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ADMINISTRATIVE LAW-NATIONAL ENVIRONMENTAL POLICY ACT-CAB's Reissuance of 14 C.F.R. section 312 Will Reduce the Burden on Airlines to Submit Environmental Data and Increase the Opportunity for Public Participation in Environmental Investigations. 45 Fed. Reg. 16,132 (1980).

Stephanie Barron

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Case Notes and Statute Notes

ADMINISTRATIVE LAW—NATIONAL ENVIRONMENTAL POLICY ACT—CAB's Reissuance of 14 C.F.R. section 312 Will Reduce the Burden on Airlines to Submit Environmental Data and Increase the Opportunity for Public Participation in Environmental Investigations. 45 Fed. Reg. 16,132 (1980).

On February 28, 1980, the Civil Aeronautics Board (CAB or the Board) reissued the procedural regulation implementing the National Environmental Policy Act of 1969 (NEPA) to become effective April 26, 1980.¹ The new rule eliminates most routine environmental investigations previously required before the Board issued certificates authorizing airlines to serve new routes.² Airlines will no longer be required to submit environmental data when applying for route authority.³ The public, on the other hand, will be given an expanded role in raising environmental issues.⁴ The new rule affects the deregulation policies of the Board⁵ and Congress,⁶ and raises doubts as to the continued viability of NEPA in the light of the Carter Administration policy which seeks to reduce paper work and avoid delays resulting from environmental

¹ Part 312, CAB Docket No. 32,602 (Feb. 28, 1980), 45 Fed. Reg. 16,132 (1980) (revising CAB's environmental regulation, 14 C.F.R. § 312 (1975)), The rule has been changed to "adjust for the Board's new policies and experience gained since the regulation was first adopted and take into account the Council on Environmental Quality's new regulation." Proposed Reissuance of Part 312, 44 Fed. Reg. 45,637 (1979) [hereinafter cited as Proposed Rulemaking].

² Part 312, 45 Fed. Reg. 16,132, 16,133 (to be codified at 14 C.F.R. § 312.11(c)). See text accompanying notes 103-05 *infra*.

³ Proposed Rulemaking, *supra* note 1, at 45,638. See note 107 *infra*, and accompanying text.

⁴ Proposed Rulemaking, *supra* note 1, at 45,639. See text accompanying notes 115-20 *infra*.

⁵ Board policy favoring competition is clearly demonstrated by the decision to allow multiple permissive awards of route authority. See note 53 *infra*.

⁶ The deregulation policy of Congress is expressed in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (amending 49 U.S.C. §§ 1301-1542 (1976) (codified at 49 U.S.C.A. §§ 1301-1542 (Supp. 1979))), which streamlines certification procedures and creates new avenues of entry into existing markets. See text accompanying notes 67-84 *infra*.

investigation.⁷ This statute note examines the statutory policy of the Airline Deregulation Act of 1978 (ADA)⁸ and the regulatory policy of the Council on Environmental Quality Guidelines of 1979 (New CEQ Guidelines),⁹ both of which precipitated the new rule. It also considers the effect of the rule on the policy underlying NEPA.¹⁰

I. BACKGROUND OF THE ENVIRONMENTAL RULE

Since its inception under the Civil Aeronautics Act of 1938,¹¹ and more clearly under the Federal Aviation Act of 1958¹² the CAB has been the federal agency responsible for the economic regulation of the airline industry.¹³ The language of the Federal Aviation Act empowers the CAB to regulate fares and market

⁷ See Executive Order 11,991, 13 C.F.R. § 808 (1977) and text accompanying notes 87 and 88 *infra*.

⁸ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. §§ 1301-1542 (Supp. 1979)).

⁹ Council on Environmental Quality Regulations Implementing the National Environmental Policy Act Procedures, 40 C.F.R. §§ 1500-1508 (1979) [hereinafter cited as New CEQ Guidelines]. These new regulations recommend changes in the procedures followed by administrative agencies of the federal government in preparing environmental impact statements. See text accompanying notes 89-94 *infra*.

¹⁰ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331 (1976). NEPA requires that every federal agency consider the environmental impact of decisions governing major federal actions. Each agency must set its own standards to determine whether an action is "major" and its environmental effect significant. See Burger, *Miami-Los Angeles and NEPA: The Use of the National Environmental Policy Act of 1969 as an Anticompetitive Weapon*, 42 J. AIR L. & COM. 529, 530-35 (1976); McGarity, *The Courts, the Agencies and NEPA Threshold Determinations*, 55 TEX. L. REV. 801, 842-47 (1977) (discussing the difficulty of establishing standards for "major" and "significant") [hereinafter cited as McGarity]. See text accompanying notes 20-24 *infra*.

¹¹ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (current version at 49 U.S.C.A. §§ 1301-1542 (Supp. 1979)). See generally R. BURKHARDT, *THE CIVIL AERONAUTICS BOARD* 3 (1974) [hereinafter cited as R. BURKHARDT].

¹² 49 U.S.C. §§ 1301-1542 (1976). The Federal Aviation Act recodified the general economic regulatory authority of the CAB and established the Federal Aviation Agency to take over the safety regulation that was previously a CAB responsibility. R. BURKHARDT, *supra* note 11, at 15, 208.

