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# ADMINISTRATIVE AGENCY IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969: A CONCEPTUAL FRAMEWORK FOR EXPLAINING DIFFERENTIAL RESPONSE

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## INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> combines a statement of national environmental policy<sup>2</sup> with a set of procedural duties designed to assure the implementation of that policy throughout the federal government.<sup>3</sup> The Act directs federal agencies to interpret and administer "to the fullest possible extent" their policies and regulations in accordance with its policy statement,<sup>4</sup> making environmental protection part of the mandate of each federal agency. NEPA also instructs the agencies to use systematic, interdisciplinary methodologies in environmental impact studies,<sup>5</sup> and to improve the techniques through which they take into account environmental values in their planning and decision-making activities.<sup>6</sup>

Except for the procedural duties specified in Section 102, the Act provides no precise guidance for agency implementation and compliance, nor does it delegate responsibility for developing such guidance to any administrative body.<sup>7</sup> The Act's scant legislative history suggests that its drafters assumed that it would be largely self-implementing.<sup>8</sup> The statute simply directs each agency to develop its own

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1. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970) [hereinafter NEPA].

2. *Id.* § 101, 42 U.S.C. § 4321.

3. *Id.* § 102, 42 U.S.C. § 4332.

4. *Id.* § 102(1), 42 U.S.C. § 4332(1).

5. *Id.* § 102(2)(A), 42 U.S.C. § 4332(2)(A).

6. *Id.* § 102(2)(B), 42 U.S.C. § 4332(2)(B).

7. Dreyfus and Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 Nat. Res. J. 243 (1976) cite the Act's conference report as evidence that implementation guidance would be provided through extensive rule-making. They also note that an interpretive role was envisioned for the federal courts.

8. Dreyfus & Ingram, *Id.*, discuss the difficulty of determining the intentions of the legislators who participated in the formulation of NEPA. However, the use of the term "action-forcing" to describe the Act's environmental impact statements (EIS) requirement supports the view that at the very least, the Act's proponents expected it to catalyze

methods and procedures for integrating environmental values into agency decisionmaking, and to review their organic statutes for inconsistencies with NEPA's environmental policy.<sup>9</sup> The Council on Environmental Quality (CEQ), established by NEPA, only assists the agencies in carrying out the Act.<sup>10</sup>

Some of NEPA's proponents anticipated that the Act's mandatory procedural reforms would be sufficient to bring environmental concerns within the scope of agency consciousness. By requiring greater scrutiny and full public disclosure of the impacts of agency actions, the Act's supporters argued, it would assure informed consideration of previously neglected environmental values in agency decisionmaking. NEPA's critics were quick to assert that the Act might assure detailed disclosure of the environmental impacts of agency activities yet leave essentially unaltered the processes by which agency decisions are made. As a consequence, they believed, NEPA's procedural reforms would be inadequate to implement the Act's substantive environmental policy.

Controversy over NEPA's actual and potential impact on agency decisionmaking tends to gloss over the many political and practical differences that characterize the array of federal agencies which comprise the administrative process. These agencies differ markedly in power, purpose, and clientele.<sup>11</sup> At the time of NEPA's enactment, some agencies possessed technical expertise, staffing and monetary resources requisite to implement the Act. Others evidenced little experience in environmental management and lacked necessary internal structures and procedures to implement the Act. Still others,

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changes within the administrative process in and of itself. See generally *Hearings on S. 1075, S. 237 & S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. (1969) and Senate Comm. on Interior and Insular Affairs, *National Environmental Policy Act of 1969*, S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969). These and other relevant documents are discussed and supplemented by interview data in R. Andrews, *Environmental Policy and Administrative Change: The National Environmental Policy Act of 1969 (1970-71)*, (Ph.D. dissertation, Dept. of City and Regional Planning, U. of N.C. 1972), and T. Finn, *Conflict and Compromise: Congress Makes a Law, The Passage of the National Environmental Policy Act* (Ph.D. dissertation, Dept. of Gov., Georgetown U. 1972).

9. NEPA §§ 102(2)(B), 103, 42 U.S.C. §§ 4332(2)(B), 4333 (1970).

10. *Id.* § 102(2)(B), 42 U.S.C. § 4332(2)(B).

11. Organizational differentiation across the administrative process is considered in J. Davis, Jr., *An Introduction to Public Administration: Politics, Policy, and Bureaucracy* (1974) and I. Sharkansky, *Public Administration: Policy-Making in Government Agencies* (1970). More specialized analyses are presented in L. Salamon & G. Wamsley, *The Federal Bureaucracy—Responsive to Whom?* (unpublished paper presented at the Annual Meeting of the Midwest Pol. Sci. Ass'n., Chicago, Ill., May 1-3, 1975) and J. Hartmann, *Representative Bureaucracy: Variations in Specialization and Hierarchy in Sixty Federal Agencies* (unpublished paper presented at the Annual Meeting of the Am. Pol. Sci. Ass'n., San Francisco, Cal., Sept. 2-5, 1975).

while technically competent to implement NEPA, found it politically inexpedient to do so enthusiastically. Now, six years after NEPA's enactment, scholarly commentary is just beginning to refine our understanding of the importance of agency differences in explaining the Act's differential implementation across the administrative process.<sup>12</sup> In response to this research need, this paper presents the results of exploratory research that was designed to identify factors relevant to understanding how and why administrative agency response has varied.<sup>13</sup>

The research includes data obtained from interviews conducted during the summer of 1974 with more than thirty NEPA liaisons<sup>14</sup> and a variety of other knowledgeable informants involved in the implementation of NEPA. Table 1 identifies the agencies included in the study and classifies them into three types according to the extent of their involvement in environmental management activities prior to enactment of NEPA.<sup>15</sup> The interview schedule employed in studying these agencies was designed to identify internal agency characteristics and external forces associated with different rates and kinds of implementation activity.<sup>16</sup>

From the results of the research, a multi-phased conceptual framework was developed. The framework identifies four general phases of implementation activity observed during the first four and one-half years of the Act's operation and isolates the principal intervening variables associated with movement by an agency from one phase to another. The phases tend to occur as a progression, beginning with an "Interpretive Phase" in which agency leadership first recognizes the existence of the Act's requirements and implications. This phase tends to be followed by a "Formal Compliance Phase" in which

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12. For a critical evaluation of the research to date on NEPA, see Wandesforde-Smith, Schwartz & Johnston, *Policy Impact Analysis and Environmental Management: Review and Comment*, 3 Policy Studies J. (1975).

13. A complete report of the author's research is contained in his doctoral dissertation, *The National Environmental Policy Act of 1969: A Study of the Politics of Policy Implementation* (U. of Ill., forthcoming).

14. The Council on Environmental Quality (CEQ) has requested each agency involved in NEPA's implementation to designate a "NEPA liaison." This person then becomes responsible for maintaining an overview of his agency's implementation activities so as to enable him to receive and process any inquiries concerning these activities. Lists of NEPA liaisons are regularly published in the 102 Monitor.

15. The rationale underlying the classification scheme and the materials used to position each agency are presented in A. Wichelman, *The National Environmental Policy Act of 1969: A Study of the Politics of Policy Implementation* (Ph.D. dissertation, U. of Ill., forthcoming).

16. See Wichelman, *id.* See also the comments of Wandesforde-Smith *et al.*, *supra* note 12, noting the need to take into account the "interdependency among the agencies, courts, and interest groups . . . in explaining the impact of NEPA on environmental decisionmaking."

TABLE 1

A Classification of Selected Administrative Agencies  
By Extent of Their Pre-NEPA Involvement in Environmental Management

<i>Type I Agencies</i>	<i>Examples Studied*</i>
Agencies whose pre-NEPA responsibilities required substantial activity designed to protect or improve environmental quality	Department of Interior (DOI) Bureau of Outdoor Recreation (BOR) Bureau of Sport Fisheries and Wildlife Conservation (BSF) National Park Service (NPS) Department of Agriculture (DOA) Forest Service (AFS) Department of Transportation (DOT) Coast Guard (CGD) Water Resources Council (WRC)
<i>Type II Agencies</i>	<i>Examples Studied</i>
Agencies whose pre-NEPA responsibilities generally did not require substantial environmentally protective activity, but whose activities were constrained by environmental legislation	Department of Interior Bureau of Land Management (BLM) Bureau of Reclamation (IBR) Department of Agriculture Rural Electrification Administration (REA) Soil Conservation Service (SCS) Department of Transportation Federal Aviation Administration (FAA) Federal Highway Administration (FHWA) Department of Defense (DOD) Army Corps of Engineers (COE) Various other military agencies** Department of Commerce (DOC) Department of Housing and Urban Development (HUD) Atomic Energy Commission (AEC) Federal Communications Commission (FCC) National Science Foundation (NSF)
<i>Type III Agencies</i>	<i>Examples Studied</i>
Agencies whose pre-NEPA responsibilities seldom were considered to have any environmental significance	Department of Health, Education and Welfare (HEW)*** Department of Justice (JUS) Department of the Treasury (TRE) Federal Trade Commission (FTC) General Services Administration (GSA) Interstate Commerce Commission (ICC) Veterans Administration (VAD)

\*The Environmental Protection Agency (EPA), established on December 2, 1970, was also included in the study.

\*\*The military agencies studied were the Army (USA) and Navy (USN).

\*\*\*Excluding the Public Health Service.

implementation activity focuses on putting the procedural and structural adaptations required to comply formally with the Act into effect. A third or "Integrated Planning Phase" tends to follow, in which formal implementation activities are slowly integrated into ongoing agency decisionmaking procedures.<sup>17</sup> A final or "Programmatic Planning Phase" tends to complete the implementation process. During this phase, environmental values are integrated into the formulation of proposed agency legislation, programs, policies and regulations.<sup>18</sup>

The reader is cautioned that the activities which define the four phases of implementation are not mutually exclusive. They simply provide a convenient notation with which to discuss measurable shifts in the rates and kinds of implementation activity that characterize an agency or group of agencies at a given point in time. Although the research indicates that the phases tend to occur as a progression, whether any given agency moves from one phase to another is dependent on a variety of exogenous and intervening variables. Movement from one phase to another is not inevitable, nor is the possibility of retrogression ruled out.

#### THE INTERPRETATIVE PHASE

NEPA was signed into law by President Nixon on January 1, 1970. Although the White House had not supported the legislation in Congress,<sup>19</sup> the President used the opportunity to proclaim the 1970's as the decade in which "America [would pay] its debts to the past by reclaiming the purity of its air, its waters and our living environment."<sup>20</sup> Despite the President's endorsement, most administrative agencies initially exhibited a more reserved attitude toward the new legislation. This time period, during which the agencies first develop an awareness of NEPA, will be referred to as the "Interpretive Phase" of implementation.

