of Americans, including certain non-profit organizations, for special praise. Examples of this type include "National Former Prisoners of War Day," "American Red Cross Month," or "Federal Employees Recognition Week."

4. Those that recognize past events of an historic nature.

The President will also not issue proclamations commemorating a date prior to passage of the joint resolution. Once a joint resolution requesting a proclamation passes one house of Congress, OMB will normally ask a Department or agency to prepare a draft proclamation, which OMB then forwards to

Correspondence for editing and clearance. The process works most efficiently if these Department and agency drafts are provided to OMB alone, and not to other White House offices.

Presidential Messages

Some subjects may warrant a Presidential message rather than a proclamation. For example, Congress requested that June 13, 1984, be commemorated as "Harmon Killebrew Day." Clearly, it would be more appropriate to send a message of greetings to an event honoring Killebrew.

More broadly, Presidential messages are utilized to recognize various special occasions, events, or circumstances. Such messages are generally limited to major national conventions, annual meetings, or events of significant national organizations; commemorative events; political/Congressional events; tributes and testimonials; and significant anniversaries of non-profit organizations.

With respect to charitable or fundraising events, the Office of the President is generally not associated with a specific fundraising event. There is a limited exception to this rule for major fundraising organizations such as the American Red Cross, American Cancer Society, etc., at their annual dinners or conventions. Another exception would be events that the President or the First Lady have specifically endorsed.

Events of a commercial nature or events sponsored by a profit-making organization generally do not qualify for Presidential messages.

Thank you for your assistance with respect to the above.

ATTACHMENT
Talking Points for Presidential Events

When the President requires talking points for an event, they should normally be provided on 4x6 cards. Each point should be brief -- preferably no more than two or three lines. Please type on one side of the card only, and please keep the number of cards to the absolute minimum necessary. The sample below shows the format talking points should take.

However, for events at which the President is standing to deliver remarks or at which he will be using a podium, talking points should be provided on half-sheets ("speech cards").

Offices which have HPLaserJet printers may wish to have the Computer Center instruct them on how to prepare appropriate half-sheets in large type. Other offices may ask the office of the Deputy Assistant to the President for Communications, Rm. 122, x2930, to prepare these half-sheets. However, offices must provide the approved talking points to Communications on a diskette in WordPerfect. This will save the necessity of retyping the talking points and will speed their completion.

TALKING POINTS

-- Talking points should be typed on 4x6 cards in this format.

-- They should be double-spaced between points.

-- Regular type may be used to print cards; orator or other large type should be used for speech cards.

-- Points should be brief and clearly worded for quick reference.

-- Xerox copies of the cards should be attached to the 16 copies of the briefing memo submitted to the Staff Secretary's office. For events outside the White House, two originals of the cards are required.

TYPE: WHITE HOUSE MEMO DOCUMENT NUMBER: 9120563

****

SPEECH: YES NO

FROM: SUPER, Kathy

DATE OF EVENT: 02/15/91

LOCATION OF EVENT: SHERATON WASHINGTON HOTEL, WASHINGTON, D.C.

TIME OF EVENT: 10:00AM

SUBJECT: APPROVED PRESIDENTIAL ACTIVITY: ADDRESS THE ANNUAL MEETING OF THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE.

****

RSVP:

CONTACT PERSON: ROBIN WOO

CONTACT NUMBER: 326-6466

****

INVITATION ACCEPTED? YES NO

****

COPIES TO: D. Allan Bromley
Ken Yale
Damar Hawkins

REMARKS:

DATE OF LETTER: 02/06/91 DATE RECEIVED: 02/06/91

FILE: WHITE HOUSE MEMO

9/20563

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

TO: Dr. Bromley

FROM: KATHY SUPER

SUBJECT: APPROVED PRESIDENTIAL ACTIVITY

EVENT: Address the Annual Meeting of the American Association for the Advancement of Science

DATE: Friday, February 15, 1991

TIME: 10:00 a.m.

DURATION: 30 minutes

LOCATION: Sheraton Washington Hotel, Washington, D.C.

ATTIRE: Business Suit

REMARKS REQUIRED: Yes

MEDIA COVERAGE: Open

FIRST LADY PARTICIPATION: Is Invited

ADDITIONAL INFORMATION:

CONTACT: Robin Woo
TELEPHONE: 326-6466

NOTE: PROJECT OFFICER, SEE ATTACHED CHECKLIST

Ed Rogers	Marlin Fitzwater	Ede Holiday
Phil Brady	David Demarest	David Valdez
Fred McClure	Fran Norris	USSS-PPD
Susan Porter Rose	Sig Rogich	Gary Walters
Patty Presock	John Keller	WHCA Audio/Visual
Chriss Winston	Bruce Caughman	WHCA Operations
Laurie Firestone	C. Boyden Gray	William Kristol
Paul Bateman	Laura Melillo	Jackie Kennedy
Debra Romash	John Herrick	Deb Anderson
Richard Trefry		

AJM 2/6/91