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17. This paper follows the distinction between "decisions" and "decisionmaking" and "policies" and "policymaking" presented in J. Anderson, *Public Policymaking* 3, 10 (1975). Therein "policy" is defined as "a purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern." Policymaking "typically involves a pattern of action, extending over time and involving many *decisions*, some routine and some not so routine. Rarely will a policy be synonymous with a single decision." (Emphasis added.)

18. For similar attempts to delineate general patterns of NEPA implementation, see C. Ash, *Three Year Evolution*, 5 *Water Spectrum* 28-35 (1973), and Council in Environmental Quality, *Environmental Quality—1974: The Fifth Annual Report of the Council on Environmental Quality* 372-74 (1974).

19. T. Finn, *supra* note 8, at 432.

20. Statement by the President of the United States, Office of the White House Press Secretary, January 1, 1970.

Harrell Rodgers has posited four conditions with which to predict the degree of congruence between the content of a statute and the consequences it actually engenders:

- 1) The extent to which the regulated agree both that a legal standard has been established by a legitimate source and that the standard requires compliance;
- 2) The extent to which the law clearly and carefully defines both who is responsible for seeing that it is obeyed and the type and amount of compliance required;
- 3) The extent to which the regulated perceive that certain and severe sanctions will result from noncompliance; and
- 4) The extent to which those who are to receive the benefits of the law are cohesive and take strong actions to achieve their rights.<sup>21</sup>

When most agencies entered the Interpretive Phase shortly after NEPA's enactment,<sup>22</sup> none of these conditions were fully met. Although the agencies did not question the legitimacy of Congressional authority to make law, they did adopt a wait-and-see attitude toward whether Congress would require strict compliance with the Act. In so doing, the agencies tended to prefer discussions of NEPA's possible import to actions implementing the Act.<sup>23</sup> This tendency was supported by uncertainty about who would oversee the Act's implementation, whether interest group litigation demanding implementation would ensue, and what internal agency changes would be required to comply with NEPA's procedural reforms. Initially, therefore, agency implementation exhibits the general disposition to resist change frequently attributed to administrative agencies.<sup>24</sup>

Four important sources of resistance to implementation during the Interpretive Phase can be identified. These include actions by agency leadership, the characteristics of agency staff, the composition of agency clientele, and agency procedures and structures for routine decisionmaking.<sup>25</sup> The strength of these sources of resistance, com-

21. *Law as an Instrument of Public Policy*, 17 *Am. J. Pol. Sci.* 646 (1973).

22. A few agencies entered the Interpretive Phase later. These were agencies that were given responsibility for environmental management activities after NEPA's enactment. The Environmental Protection Agency, for example, was not established until December of 1970, nearly a year after the passage of NEPA.

23. C. Ash, *supra* note 18; Kreith, *Lack of Impact*, 15 *Environment* 26-33 (January-February 1973); A. Wichelman, *supra* note 15.

24. C. Lindblom, *Incrementalism and Environmentalism*, in *Managing the Environment* 83-84 (U.S. Environmental Protection Agency ed. 1973); L. Caldwell, *Environmental Quality as an Administrative Problem*, 900 *The Annals of the Am. Academy of Pol. and Social Sci.* 103-15 (1972); L. Jaffe, *Commentary: The Administrative Agency and Environmental Control*, 20 *Buffalo L. Rev.* 231-37 (1970); and, *see generally*, A. Downs, *Inside Bureaucracy* (1966); and H. Kaufman, *The Limits of Organizational Change* (1971).

25. These categories roughly follow those utilized by L. Salamon & G. Wamsley, *supra* note 11; and H. Kaufman, *id.*

bined with the degree of uncertainty that prevails about the implementation conditions posited by Rodgers, is especially important in determining whether and when an agency moves from the interpretation of NEPA to its implementation.

The actions of agency leadership are especially significant during the Interpretive Phase. In the absence of detailed implementation standards and procedures, court decisions, and other forms of administrative oversight, agency leaders provide agency staff with their only source of authoritative guidance on implementation. Agency leaders are also the ultimate source of staff rewards, patronage and promotions. Thus, the views they espouse set the parameters for the "proper" amount of staff implementation activity.<sup>26</sup> The respondents seldom reported changes in their respective agencies' capabilities for environmental analysis in the absence of a clear mandate from agency leadership for such changes.<sup>27</sup>

Type I agencies, for example, tend to be among the slowest to move through the Interpretive Phase despite their greater experience in environmental management. When asked to explain their dilatory implementation during the Interpretive Phase, agencies such as the National Park Service, the Forest Service, the Bureau of Sport Fisheries, and the Bureau of Outdoor Recreation reported that their leadership initially believed that NEPA did not apply to their activities. Staff within the agencies, accordingly, concluded that they were in effect exempt from the Act.<sup>28</sup> A comment by an official of the National Park Service is representative of the responses elicited from most Type I agency personnel when they were asked why their initial implementation activities had been slow in developing:

The Park Service . . . felt [it was] on the side of the environment. People in the Service . . . felt that they were doing good. . . . We really felt for the first year or eighteen months that we weren't subject to NEPA, so we messed around, didn't do environmental statements, and gave [NEPA] lip service.<sup>29</sup>

A more extreme version of this justification was offered by the Environmental Protection Agency (EPA) when environmentalists

26. Agency patterns of staff recruitment and socialization, in turn, reinforce this tendency. See, e.g., L. Salamon & G. Wamsley, *id.* at 30-32, and H. Seidman, *Politics, Position and Power: The Dynamics of Federal Organization* ch. 4 (1970).

27. More complete documentation of deference to leadership is contained in A. Wichelman, *supra* note 15, ch. 5. Exceptions include agencies such as the Department of Housing and Urban Development, the Forest Service, and the Environmental Protection Agency. Each of these agencies reported significant implementation initiatives by their field staff that exceeded those required by agency leadership.

28. *Id.*

29. Confidential interview with National Park Service official, May 22, 1974.



criticized it for refusing to prepare environmental impact statements (EIS's) on its regulatory activities. EPA contended that since NEPA's procedural requirements might have a harmful substantive impact on its regulatory activities under various standard setting statutes, they did not apply to these EPA activities.<sup>30</sup>

Type II agency administrators were less likely to find the Act applicable to their activities. During the Interpretive Phase, these agencies engaged in lengthy and often unproductive debates over which of their activities came within the ambit of NEPA.<sup>31</sup> In the absence of implementation oversight from external sources, Type II agencies tended narrowly to construe what constitutes a "major" federal action, what a "significant adverse effect" is, and what the contents of an EIS should be.<sup>32</sup> Discussions about implementation by Type III agencies were even more abstruse.<sup>33</sup>

In the absence of strong endorsement of NEPA implementation by agency leadership, it is not surprising that significant staff opposition to the Act's implementation can be documented during the Interpretive Phase in all three agency types. Agency staff, who are recruited and socialized in accordance with agency norms and customs, tend to prefer the certainty of existing arrangements to the uncertainty of procedural and structural reform. The few changes reported during the Interpretive Phase were limited to the reassignment of small numbers of staff to tasks such as EIS preparation or study of how the Act might be implemented at some later point in time. The definition of new lines of authority and responsibility for NEPA implementation that occurs during the Formal Compliance Phase is not yet operative. Staff criticism of NEPA as an impediment to key programs and disruptive of routine agency business goes virtually unchallenged. The Act's immediate costs and the threat it poses to existing arrange-

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30. Insightful discussions of EPA's paradoxical attitude toward NEPA are offered in F. Anderson, *The National Environmental Policy Act*, in *Federal Environmental Law* 256-67; (E. Doig and T. Guilbert ed. 1974); B. Neuman, *Implementation of the Clean Air Act: Should NEPA Apply to the Environmental Protection Agency?*, 3 *Ecology L. Q.* 597-638 (1973); and Muskie & Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 *Maine L. Rev.* 163-193 (1973). In 1974 EPA agreed voluntarily to prepare EIS's on a variety of regulatory actions. 39 *Fed. Reg.* 16186 (May 7, 1974).

31. Ambiguities in NEPA's statutory language are discussed in R. Liroff, *NEPA and its Aftermath: The Formation of a National Policy for the Environment* ch. 4 (Ph.D. dissertation, Northwestern U., forthcoming).

32. The Council on Environmental Quality, for example, notes that at first "most agencies adopted the position that NEPA did not apply to them at all—at least not to most of their programs . . ." CEQ, *supra* note 18, at 372.

33. Confidential interview with Department of Health, Education and Welfare official, May 17, 1974, discussed in A. Wichelman, *supra* note 15, ch. 5.

ments dominate staff discussions, while the possible long-range benefits of the Act are largely overlooked.<sup>34</sup>

Agency clientele<sup>35</sup> present a third source of implementation resistance during the Interpretive Phase. Concerned primarily with furthering their particular special interests, most clientele groups prefer to ignore or oppose implementation of the Act. These groups quickly recognize that in many instances implementation costs will devolve upon them and that vigorous implementation may weaken their positions within the policy subsystems of their respective client agencies.<sup>36</sup> Agencies are quick to take into account the attitudes of their clientele toward implementation. Without the support of their clientele, the agencies face increased organizational instability that may even jeopardize their survival. Lester Salamon and Gary Wamsley offer this characterization of the relationship between an agency and its clientele:

Those who . . . can insure agency survival or threaten it . . . have a first call on agency behavior; and [an] agency's "responsiveness" boils down to a concerted effort to define and carry out its task in a way that will stabilize and institutionalize supportive relationships with these "relevant others."<sup>37</sup>

NEPA, of course, was designed to reform agency-clientele relationships by forcing agencies to add environmental considerations to those criteria against which they traditionally tested their actions and to admit into their policy subsystems environmental interest groups that had been excluded in the past. It is not surprising, therefore, to find most Type II and Type III agencies reporting that their initial implementation efforts were constrained by reluctant cooperation from their clientele.

Type II agencies especially emphasized that in planning when and in what ways they would implement NEPA, they had to take into account both the views of key legislators in their substantive and

34. Agencies, such as the Federal Highway Administration, that administer major federal programs, tended to emphasize their initial concern that NEPA might suddenly bring these programs to a halt. An FHW official commented, for example, that he thought the "Federal Highway Administration's biggest problem in implementing NEPA [was] how to work it into the highway program without bringing [the program] to a complete halt." Confidential interview with Federal Highway Administration official, May 20, 1974.

35. The term "clientele" is used here to include those "groups that regard themselves or that are regarded by an agency as benefiting from its work." F. Rourke, *Bureaucracy, Politics, and Public Policy* 11 (1969). A more encompassing use of the term is employed in Holden, *Imperialism in Bureaucracy*, 60 *Am. Pol. Sci. Rev.* 943-51 (1966).

36. An agency's "policy subsystem" links the agency to its clientele in a semi-stable, symbiotic state of equilibrium. Implementation of NEPA threatens to disturb this equilibrium.

37. L. Salaman & G. Wamsley, *supra* note 11, at 6.

appropriations committees and the demands of the interest groups capable of influencing these committee members. The Atomic Energy Commission (now two agencies, the Nuclear Regulatory Commission and the Energy Research and Development Administration), for example, limited its independent environmental impact analysis during the Interpretive Phase to the area of radiology rather than require its construction permit applicants to submit detailed technical information on other environmental considerations.<sup>38</sup> The Federal Power Commission delegated to its clientele (license applicants and intervenors) responsibility for compliance with NEPA.<sup>39</sup> These implementation decisions were attributed by the interview respondents, at least in part, to the power of clientele groups in Congress favorable to energy development, with which both agencies must contend.<sup>40</sup> Subsequently both agencies have taken greater initiative in NEPA implementation. But during the Interpretive Phase they preferred to see what consequences would ensue from implementation activities congenial to their clientele. Generally the greater the perceived conflict between NEPA implementation activities and an agency's pre-NEPA mandate, the more likely the agency was to go slowly and cautiously in implementing the Act.

A fourth source of implementation resistance during the Interpretive Phase results from the "standard operating procedures" (SOP's) that agencies use. SOP's are an agency's set organizational responses to new circumstances.<sup>41</sup> Organization theorists, such as Kaufman, argue that SOP's are systemic sources of resistance to policy change:

Really to change what people do in large organizations thus turns out to require much more than a single, simple, direct order; the full extent and ramifications of the necessary changes become evident only as each attempted innovation runs afoul of *long-established prescriptions and conventions*.<sup>42</sup>

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38. This stance led to the first major circuit court interpretation of NEPA. See *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n.*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

39. This practice was struck down in *Greene County Planning Bd. v. Fed. Power Comm'n.*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

40. Confidential interviews with Atomic Energy Comm'n. official, May 30 and 31, 1974, and Fed. Power Comm'n. official, May 3, 1974. See also the Congressional hearings concerned with NEPA's impact on the AEC's regulatory program: *Hearings on H.R. 13752 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, Interim Nuclear Licensing*, 92d Cong., 2d Sess., ser. 91-18 (1972); *Hearing Pursuant to S. Res. 45, A National Fuels and Energy Policy Study, Parts 1 and 2, Calvert Cliffs' Court Decision*, 92d Cong., 1st Sess., ser. 92-14 (1971); *Hearings on H.R. 13752 Before the Senate Comm. on Interior and Insular Affairs, Interim Nuclear Licensing*, 92d Cong., 2d Sess. (1972).

41. See, e.g., the discussion of SOP's in G. Allison, *Essence of Decision* 79 (1970).

42. H. Kaufman, *supra* note 24, at 31-32.

NEPA, through the procedural reforms it introduced, provided the "direct order" for agencies to reconceptualize their mandates to include environmental values in their routine decisionmaking processes. It did not provide the organizational units or specialized personnel needed to police compliance with that direct order. Moreover, NEPA offered no supplemental funding or grade period during which these requisites for effective policy implementation could be developed. It is not surprising, therefore, to find that during the Interpretive Phase political and organizational expediency take precedence over NEPA's reform objectives, regardless of agency type.

The environmental impact analysis that is performed during the Interpretive Phase tends to be delegated to whatever staff happens to be available to do it, usually as a finishing touch to justify decisions made earlier without consideration of environmental factors.<sup>43</sup> The pooling of governmental expertise and citizen participation envisioned by the Act is not integrated into agency decisions during this phase. Internal agency characteristics continue to thwart implementation until severe external, intervening factors combine to lessen the resistance.

#### EXTERNAL OVERSIGHT AND AGENCY TRANSITION TO A FORMAL COMPLIANCE PHASE

Environmentalists, who initially had been skeptical of NEPA's self-implementation by the agencies, responded to the agencies' Interpretive Phase activities with litigation in the federal courts that sought injunctions against proposed agency actions. Most of these suits alleged noncompliance or inadequate compliance with NEPA procedures.<sup>44</sup> Although NEPA contained no explicit provision for judicial oversight of its implementation,<sup>45</sup> the environmentalist-plaintiffs were surprisingly successful in their initial efforts to involve the federal courts in such a role.<sup>46</sup> The court suits engendered by the Inter-

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43. Discussions of early environmental review efforts are contained in J. Sullivan & P. Montgomery, *Highways and the Environment: How State and Federal Officials Assess the Impact of Urban Highways* (1972); G. Enk, *Beyond NEPA: Criteria for Environmental Impact Review* (1973); and Kennedy & Hanshaw, *The Effectiveness of Impact Statements: The U.S. Environmental Policy Act of 1969*, 243 *Esthetics* 19-22 (1974).

44. These cases are discussed in F. Anderson, *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act* (1973).

45. Dreyfus & Ingram, *supra* note 7, however, assert that a definite role for judicial oversight was anticipated by the Act's drafters.

46. A. Wichelman, *supra* note 15, ch. 6, presents a statistical summary of NEPA litigation from 1970 through April, 1973, which indicates that district court decisions favored the environmentalist-plaintiffs in 44.5 percent of the cases litigated. *See also* the data on environmental cases generally that are presented in W. Grunbaum, *Judicial Attitudes Toward Environmental Quality in the Federal and State Courts* (unpublished paper presented at the

pretive Phase frequently resulted in court orders forcing agencies to implement NEPA's procedural reforms and to give a broader construction to many of the Act's provisions. Frederick Anderson, a leading commentator on judicial oversight of NEPA, has noted that while the early judicial decisions construing the Act did not reflect a departure by the judiciary from conventional standards for scrutiny of agency decisionmaking, "the courts [did] become deeply involved in NEPA's implementation, much more deeply involved than their reliance upon the usual rhetoric of reviewing courts might imply."<sup>47</sup>

The judicial review to which Anderson refers helped fulfill many of the conditions Rodgers postulated as necessary for effective policy implementation, but which had not been fulfilled by NEPA's statutory language.<sup>48</sup> Much of the uncertainty about the necessity for elaborate procedural implementation of the Act was removed by the court decisions. Moreover, they defined for the agencies the type and amount of procedural implementation that would be required under the Act. They also presented the agencies with severe sanctions for noncompliance with the Act in the form of costly and time-consuming injunctions and adverse publicity.

Without judicial review, many of the Type II agencies indicated that they would have undergone a less rapid transition from the Interpretive to the Formal Compliance Phase of implementation.<sup>49</sup> The Type II agencies responsible for developmental activities, such as the Army Corps of Engineers and the Federal Highway Administration, were the most frequent objects of Interpretive Phase litigation. Thirty-six of the fifty NEPA suits decided during the first two years of the Act's history involved various Type II agencies, whereas only eight suits involved Type I agencies, and six, Type III agencies.<sup>50</sup> However, the interview data strongly support the proposition that the effects of these suits quickly generalized to the less visible agencies, which were not subjected to litigation. The offices of general counsel in these agencies monitored the emerging court decisions and alerted agency leadership to the fact that any agency was vulnerable to NEPA suits. An attorney at the National Science Foundation offered this observation:

I think the possibility . . . that someone is going to feel that we have violated NEPA one way or another is going to grow and . . . we

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1974 Annual Meeting of the Am. Pol. Sci. Ass'n. in Chicago, Ill., August 29-September 2, 1974).

47. F. Anderson, *supra* note 30, at 281.

48. See note 21 *supra* and accompanying text.

49. A. Wichelman, *supra* note 15, ch. 5.

50. *Id.*, ch. 6.

might get hit with a suit. I think the fact that the Foundation has always been somewhat of a low profile agency . . . is one reason we haven't had problems.<sup>5 1</sup>

Judicial review directly enhanced the ability of environmental interests to require procedural implementation of NEPA.

Less appreciated is the impact judicial review had on the complementary oversight activities of CEQ, EPA, and, to a lesser extent, the Congress. CEQ, whose oversight powers were amplified by Executive Order shortly after NEPA's enactment,<sup>5 2</sup> facilitated the transition of many agencies from the Interpretive to the Formal Compliance Phase by issuing three sets of progressively more elaborate general guidelines for agency implementation of NEPA, preparing supplemental memoranda on implementation, and consulting with agency staff members. These activities closely reflected judicial interpretation of NEPA. Herbert Stevens, in his analysis of guidelines issued by CEQ, concludes that the guidelines

are not simply parallel to and separate from the judicial interpretations of NEPA, but are instead a kind of hybrid creation—an administrative-judicial gloss on the statutory language of NEPA. Given the advisory position of CEQ with respect to implementation of NEPA, as contrasted with the position of those mission agencies of the federal government, the Guidelines draw their strength from their consolidation of important cases under NEPA. . . . Thus, CEQ has exerted its influence over other, far larger federal agencies by its ability to first influence the courts.<sup>5 3</sup>

Absent supportive court decisions, CEQ's role as overseer might have been less consequential, like that of the Office of Management and Budget.<sup>5 4</sup> Instead, during the Interpretive Phase, when implementation resistance tended to be the strongest, CEQ provided the coordination necessary to assure implementation of specific court decisions across the administrative process. CEQ also became a focus to which agencies could turn voluntarily for informal guidance and practical

51. Confidential interview with National Science Foundation official, May 6, 1974.

52. Protection and Enhancement of Environmental Quality, Exec. Order No. 11514, 3 C.F.R. 286 (1973).

53. *The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act*, 23 Catholic U. L. Rev. 573 (1974).

54. Senator Jackson and Professor Caldwell indicated that they thought OMB would assume the role delegated to CEQ by Executive Order 11514. *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. at 116-17. In fact, OMB has eschewed such a role. See the discussion in F. Anderson, *supra* note 30, at 250-53; Morgenthaler, *OMB Circular A-95: A Neglected Environmental Assessment Tool Provides an Early Public Pressure Point*, 4 Environmental L. Rep. 50043-58 (1974); The Association of the Bar of the City of New York, *Electricity and the Environment: The Reform of Legal Institutions* 156-59 (1972).

advice about NEPA implementation.<sup>55</sup> Without a semi-authoritative body, such as CEQ, to resolve the agencies' idiosyncratic uncertainties about how to implement the Act, many of the NEPA liaisons interviewed reported that their agencies would have moved more slowly toward formal procedural compliance with the Act.<sup>56</sup>

Unlike CEQ, the Environmental Protection Agency (EPA), established shortly after NEPA's enactment,<sup>57</sup> initially did not take full advantage of its potential NEPA-overseer role. Under NEPA, EPA, like other federal agencies, is required to comment on EIS's that are referred to it by other agencies. In addition to this responsibility, EPA, under Section 309 of the Clean Air Act,<sup>58</sup> has an affirmative obligation to comment publicly and in writing on the environmental impact of any matter relating to the agency's duties, regardless of whether a proposing agency requests such comments.<sup>59</sup> Proposed legislation, actions, or regulations that EPA finds unsatisfactory from the standpoint of public health, welfare, or environmental quality are to be referred to CEQ.<sup>60</sup> In view of EPA's sizable EIS review staff and substantive expertise, Section 309 of the Clean Air Act afforded the agency an opportunity to enter into partnership with CEQ in the task of overseeing NEPA implementation.

During the Interpretive Phase, EPA limited most of its NEPA-oversight activities to preparation of comments on EIS's referred to it by other agencies. This behavior has been attributed to a variety of political and organizational problems that beset EPA during its formative years.<sup>61</sup> Its publication, for example, of comments critical of the Trans-Alaska Pipeline draft EIS in 1971 evoked especially hostile reaction from various agency officials.<sup>62</sup> As a consequence, EPA's authorization under the Clean Air Act to initiate substantive review of proposals not referred to it for comment remained largely unexercised.

The administrative burden imposed by the requirement of prompt

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55. Almost without exception the interview respondents reported that CEQ had provided helpful advice about the many uncertainties that attached to the Act's interpretation during the period from 1970 to 1972.

56. A. Wichelman, *supra* note 15, ch. 5.

57. EPA was created by Exec. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623, 84 Stat. 2086 (effective December, 1970).

58. 42 U.S.C. § 1857h (1970).

59. More detailed discussions of these responsibilities are contained in the references cited in note 30 *supra*, and in Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 Environmental L. Rep. 50071-84 (1973).

60. 42 U.S.C. § 1857h (1970).

61. Healy, *supra* note 59, at 50076.

62. *Id.* at 50077.

comment on the many EIS's referred to EPA is evident in the reports of the NEPA liaisons that were interviewed. They indicated that EPA's comments tended to be uneven in quality, depending on which component of the agency was responsible for writing the comments. Despite mixed reactions to the quality of EPA comments during the Interpretive Phase, the NEPA liaisons reported that routine scrutiny of the substance of their EIS's by EPA quickly forced them to develop implementation procedures that would permit their agencies to be responsive to EPA's review standards. This often meant broadening the data base upon which environmental analyses were founded and refining the research techniques with which the implications of the data were explored. Thus, even as a new and politically inexperienced agency, EPA appears to have contributed to the development of implementing procedures that signalled the end of the Interpretive Phase of implementation.

Unlike either CEQ or EPA, Congress, which had enacted NEPA without significant internal opposition to the Act, evidenced sharp, internal division over the extent to which NEPA implementation should be facilitated. A few review hearings were held during 1970-72. They were concerned with agency compliance in general,<sup>63</sup> the effects of court decisions on specific agencies,<sup>64</sup> and proposals to amend the Act.<sup>65</sup> The transition of agencies to the Formal Compliance Phase was facilitated more by failure of NEPA's critics to weaken the Act significantly through amendments and exemptions, than by the sporadic oversight exercised by the committees that had supported the Act's passage. The NEPA liaisons reported that they

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63. *Hearings Before the House Comm. on Merchant Marine and Fisheries, Environmental Quality*, 91st Cong., 2d Sess. (1970); *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, Ad. of the Nat. Environ. Policy Act*, 91st Cong., 2d Sess., ser. 91-41, pt. I, II, app. (1970); *Committee on Merchant Marine and Fisheries, Administration of the National Environmental Policy Act of 1969*, H.R. Rep. No. 92-316, 92d Cong., 1st Sess. (1971); *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, Ad. of the Nat. Environ. Policy Act—1972: On NEPA Oversight, February 17, 1972*; *on Fed. Agency Compliance, May 24, 1972*, 92d Cong., 2d Sess. ser. 92-94 (1972); *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. ser. 92-25, app. (1972). *Hearings Before the Senate Comm. on Public Works, Nat. Env. Policy Act Relative to Highways*, 91st Cong., 2d Sess. (1970); *Joint Hearings of the Senate Comm. on Interior and Insular Affairs and Public Works, Nat. Environ. Policy Act*, 92d Cong., 2d Sess. ser. 92-H32 (1972).

64. *See, Hearings, supra* note 40; *Hearings Before the Staff of the Comm. on Interior and Insular Affairs, Effect of Calvert Cliffs' and Other Court Decisions Upon Nuclear Power in the United States*, 92d Cong., 2d Sess. ser. 92-28 (Comm. Print, 1972).

65. An excellent discussion of the political considerations underlying various proposals to amend NEPA is contained in R. Liroff, *supra* note 31, ch. 6. *See also Comm. on Interior and Insular Affairs, Nat. Environ. Policy Act of 1969: An Analysis of Proposed Legislative Modifications—First Session*, 93d Congress, 93d Cong., 1st Sess. (1973).



closely monitored efforts to weaken the Act, often hoping that implementation would not be required if, for example, the EIS requirement were amended out of the Act. When environmentalists succeeded in countering the initial backlash to the Act, many agencies recognized that they could no longer avoid formal compliance.<sup>66</sup> In the absence of decisive Congressional action either to weaken or reaffirm NEPA's mandate, the courts, CEQ, and EPA became increasingly more legitimate sources of implementation review. Without their complementary review activities, the transition to formal compliance with the Act would have been slower and might not have occurred at all in some instances. These external forces acted as catalysts for a wide range of internal agency adaptations to NEPA. These adaptations are discussed in the succeeding section of this paper.

### THE FORMAL COMPLIANCE PHASE

During the Formal Compliance Phase of implementation the agencies no longer debate whether and how they will implement NEPA. Instead, their attention shifts to implementing the changes they believe are necessary to accommodate the demands of the Act's external observers. Detailed procedures are developed, environmental review offices are set up to assure the implementation of these procedures, budgets are adjusted to include NEPA-related expenditures, new staff may be hired, existing staff often are retrained and assigned to environmental review tasks, and research contracts are let. Increasingly more detailed and elaborate EIS's are prepared for a greater number of agency activities. Some observers of the NEPA implementation process, however, have argued that the environmental impact analyses produced during the Formal Compliance Phase tend not to be integrated into the agencies' ongoing decisionmaking processes.<sup>67</sup> Even when the technical quality of an EIS is high, they

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66. For discussions of the initial backlash to NEPA see Barfield & Corrigan, *Environment Report/White House Seeks to Restrict Scope of Environment Law*, 4 Nat. J. 336-49 (1972), *Hearings on H.R. 14103, a Bill to Amend the National Environmental Policy Act of 1969 to Provide a Temporary, Partial Exemption from the Requirements for the Issuance of Environmental Impact Statements before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess., ser. 92-29 (1972); especially the testimony of Anthony Roisman of the Save NEPA Coalition, at 196-207; Zeldin, *Will Success Spoil NEPA?*, *Audubon Magazine* 105-11 (July 1972); Higgins, *Legislation Under NEPA: Plaintiffs' Pyrrhic Victories Draw Congressional Fire, Judicial Warnings*, 34 Mo. L. Rev. 415-29 (1974).

67. See, e.g., Sandler, *NEPA: A Sheep in Wolf's Clothing?*, 37 Brooklyn L. Rev. 139-58 (1970); Sumek, *Environmental Impact Statements: Frustration for Local Governments in The Municipal Year Book-1973* (1973); Fishman, *A Preliminary Assessment of the National Environmental Policy Act of 1969*, 1973 Urban L. Ann. 209-41; Greis, *The Envi-*

argue, the statements have little impact on the substantive decisions made by the agencies. In other words, the production of procedurally and technically satisfactory EIS's that comply formally with NEPA remains a sterile, bureaucratic exercise, designed only to meet the letter, not the spirit, of the Act.

This writer believes these conclusions are premature and possibly incorrect. Assessments that are limited to the short-term effects of formal compliance may be misleading. The interview data support the proposition that formal compliance, coupled with continuing external oversight, sets in motion a variety of new agency routines and learning processes.<sup>68</sup> These internal changes gradually effect a subtle but pervasive integration of environmental values into many of the agencies' routine decisionmaking activities. NEPA case studies<sup>69</sup> and content analyses of EIS's<sup>70</sup> often have failed to take into account the ways in which even the routine production of mediocre EIS's eventually force most agencies to integrate environmental values into their ongoing operations. Three patterns of change, which facilitate this integration, are considered here.

*Facilitating the Integration of Environmental Values into Agency Decisionmaking Through Changes in Procedures and Structures.*

Organizational survival requires adjustments to new conditions even when agency leadership, staff, or clientele lack sympathy with the changes required. Kaufman, recognizing this phenomenon, comments that "[t]aken all together, the factors making for change in organizations turn out to be strong enough to overcome the powerful forces against it."<sup>71</sup> To come into formal compliance with the implementation requirements of NEPA's external overseers, significant changes occur in the standard operating procedures (SOP's) and organizational structures of virtually all agencies.

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*ronmental Impact Statement: A Small Step Instead of a Giant Leap*, 5 *The Urban Lawyer* 264-303 (1973).

68. A. Wichelman, *supra* note 15, ch. 5. Similar evidence is presented in Council on Environmental Quality, *supra* note 18, at 371-81 and *CEQ Review of Agency Implementation of NEPA*, 5 *102 Monitor* 3-14 (1975).

69. Recent case studies include Randolph & Ortolano, *Effect of NEPA on the Corps of Engineers' New Melones Project*, 1 *Colum. J. of Environ. L.* 233-73 (1975); Council on Environmental Quality, *A Study of the Implementation of NEPA by the United States Navy* (1974), and *The National Environmental Policy Act Process Study: An Evaluation of the Implementation and Administration of the NEPA by the Forest Service and the Bureau of Land Management* (1975); Tarlock, *The Application of the National Environmental Policy Act of 1969 to the Darien Gap Highway Project*, 7 *N.Y.U. J. of Int'l. L. and Pol.* 459-73 (1974); Wood, *A Prescriptive Analysis of the U.S. Navy's Program to Implement the National Environmental Policy Act*, 3 *Environmental L. Rep.* 50049-78 (1975).

70. Enk, *supra* note 43; Kreith, *supra* note 23; A. Wichelman, *supra* note 15, ch. 5.

71. H. Kaufman, *supra* note 24, at 66.

The Type II agencies tend to undergo the most extensive restructuring. Typically, this involves establishment of a specific office responsible for coordinating and overseeing NEPA implementation within the agency.<sup>72</sup> The powers exercised by these offices vary. They often hold a formal or informal veto power over agency proposals for which they find the environmental impacts inadequately or improperly evaluated. These offices also tend to communicate regularly with agency leadership, often serving as advocates for vigorous NEPA implementation.<sup>73</sup> They have regular contact with their agencies' legal staff, with whom they frequently work in developing internal agency implementing procedures tailored to the idiosyncracies of their respective agencies. They often control the types of personnel hired for or assigned to environmental review activities.<sup>74</sup> The greater their powers, the more likely they are to force other operational units within their agencies to seriously and conscientiously implement NEPA.

The Type I agencies undergo a similar adaptation. Whereas environmental review offices as such often did not exist prior to NEPA in Type II agencies, the Type I agencies usually had functioning environmental review offices at the time of NEPA's enactment. The interview data indicate that these pre-existing offices were also able to utilize NEPA to justify structural and staffing changes. These changes usually enable agencies to place greater emphasis on environmental review and put into effect more activities supportive of such review. This statement by a Coast Guard official is representative of this change process:

[NEPA] gave us no resources to accomplish these things. So, now we have been able to justify not only this office . . . but staff officers on district staffs placed there solely for the purpose of working with environmental assessments and preparing environmental impact statements and giving advice to program managers who are directly

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72. More detailed descriptions of these offices and their powers can be obtained by examining the NEPA implementation procedures of each agency, which are published in the Federal Register. A list of agencies that have issued such procedures is contained in Council on Environmental Quality, *Environmental Quality—1974* 382-85, along with the relevant Federal Register references.

73. The importance of information flow for understanding policy implementation is discussed in Ingram, *Information Channels and Environmental Decision Making*, 13 Nat. Res. J. 150-69 (1973).

74. An official of HUD, for example, commented that "if a guy . . . was being pushed for a position . . . within the control [of the environmental review office] and if he was particularly opposed to NEPA, we would raise some questions about it—there's a process that goes on." Confidential interview with Department of Housing and Urban Development official, May 17, 1974. Although the selection process alluded to is informal and may affect the hiring of only certain categories of employees, it illustrates one of the subtle ways in which environmental review offices influence agency decisionmaking.

responsible for preparing these statements. . . . We are expanding each budget year in these areas as the need can be shown and justified.<sup>75</sup>

The necessity for formal compliance with NEPA usually forces agency leaders to clarify and enhance the powers of the agency offices and personnel responsible for reviewing the environmental effects of agency proposals and activities. In many instances this means training and reassigning existing personnel to NEPA responsibilities, as well as introducing new environmental professionals into the agency.<sup>76</sup> The latter often bring with them an outlook and values previously absent or underemphasized in agency planning.<sup>77</sup> Recognizing their responsibility to keep their agencies out of court and free from adverse review by CEQ and the committees of Congress, the staff of the environmental review offices tend to be strongly motivated to bring other agency components into formal compliance with NEPA.

The most extensive restructuring occurs in the Type III agencies. Without the enactment of NEPA, it is unlikely that any significant procedural or structural changes to implement formal environmental review would have occurred in most of these agencies. Their cognizance of the impact of external oversight on Type I and Type II agencies forces the Type III agencies to devise mechanisms with which to implement the Act, even when they perceive it to be only tangentially applicable to their activities.<sup>78</sup> Without external oversight, agency leadership, especially within Type II and Type III agencies, would tend to dismiss implementation of NEPA as unnecessary or too costly, given other agency priorities.<sup>79</sup>

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75. Confidential interview with U.S. Coast Guard official, May 21, 1974.

76. Virtually all of the agencies significantly involved in activities that have environmental impacts reported the development of special training and educational programs, both for staff and leadership. Similarly, transfers of personnel and the hiring of new personnel to expand agency competence in environmental analysis were commonplace. For more detailed discussions of these changes see A. Wichelman, *supra* note 15, ch. 5.

77. H. Kaufman, *supra* note 24, at 56-58. He argues that "[n]ewcomers to organizations, no matter how carefully screened, bring with them values and perceptions at least a little divergent from those prevailing among members and leaders of long standing. . . . [Hence] new viewpoints will creep into every organization regardless of efforts to keep them out. . . ." *Id.*, at 42.

78. For example, the Central Intelligence Agency has published NEPA implemental procedures, 39 Fed. Reg. 3579 (1974). Similarly, in an interview with an official of the Federal Trade Commission, it was noted that NEPA has "perked a lot of people up to considerations that they might not have particularly faced before." Confidential interview with Federal Trade Commission official, May 17, 1974.

79. The interview respondents almost always reported that implementation would have occurred more rapidly and would have been more extensive if the Act had authorized special appropriations for that purpose. Some agencies requested such appropriations when it became apparent that formal compliance could not be avoided.

For example, the General Services Agency, a Type III agency, was able to provide documentation of significant environmental review of its construction projects initiated as a consequence of establishing an environmental review office to oversee NEPA implementation.<sup>80</sup> Similarly, the Department of Health, Education and Welfare, which had no environmental review office prior to the enactment of NEPA, reported that while the department "did not really do very much in the first couple of years [of the Act's history]," when then-Secretary Elliot Richardson "got concerned about [NEPA], he established a task force to see how the Department might better comply with the law itself and also the spirit of the law."<sup>81</sup> As a consequence of the report issued by Richardson's task force, HEW established an environmental review office responsible for bringing the department into compliance with NEPA.<sup>82</sup>

The importance of institutionalizing NEPA review structures within the agencies cannot be overemphasized. Initially these structures focus on implementation of procedural changes. After these procedures are securely in place and operating adequately, the environmental review offices begin the difficult task of integrating them into their agencies' ongoing decisionmaking routines. The interview data suggest that these offices recognize the need for integration well before they concentrate on achieving it.<sup>83</sup> Most agencies reported that education of agency staff would be slow and haphazard without prior implementation of procedures and guidelines for environmental analysis.<sup>84</sup> Therefore, an initial period of enforced procedural compliance with NEPA implementation policies tends to precede initiatives by the environmental review offices to integrate these changes into agency decisionmaking routines.

During the period in which formal compliance is achieved, the environmental review offices become increasingly adroit at internal agency politicking. The continuation of external oversight enhances their legitimacy as participants in internal agency politics.<sup>85</sup> Simi-

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80. Confidential interview with General Services Administration official, May 16, 1974; General Services Administration, *Man, Construction and the Environment* (1973) and *Build the Environment Up for People: Final Report—August 1973* (1973).

81. Confidential interview with Department of Health, Education and Welfare official, May 17, 1974.

82. *Id.*

83. A. Wichelman, *supra* note 15, ch. 5.

84. *Id.*

85. It is noteworthy that thus far in the NEPA implementation process Presidential support for vigorous implementation has been lacking. See, e.g., Noone, *Environment Report/NEPA suffers setback in housing, wins transit attack*, 6 Nat'l. J. 1269 (1974). It could be argued, however, that legitimacy achieved without such support enhances the likelihood that these offices will remain an integral part of their respective agencies.

larly, their specialized knowledge of legislative hearings, court decisions, recommendations of agency general counsel, and demands of environmental interest groups, combined with their appreciation of specific agency implementation problems, enable the environmental review offices to become increasingly significant brokers in agency decisionmaking. Whereas environmentalists and other oversight bodies must wait until a proposal is presented for comment to evaluate it (unless invited to participate at an earlier stage of policy-making), the internal environmental review offices can take actions in anticipation of implementation problems. These actions may take the form of lobbying with agency leadership, developing special training programs, formulating guidelines, substantive review of new proposals, or improving the coordination of agency environmental assessment activities.<sup>86</sup> Without the presence of specialized staff and structures for NEPA implementation within the agencies, compliance with the Act might be expected to decrease. Kaufman offers this generalized description of the impact that offices such as these tend to have on the implementation of a new policy:

Merely to announce or publish requirements is not enough; they have to be policed. So specialized personnel, and perhaps specialized organizational units, are assigned to make sure that the rules are obeyed. They perform their mission by issuing . . . guidelines and policy statements and requirements, by offering advice and opinions in advance of action to colleagues who request them, and by exposing or even disallowing actions that were taken in their sphere of responsibility and seem to them improper.<sup>87</sup>

The interview respondents consistently indicated that external NEPA oversight provided the impetus for implementing many of the structural and procedural changes required to come into formal compliance with the Act. Without such oversight, many agencies indicated that their implementation activities would have depended on further clarification of the Act by Congress, special appropriations to implement it, or clearer guidance from the President on the extent of implementation required. Ironically, once formal procedural compliance with the Act is achieved, many of the former sources of resistance to its implementation<sup>88</sup> begin to work to sustain implementation.

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86. A. Wichelman, *supra* note 15, ch. 5.

87. H. Kaufman, *supra* note 24, at 34.

88. See notes 25-43 *supra* and accompanying text.

*Facilitating the Integration of Environmental Values into Agency Decisionmaking Through Improvements in the Collection and Analysis of Environmental Data.*

Closely related to the appearance of new procedures and structures within the agencies during the Formal Compliance Phase are changes in the amount and types of environmental data they collect and in the techniques they use to analyze it. When the interviews for this paper were conducted in mid-1974, most of the environmental review offices that had been established were especially concerned about ensuring informational adequacy in their agencies' EIS's.

Most of the Type I and Type II agencies were able to document extensive upgrading of their environmental data collection systems during the Formal Compliance Phase.<sup>89</sup> Special efforts are made to identify environmentally significant actions and to ascertain their possible impacts. Many of the NEPA liaisons, however, noted that this upgrading was often due to overreaction by their field staffs to adverse court decisions, CEQ guidelines, and public criticism. The result was the production by some agencies of encyclopedic EIS's that failed to relate the voluminous information presented to the environmental impacts that alternative actions might produce.<sup>90</sup> The liaisons recognized that even if such statements withstand court scrutiny, they fail to comply with the spirit of NEPA. Further, they recognized that the high costs of producing unnecessarily lengthy statements might trigger renewed attacks on NEPA by its Congressional critics.<sup>91</sup>

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89. A. Wichelman, *supra* note 15, ch. 5.

90. The NEPA liaisons appreciated that the Act could be thwarted by staff who chose uncritically to collect more and more information without taking into account the importance of the action or of the information collected. A number of commentators have noted that this tendency has been encouraged by certain court decisions as much as by agency insensitivity to NEPA. See Higgins, *supra* note 66; Collins, *The National Policy Act of 1969: The Influence of Agency Differences on Judicial Enforcement*, 52 Tex. L. Rev. 1227-45 (1974); Dreyfus & Ingram, *supra* note 7; C. Ash, *supra* note 18; Culhane, *Federal Agency Organizational Change in Response to Environmentalism*, 2 Humboldt J. of Soc. Relations 31-44 (1974); Edmonds, *The National Environmental Policy Act Applied to Policy-Level Decisionmaking*, 3 Ecology L.Q. 799, 817-23 (1973). Conversely, some liaisons reported that their agencies had produced only a few EIS's (if any) because they lacked adequate environmental indices and interpretive techniques, a fact acknowledged by CEQ in *Environmental Quality—1974*. Council on Environmental Quality, *supra* note 18, at 331-35.

91. See Higgins, *supra* note 66, for a discussion of the costs of NEPA implementation. The Council on Environmental Quality has estimated that NEPA costs might be as high as \$65 million annually once full implementation is underway. See Council on Environmental Quality, *Environmental Quality—1972: The Third Annual Report of the Council on Environmental Quality* 258 (1972). This amount is apportioned among seventeen agencies in N. Orloff, *The Environmental Impact Statement Process* 54 (unpublished paper presented at the Environmental Impact Statement Seminar of the Twin Cities Fed. Exec. Bd., Minneapolis, Minn., February 6, 1973).

The NEPA liaisons also expressed agreement that carefully devised procedures for data collection and analysis would not necessarily lead to good faith consideration of environmental impacts in agency decisionmaking. Nonetheless they saw the development of improved bases of environmental data and experience with techniques for its analysis as prerequisites for any future efforts they might undertake to transform legal compliance into more meaningful policy analysis. Without credible data and staff able to analyze it, the NEPA liaisons doubted that their offices could ever hope to be an integral part of agency decisionmaking. Consequently, during the Formal Compliance Phase they emphasize preparation of informationally and analytically sufficient EIS's. Even when these statements are not fully integrated into the agencies' final decisionmaking, the new data collection and analysis procedures are becoming an integral part of the agencies' SOP's.

The Formal Compliance Phase also evidences new research initiatives by many of the Type I and Type II agencies, including funding contract research and retaining consultants to provide environmental information and analytic skills not available in-house.<sup>9 2</sup> The agencies that initially depended on data from their clientele in preparing EIS's begin to take a more active part in specifying data requirements and in monitoring their clientele's response to these specifications.<sup>9 3</sup> Agency clientele, in turn, begin to recognize that failure to provide adequate environmental information may mean costly delays in or disapproval of their requests for government projects, loans, or permits.<sup>9 4</sup> Agencies such as the former Atomic Energy Commission, the Federal Power Commission, and the Army Corps of Engineers, for the first time began to conduct environmental analyses of alternatives not within their mandates to implement.

The larger, wealthier agencies generally find it less difficult to alter their priorities and budgets to accommodate NEPA's requirement that EIS's and environmental assessments reflect the utilization of a "systematic, interdisciplinary approach" to environmental analysis that will "insure the integrated use of the natural and social sciences

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92. A. Wichelman, *supra* note 15, ch. 5.

93. *Id.*

94. This statement, by an official of the Rural Electrification Administration, is typical: We have to live with our borrowers and we don't like to dissipate our goodwill unnecessarily. Initially this whole thing impressed them as being utterly ludicrous and ridiculous. If it had been only our own views we would have had a hard time. They didn't know how much this was for real and how much was just words that could be ignored. Court litigation and public comment enables us to put a lot more pressure on our borrowers to get them to do things the way they ought to.

Confidential interview with Rural Electrification Administration official, May 2, 1974.



and environmental design arts in planning and in decisionmaking.”<sup>95</sup> Smaller, less well-financed agencies, and those with the least experience in environmental management, often must seek special appropriations to upgrade their informational base. The Type I agencies especially utilize the Formal Compliance Phase to demonstrate the need for funds and staff to upgrade the study of the social and secondary impacts of their proposed actions and to conduct systems research and follow-up studies. The Type II agencies are more inclined simply to deplore the absence of systems research and the extensive baseline data necessary for follow-up studies. These problems, they contend, should be remedied by Congressionally requested studies performed by agencies such as the National Science Foundation, the National Academy of Science, or by Type I agencies whose mandates explicitly include protection of the environment.

Although it is difficult to generalize about the specific factors that cause an agency to upgrade its environmental analysis capabilities, the necessity of preparing EIS's capable of passing internal agency review and possible judicial scrutiny has resulted in virtually all agencies improving their pre-NEPA capabilities for environmental analysis to some extent. An official of EPA offered this favorable evaluation of these agency-wide changes:

[The capability to measure environmental impacts] has increased hordes and magnitudes since the Act was passed. And it varies from agency to agency, but by-and-large, all of the major agencies either now have it or are well underway to having it.<sup>96</sup>

*Facilitating the Integration of Environmental Values into Agency Decisionmaking Through Increased Inter-Governmental and Public Review of Proposed Agency Actions.*

NEPA requires that each agency, prior to undertaking actions significantly affecting the environment, “consult and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”<sup>97</sup> The comments thus obtained, as well as those from relevant state and local agencies, must accompany the draft EIS “through the existing agency review procedures” and are to be disclosed and considered in the final EIS.<sup>98</sup> CEQ's implementation

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95. NEPA § 102(2)(A), 42 U.S.C. § 4332(2)(A) (1970).

96. Confidential interview with Environmental Protection Agency official, May 22, 1974.

97. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

98. *Id.*

guidelines further provide that interested groups and individuals shall have the same privilege to offer comments on draft EIS's.<sup>99</sup>

These provisions for the first time formalized and legitimized access to agency decisionmaking by any interested party when environmentally significant activities are involved.<sup>100</sup> Type I agencies experienced the least difficulty in implementing these commenting and disclosure provisions. Since they considered many environmental agencies and interest groups to be part of their policy subsystem prior to NEPA's enactment, the Act did not require significant adjustments in terms of the interests to which these agencies were responsive. It did, however, tend to enhance the bargaining power of these interests.<sup>101</sup>

The liaisons for the Type I agencies also noted that formation of environmental review offices contributed to the rationalization of the commenting process. This process, they indicated, existed prior to NEPA, but was poorly coordinated, loosely structured and highly informal.<sup>102</sup> The environmental review offices quickly became the focal point within each agency for NEPA-related activities, making it easier for concerned parties to make known their concerns early in an agency's decisionmaking process, especially if an agency is decentralized.<sup>103</sup> The liaisons further noted that the commenting process facilitated more frequent informal interactions at the staff level by personnel of the administrative agencies. One consequence of this development has been less attention to preparation of formal comments on a draft EIS when informal discussions and understandings have been reached early in an agency's decisionmaking process.<sup>104</sup>

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99. Council on Environmental Quality, *Guidelines for Statements on Proposed Actions Affecting the Environment*, 36 Fed. Reg. 7724, 7725-26 (1971).

100. The importance of access by environmental interests to the decisionmaking activities of the federal agencies is discussed in W. Rosenbaum, *The Politics of Environmental Concern* 266-68 (1973), and generally, in Ingram, *supra* note 73, and Culhane, *supra* note 89.

101. A. Wichelman, *supra* note 15, ch. 5.

102. *Id.*

103. For example, the Forest Service, a highly decentralized agency, delegates the actual preparation of EIS's to its field offices. By setting up an environmental review office in Washington, D.C., however, it is able to route comments and requests for information to the appropriate field offices, and to coordinate the preparation of EIS's that involve more than one component of the agency.

104. A. Wichelman, *supra* note 15, ch. 5. The Environmental Protection Agency reported that it had requested special appropriations to set up early liaison positions to improve communication on NEPA matters between EPA and the Army Corps of Engineers, the Department of Transportation, and the Soil Conservation Service. The purpose of these positions is to "start a dialogue early in the game so that EPA can make clear the kinds of things [it is] going to be looking for in these agencies' projects." Confidential interview with Environmental Protection Agency official, May 24, 1974. Similar findings obtained for other Type I and Type II agencies.

NEPA's review provisions also expanded the number and kinds of interests that regularly participate in agency decisionmaking, often forcing even the Type I agencies to consider a wider range of alternatives in more depth than they otherwise would.<sup>105</sup> The Type I agencies acknowledged that NEPA had forced them to confront more directly the criticism of other administrative agencies with relevant expertise but different environmental philosophies. For example, the Forest Service within the Department of Agriculture now must formally consider the comments of the Bureau of Land Management in the Department of Interior. The latter agency tends to favor significantly different land use planning concepts than does the former.<sup>106</sup> Similarly the Forest Service sometimes uses the commenting process to criticize proposals by another agency within the Department of Agriculture, the Rural Electrification Administration.<sup>107</sup>

During the Formal Compliance Phase, Type I agencies clarify lines of communication with those agencies and interests that are most concerned about their activities. In addition to facilitating earlier input of information from these groups, NEPA has forced these agencies to develop a set of expectations about the kinds of comments other agencies and interests will make and the informational resources necessary to respond to these comments. Thus, the expectation that EPA will require a certain type of response to their comments forces many of these agencies initially to structure their environmental reviews in ways that will accommodate EPA's requirements. Changes of this kind contribute to more rational use of environmental information across the administrative process and alleviate delays and misunderstandings when a draft EIS is released. A variety of formal and informal advance notice systems that call attention to the anticipated preparation of an EIS have been implemented by many of these agencies. The diverse lists of names included in these notification systems evidence NEPA's contribution to earlier involvement of old and new participants in agency decisionmaking.<sup>108</sup>

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105. A thorough discussion of the obligations of agencies to discuss alternatives under NEPA is provided in Jordan, *Alternatives Under NEPA: Toward an Accommodation*, 3 Ecology L. Q. 705-57 (1973).

106. Confidential interviews with Bureau of Land Management official, May 14, 1974, and with U.S. Forest Service official, May 23, 1974.

107. Confidential interview with U.S. Forest Service official, May 23, 1974.

108. The Army Corps of Engineers showed this writer a list of 5,000 names to whom notices of one public meeting were sent. Extensive lists are retained by agencies such as the Nuclear Energy Regulatory Commission, the Federal Power Commission, and the Soil Conservation Service. See A. Wichelman, *supra* note 15, ch. 5.

The Type II agencies reported more extensive alterations in their policy subsystems during the Formal Compliance Phase as a consequence of NEPA's commenting and disclosure provisions. An official of the Federal Power Commission, for example, noted that private commentators "giv[e] us information that people at the state and federal level can't give or might not be aware of or for political reasons not be willing to disclose to us."<sup>109</sup> Similarly, a HUD official noted that it is more difficult for their staff and clientele selectively to conceal information on environmental impacts and to dismiss as inconsequential legitimate areas of concern.<sup>110</sup> Although most of the Type II agencies traditionally have worked closely with private interests in making environmentally significant decisions, the EIS process has required these agencies to expose these relationships and the policies in which they result to closer scrutiny. During the Formal Compliance Phase the field staff of the Type II agencies are forced to develop an appreciation of the interests and concerns of commentators who previously were not included in agency decision-making. The field staff, in turn, communicate many of the informational demands of these new interests to their traditional clientele, forcing these groups to adapt to greater involvement by environmentalists in agency decisionmaking. This tends to facilitate interaction among environmental and economic interests that seldom occurred prior to NEPA.

The most extensive policy subsystem adjustments occur in Type III agencies. For the first time, these agencies often are forced to open their activities and decisionmaking processes to Type I and Type II agencies and environmental interest groups. Type III agencies begin formally to consider indirect and long-range impacts of many of their activities as well as the immediate implications of these activities.<sup>111</sup> These activities require development of new data gathering capabilities and adoption of new procedures for disclosing the information generated about the environmental impacts of their activities.

The Formal Compliance Phase also provides all three types of agencies with experience in analyzing the comments prepared by the new groups introduced into their policy subsystems. The extent of access and influence achieved by these groups depends in part on the

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109. Confidential interview with Federal Power Commission official, May 3, 1974.

110. Confidential interview with Department of Housing and Urban Development official, May 17, 1974.

111. For example, the Federal Trade Commission became aware of possible indirect and long-term environmental effects of many of its activities. See confidential interview, *supra* note 78.

quality of the comments they submit during the Formal Compliance Phase. If they demonstrate a high level of expertise, they will be likely to receive considerable deference from the agencies in the future.<sup>112</sup> Their views will be actively solicited early in agency decisionmaking. But if their comments are considered frivolous or uninformed, they will probably receive more perfunctory treatment in the future and may be excluded from early agency decisionmaking entirely. The interview respondents indicated that the quality of comments evoked by the NEPA commenting process varies tremendously and that the environmental review offices quickly determine which comments warrant careful consideration. However, the possibility of court challenges on procedural grounds has effectively forced the agencies formally to consider and disclose even those comments they would prefer to ignore.

#### THE TRANSITION TO THE INTEGRATED PLANNING PHASE

An interval of one or two years is usually required to develop and implement the procedures and structures necessary to come into formal compliance with NEPA. Likewise, the adaptations required in agency data collection and analysis systems and in their policy subsystems occur slowly and incrementally. When these changes in the way environmental values are treated have been accomplished and are functioning smoothly, agency attention tends to shift away from formal NEPA implementation toward integration of implementation changes into routine agency decisionmaking processes. At the point when this shift consistently evidences small but measurable effects on the substance of agency decisions, the Formal Compliance Phase has effectively ended and a third, or Integrated Planning Phase, has begun.

Whether and when an agency undergoes this important transition primarily depends on the extent and kinds of changes undertaken by the agency during the Formal Compliance Phase. The changes that occur during that phase tend to take on the same self-perpetuating characteristics of other agency SOP's during the Integrated Planning Phase. Kaufman, for example, notes that

[a]fter an organization has been changed even a little, it begins to freeze into its new pattern almost at once; it does not remain loosely structured and flexible.<sup>113</sup>

Consequently, the more pervasive an agency's efforts formally to

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112. A. Wichelman, *supra* note 15, ch. 5.

113. H. Kaufman, *supra* note 24, at 68.

implement NEPA, the more likely it will be to exhibit the SOP's most likely to facilitate a transition to the Integrated Planning Phase of implementation.

This transition is also facilitated by continued judicial scrutiny of agency procedural compliance with NEPA and critical review of both procedural and substantive compliance by CEQ and EPA.<sup>114</sup> Continuation of external review of procedural compliance permits agency environmental staff to concentrate their attention on NEPA's substantive policy objectives, which are summarized in section 101 of the Act.<sup>115</sup> This requires increasing emphasis on integrating the results of agency environmental review activities into other agency decisionmaking routines. CEQ, often through informal contacts with agency NEPA liaisons,<sup>116</sup> and EPA, through increasingly more vigorous use of its commenting prerogatives under Section 309 of the Clean Air Act,<sup>117</sup> help legitimize the efforts of the environmental review offices to shift emphasis toward NEPA's substantive implementation.

One source of evidence that an agency has shifted from formal compliance to substantive implementation is the content of the EIS's the agency issues. During the Formal Compliance Phase the informational content of EIS's improves. However, the statements' findings tend to remain poorly related to the alternatives selected. They also tend to be prepared apart from other ongoing agency decisionmaking routines. During the Integrated Planning Phase, the agencies' EIS's and the negotiations they reflect become integral to the substantive decisions made by the agencies. EIS's prepared during this phase more clearly delineate the relationship between the environmental impacts disclosed and the decisions made by the agencies.

#### THE INTEGRATED PLANNING PHASE

The interview respondents reported that the transition to the Integrated Planning Phase reflected their recognition that the continued viability of NEPA (and, by implication, of their offices and

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114. CEQ, for example, has institutionalized a biannual review of agency implementation of NEPA, focusing on the use of NEPA in decisionmaking, EIS content and quality, the review and commenting process, and public participation in the NEPA process. Special problems, peculiar to particular agencies, are also reviewed in staff level meetings. See Council on Environmental Quality, *supra* note 68. EPA has begun to release guidelines for review of specific kinds of projects and has begun to assert its prerogatives under § 309 of the Clean Air Act. See, e.g., EPA Guidelines for Review of Environmental Impact Statements: Volume 1—Highway Projects (1973).

115. NEPA § 101, 42 U.S.C. § 4321 (1970).

116. See note 114, *supra*, and A. Wichelman, *supra* note 15, ch. 5.

117. See note 114, *supra*.

jobs) depends not only on keeping projects out of court and free from adverse comments, but also on a demonstration that there are substantive benefits to be derived from the Act's costly implementation. Accordingly, as the Integrated Planning Phase begins, the environmental review offices concentrate less on procedural change and more on effecting environmentally desirable substantive changes in particular agency proposals and activities.

Throughout the interviews with the three types of agencies, NEPA liaisons frequently stated that they could not give enough attention to implementing NEPA's substantive policies until formal, procedural implementation was nearly complete and operating smoothly. Even then they reported problems, such as lack of techniques with which to accurately evaluate long-term, cumulative, and secondary environmental impacts.<sup>118</sup> Nonetheless, integrating the substantive findings of environmental impact analyses into agency actions increasingly absorbs the attention of the agencies' environmental review offices. An official of HEW's environmental review office offered this characterization of that agency's gradual transition into the Integrated Planning Phase:

Section 101 [of NEPA], which is the policy of doing good things for the environment, is something we are building up to, but we don't want to try to implement it at the same time we are implementing Section 102. Until people understand what an environmental effect is, it is difficult to come out with a series of value judgments concerning which effects are good and which are bad. We're moving into Section 101 slowly.<sup>119</sup>

The direction of the slow movement described by the HEW respondent is evident in many agencies. There is an explicit emphasis on making the environmental review process substantively meaningful. Both Type I and Type II agencies that were entering the Integrated Planning Phase when the field research was conducted could document the modification, rejection, or cancellation of specific projects or activities as a direct consequence of the environmental impact analyses that were conducted under NEPA.<sup>120</sup> These agencies often indicated that integrated planning and the substantive changes it produces reflected improved staff cooperation in implementing the spirit of the Act, as well as encouragement from agency leadership and aggressive work by their environmental review office

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118. These problems are discussed in A. Wichelman, *supra* note 15, ch. 5, 10.

119. Confidential interview with Department of Health, Education and Welfare official May 17, 1974.

120. A. Wichelman, *supra* note 15, ch. 5.

staff, who were eager to preserve their hard won accomplishments of the Formal Compliance Phase. Continuation of education programs and improvements in data collection systems also were mentioned as factors that contributed to the integration of environmental review activities into routine agency decisionmaking processes. The Federal Highway Administration, which was accused early in the Act's history of deliberately engaging in excessive procedural implementation,<sup>1 2 1</sup> reported that

[they had gotten] a lot of guidance out of the courts . . . and [recognized] that [they had] generated an awful lot of paperwork that wasn't necessary. . . . But [now NEPA implementation is] going to settle down to where it really is just part of our normal planning process.<sup>1 2 2</sup>

The same phenomenon was reported by the Army Corps of Engineers, the second largest producer of EIS's:

Now [we have some projects] that [we] have started with the last year where we think we have as good a scheme as anybody, whereby you can bring these environmental issues into the planning processes at the right time and truly implement the intent of NEPA. And we haven't really . . . had a chance before to do this.<sup>1 2 3</sup>

During the Integrated Planning Phase agencies also are no longer troubled by a backlog of projects that were already in progress at the time of NEPA's enactment and on which important decisions had been made. And they have had sufficient time to learn what activities require EIS's or assessments. The results of contract research, the use of consultants, and the availability of guidelines from agencies such as EPA also facilitate integration of NEPA into agency routines.<sup>1 2 4</sup>

At the time the interviews were conducted most of the Type I and Type II agencies appeared to be entering or about to enter the Integrated Planning Phase of implementation. The same process is likely to occur for the Type III agencies as they gain additional experience from formal procedural implementation of the Act. Whether the internal dynamics developed during the Formal Compliance Phase will be sufficient to sustain the transition to the Integrated Planning Phase for these agencies is uncertain.<sup>1 2 5</sup> Even more uncertain is

121. Sullivan & Montgomery, *Surveying Highway Impact*, 14 *Environment*, 12-20 (1972).

122. Confidential interview with Federal Highway Administration official, May 20, 1974.

123. Confidential interview with Army Corps of Engineers official, May 31, 1974.

124. Similar findings are reported by CEQ. See Council on Environmental Quality, *supra* note 18, at 371-72, 378-81.

125. Since the involvement of Type III agencies in environmental review is less extensive



whether at least some agencies will move from the Integrated Planning Phase to what is termed here a "Programmatic Planning Phase" of implementation.

#### A TRANSITION TO A PROGRAMMATIC PLANNING PHASE?

The substantive changes characteristic of the Integrated Planning Phase tend to be project specific. The interview respondents, when asked whether the Act had had or would have similar effects on their agencies' long range policies, plans, regulations, guidelines, legislative proposals and budgetary requests, indicated that the application of NEPA to these areas of agency activity was still difficult to document.<sup>126</sup> The respondents acknowledged that NEPA was applicable at programmatic and policymaking levels, but they identified several obstacles to its implementation at these levels that were less applicable to the incremental changes effected in specific projects.<sup>127</sup>

Specifically, the respondents noted that the federal courts had not yet fully clarified the extent to which they would require strict procedural compliance with NEPA for programmatic and policy-level activities.<sup>128</sup> And since these activities usually involve high-level agency policymakers, the respondents felt that their strategies for achieving substantive change through staff reeducation would be less effective when programmatic planning was involved. Policymakers, they noted, are directly subject to political pressures from political elites in the Congress and other governmental bodies, a factor that may sometimes render them less responsive than agency staff to input from environmental analysts and interests.<sup>129</sup> Consequently, even if the courts were to require EIS's for agency programs and policymaking activities (something many scholars consider unlikely),<sup>130</sup> there is no assurance that the environmental analyses

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than that of the Type I and Type II agencies, their investment in NEPA implementation is less substantial. They also come under less public and intergovernmental scrutiny in most instances. Consequently, it could be plausibly hypothesized that these agencies would be more likely than either the Type I or Type II agencies to undergo a regression back to the Formal Compliance Phase if either the external or internal forces facilitating implementation were significantly weakened.

126. A. Wichelman, *supra* note 15, ch. 5.

127. *Id.*

128. See, e.g., Comment, *Sierra Club Seeks to Require NEPA Impact Statement on Annual Appropriations Proposals*, 5 Environmental Law Rep. 10071-74 (1975); Frederick Anderson's proposal of multiple statements on the same subject matter in his article, *supra* note 30, at 362065.

129. A. Wichelman, *supra* note 15, ch. 5, 10.

130. The debate over substantive judicial review under NEPA is explicated in numerous law review articles, including Yarrington, *Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act*, 19 South

produced would become an integral part of the policy-level decisions ultimately reached.

Most of the Type II and Type III agencies, therefore, cannot be expected to move into a Programmatic Planning Phase of implementation. Without sympathetic Presidential, Congressional, and internal agency leadership, the agencies' internal environmental review staffs will lack the requisite means significantly to alter agency policies. Efforts by CEQ to promote preparation of programmatic, generic, and umbrella impact statements<sup>131</sup> will facilitate the movement of Type I agencies into the Programmatic Planning Phase when sympathetic leadership already exists within these agencies.<sup>132</sup>

CEQ, in its most recent annual report, indicates that there has been a sharp increase in the number of program statements prepared by the agencies.<sup>133</sup> Examples of these include EIS's for the development of the liquid metal fast breeder reactor, the use of herbicides in different states and regions by the Department of Agriculture, and the tanker construction program of the Department of Commerce.<sup>134</sup> It is still too early to determine whether the application of NEPA to broad-ranging policy-level decisions will significantly alter the substance of such decisions as extensively as it has the substance of individual projects and actions.

Edward Strohbehn, among others, has argued that

[i]f EPA and CEQ would adopt firm procedures and cooperate in implementing them, the most environmentally destructive projects and programs of the federal government would be subjected to

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Dakota L. Rev. 279-94 (1974); Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 Harvard L. Rev. 735-58 (1975); Kumin, *Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers*, 3 Ecology L. Q. 173-208 (1973); Arnold, *The Substantive Right to Environmental Quality Under the National Environmental Policy Act*, 3 Environmental L. Rep. 50028-43 (1973).

131. CEQ's most recent set of guidelines encourages the use of program or generic statements. See *Preparation of Environmental Impact Statements: Guidelines*, 40 C.F.R. t. 1500 38 Fed. Reg. 20549 (1973). The Council has also stated that although "program statements do not yet form a large proportion of the total number of statements, they offer an unprecedented opportunity to analyze major policy issues associated with the formulation of government programs. CEQ strongly encourages agencies to prepare such statements in the development of new programs and in the review of modification of programs already in operation." Council on Environmental Quality, *supra* note 18, at 393.

132. There is little published data on the attitudes of policymakers toward NEPA implementation. Edward L. Strohbehn, Jr., argues that "NEPA can be expected to have only a limited impact on agency decisionmaking, particularly at the policy levels" because "there generally is little dialogue between agency policymakers and environmentalists." *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 Ecology L. Q. 93, 104 (1974). See also, Edmonds, *supra* note 90.

133. Council on Environmental Quality, *supra* note 18, at 392.

134. *Id.* at 392-93.

intensive public scrutiny which should result in their termination or substantial modification.<sup>135</sup>

This writer agrees that such actions by EPA and CEQ would result in greater public scrutiny of the policies involved. But whether this scrutiny would force substantial change in these policies, as Strohbehn suggests, is less certain. Unlike the modification of specific projects, the substantial alteration of broad agency policies in an effort to implement NEPA's Section 101 policy goals requires the agencies to, in effect, supplement or amend their enabling legislation. Indeed Section 103 directs the agencies to consider NEPA in this manner.<sup>136</sup> Nonetheless, in the absence of strong pressures to do so, the agencies not fully in sympathy with NEPA's policy goals might be expected to seek statutory exemption for the programs involved before voluntarily complying with directives from CEQ, EPA, or, for that matter, the courts, to implement programmatic planning.<sup>137</sup> Only if these efforts failed could most of the Type II and Type III agencies be expected to integrate environmental values into their policy-level planning and programmatic activities.

#### SUMMARY

Diagram 1 summarizes the conceptual framework developed and interpreted in this paper. The framework shows that the implementation of policies across the administrative process is a complex phenomenon in which procedural and substantive change are highly interrelated. Undue attention to the contribution of any single institution or actor may cause the researcher to overlook others that are equally important.

NEPA process and case studies will further refine the relationships shown in the diagram. More detailed case studies may also be expected to identify additional internal agency variables relevant to

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135. Strohbehn, *supra* note 136.

136. NEPA § 103, 42 U.S.C. § 4323 (1970).

137. The initial backlash to NEPA in Congress is discussed at note 66, *supra* and accompanying text. A second backlash of more modest proportions is considered in Senate Committee on Interior and Insular Affairs, *Amending the National Environmental Policy Act to Clarify the Federal and State Roles in the Preparation of Environmental Analyses of Certain Federal Programs*, Sen. Rep. 16, 94-152, 94th Cong., 1st Sess. (1975). See also CEQ *Comments on NEPA Amendments*, 5 102 Monitor 3-25 (1975), and two advisory memoranda by CEQ, *Delegation by Federal Agencies of Responsibility for Preparation of Environmental Impact Statements*, (1974) and *Application of the National Environmental Policy Act to Enforcement of the Anti-Trust Laws by the Federal Trade Commission* (1975). These documents point up the continuing possibility of hostile agencies seeking statutory exemption from NEPA for particular programs, especially when they find the implementation process difficult to adapt to the programs involved.

understanding different rates and patterns of implementation. The framework presented here is intended to facilitate the comparison of research already completed and to suggest fruitful areas for further research. It should also facilitate formulation and testing of generalizations about NEPA implementation in particular, and public policy implementation in general.

Diagram 1

A Conceptual Framework for Explaining Differential NEPA Implementation By the Administrative Agencies

Interpretive Phase

Agency Leadership

- Uncertainty about NEPA's operational meaning for specific agency programs (especially those initiated before NEPA was enacted)
- Uncertainty about the extent of oversight Congress, the courts, and the Executive branch will exercise
- Resistance to extensive agency reorganization based on political and economic expediency

Agency Staff

- Confusion about the lines of responsibility for NEPA implementation
- Resistance to extensive agency reorganization by staff benefiting from existing arrangements, and from those upon whom the burdens of implementation would devolve

Agency Clientele

- Resistance to changes that might weaken their bargaining power within their client agency's policy subsystem and impose upon them added costs and burdens

Agency Environmental Impact Statements

- Generally of poor quality, emphasizing in-house descriptive data that is poorly related to the action proposed
- Generally prepared on an ad hoc basis, usually separate from and late in the agency's decision-making processes

Intervening Events

Facilitating

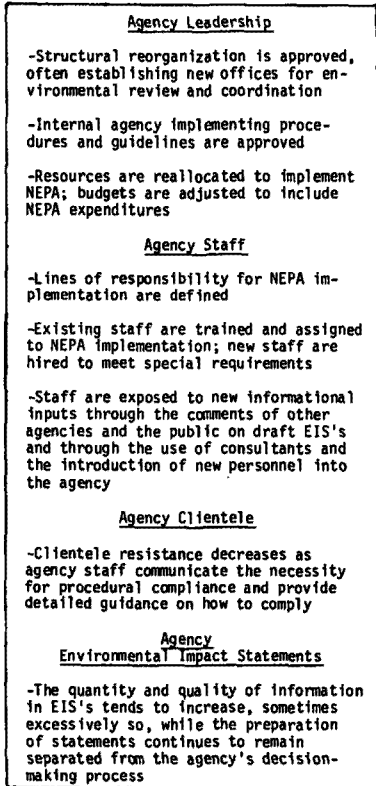
- Litigation by environmentalists results in court decisions requiring strict procedural compliance
- Executive Order 11574 is issued
- CEQ Oversight: Guidelines, Memoranda, and Consultations
- Weak EPA Oversight under § 309 of the Clean Air Act
- Congressional Oversight Hearings on compliance

Inhibiting

- Opposition to court decisions by agencies and their clientele
- Congressional hearings on implementation costs
- Introduction of amendments to weaken NEPA
- Refusal by OMB to require EIS's for most proposed legislation
- Emergence of the energy crisis and recession as major policy issues

Diagram 1 Continued

Formal Compliance Phase



Intervening Events

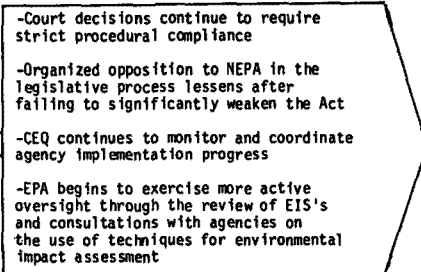


Diagram 1 Continued

Integrated Planning Phase

Agency Leadership

-Increased recognition of positive benefits from environmental assessment

-Endorsement and promotion of improved integration of environmental assessments into ongoing agency decision-making

-Beginning of consideration of environmental values in long-range planning and policy-making

Agency Staff

-Environmental review becomes securely institutionalized forming a routine part of agency activity, requiring less internal oversight

-Field staff attitudes become more favorable to environmental review as a consequence of experience in implementing NEPA

-Educational Programs continue to reinforce learning from experience

Agency Clientele

-Experience with NEPA implementation results in increased cooperation and recognition of positive benefits from implementation

Agency

Environmental Impact Statements

-EIS findings are increasingly integrated into agency decisions, often resulting in incremental changes in the actions taken

-Environmental considerations are discussed with external interests well in advance of the preparation of the draft EIS

-Efforts continue within the agencies to improve baseline environmental data and data collection techniques

-Consultants and contract research are routinely utilized to evaluate impacts involving matters not within agency competence

Intervening Events

-Judicial review of agency procedural compliance decreases

-Judicial review of the substance of agency actions is limited to the "arbitrary and capricious" standard

-Conflicts in Congress between energy development and environmental programs limit the extent to which environmental values are incorporated into new legislation and program plans

-Efforts are reinitiated to exempt certain categories of projects from NEPA, especially those relating to economic and energy development

-CEQ and EPA increase their efforts to provide substantive guidance and oversight to agencies

-CEQ and EPA contract research improves the techniques available for environmental measurement and assessment

## Diagram 1 Continued

## Programmatic Planning Phase

Agency Leadership

-Multi-level EIS's are endorsed by agency leadership that apply NEPA to agency policy-making and planning in addition to its application to specific projects

Agency Staff

-Internal environmental review shifts to the substantive quality of staff environmental analysis and to the application of NEPA to early agency planning processes and the generic impact of agency activities

-Improved techniques for environmental assessment continue to be implemented

Agency Clientele

-Clientele reassert opposition to major changes in agency policies premised on NEPA

Agency  
Environmental Impact Statements

-EIS findings are integrated into both project and programmatic planning at the earliest possible points in time

-The number and length of EIS's decreases as a multi-level approach to impact analysis is adopted

-EIS's take into account impacts on the human as well as physical environment

-Follow-up studies are conducted to ascertain the accuracy of antecedent environmental analyses