¹³ 49 U.S.C. § 1302(b) (1976) declares the policy of the Federal Aviation Act to be: "[t]he regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation . . ." *Id.* See R. BURKHARDT, *supra* note 11, at 3, 15; Dupre, *A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry*, 9 TRANSP. L.J. 273, 274 (1977) [hereinafter cited as Dupre].

entry¹⁴ as the means of promoting "sound economic conditions"¹⁵ and "adequate, economical and efficient service"¹⁶ but gives no express power or mandate to protect environmental values through its procedures.¹⁷ Under judicial construction of the Act, however, the implied responsibility to consider environmental issues has been added as an element to be weighed in the certification process.¹⁸

Environmental protection became an express responsibility of the Board with the passage of NEPA in 1969.¹⁹ In a national effort to protect and enhance the environment, the Act sets forth goals and procedures for all federal agencies to follow.²⁰ It directs agencies to investigate and analyze the environmental consequences of their plans and decisions²¹ and to inform the public through the preparation and distribution of an "environmental impact statement" (EIS)²² prior to final action.²³ Agencies are required to

¹⁴ 49 U.S.C. § 1482 (1976) provides the CAB with the power to regulate fares; 49 U.S.C. § 1371 (1976), *as amended by* Pub. L. No. 95-504, 92 Stat. 1705 (1978), provides for market entry procedures. "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." *Id.* See Dupre, *supra* note 13, at 276.

¹⁵ 49 U.S.C. § 1302(b) (1976). See note 12 *supra*.

¹⁶ *Id.* § 1302(c). See note 12 *supra*.

¹⁷ See, e.g., 49 U.S.C. § 1371(d) (1976), *as amended by* Pub. L. No. 95-504, 92 Stat. 1705 (1978) which requires that a carrier be "fit, willing and able" and the authority sought be "consistent with the public convenience and necessity." *Id.*

¹⁸ *Palisades Citizens Ass'n v. CAB*, 420 F.2d 188 (D.C. Cir. 1969). In a suit brought by an environmentalist group to demand the right to intervene in a proceeding to authorize helicopter service in the Washington, D.C.-Baltimore area, the court ruled that "questions of environmental impact are proper 'public interest' questions in the Board's certification inquiry." *Id.* at 192.

¹⁹ 42 U.S.C. §§ 4321-4334 (1976).

²⁰ *Id.* § 4321. The purpose of NEPA is to "prevent or eliminate damage to the environment." *Id.* Section 4331 sets forth the policy that the "Federal Government [is] to use all practicable means, consistent with other . . . considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources" to meet the environmental goals of NEPA. *Id.* § 4331.

²¹ See 42 U.S.C. § 4332(2)(A) (1976).

²² *Id.* § 4332(2)(C). The purpose of the EIS is to bring information concerning adverse effects, irretrievable commitments of resources and alternatives available in any "major federal action significantly affecting the human environment" to the attention of both government officials and the public. *Id.* See Burger, *supra* note 10, at 530-35; McGarity, *supra* note 10, at 804.

²³ See McGarity, *supra* note 10, at 805-07. The informational function of

adopt procedures that "insure that presently unquantified environmental amenities and values may be given *appropriate consideration* in decision-making along with economic and technical consideration."²⁴ The Act functions to increase knowledge and awareness of negative environmental effects but it does not provide a ban on government actions that potentially threaten the environment.²⁵

Soon after NEPA became effective in January, 1970,²⁶ President Nixon issued an Executive Order establishing the Council on Environmental Quality (CEQ) to assist other federal agencies in their efforts to include environmental values in the decision-making process.²⁷ The first EIS guidelines for federal agencies were adopted by the CEQ in 1971.²⁸ At the same time, the courts were providing federal agencies with interpretations of the extent of their responsibility for environmental protection and emphasizing the necessity of following statutory form in preparing statements.²⁹ In *Calvert Cliffs' Coordinating Committee v. AEC*,³⁰ the court ruled that a federal agency must take the initiative in considering the environmental consequences at every stage of the decision-making process,³¹ and prepare a detailed statement of the environ-

NEPA is based on "a profound though perhaps naive hope that the political process will produce the right result if all relevant facts are before the public." *Id.* at 807.

²⁴ 42 U.S.C. § 4332(2)(B) (1976) (emphasis added).

²⁵ See Burger, *supra* note 10, at 531: "Congress did not say that if a Federally funded highway will destroy a park the road may not be built." See generally McGarity, *supra* note 10.

²⁶ 42 U.S.C. § 4321 (1976).

²⁷ Executive Order 11,514, 3 C.F.R. § 902 (1966-1970 Compilation). The President ordered all federal agencies to initiate procedures needed to direct their policies, plans and programs to meet national environmental goals and established the CEQ as mandated in NEPA. See 42 U.S.C. § 4331, quoted at note 20 *supra*.

²⁸ CEQ Guidelines, 40 C.F.R. § 1500 (1971) set forth procedures to be followed by federal agencies in the preparation, use and distribution of environmental impact statements.

²⁹ See *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). The court rejected the procedural rules adopted by the Atomic Energy Commission to implement NEPA in licensing nuclear power projects because the agency refused to consider environmental questions if states and local agencies had already approved the project under their own environmental standards. *Id.* at 1123. *Accord*, *Citizens Airport Comm. v. Volpe*, 351 F. Supp. 52 (E.D. Va. 1972); Annot., 17 A.L.R. Fed. 33 (1973).

³⁰ 449 F.2d 1109 (D.C. Cir. 1971).

³¹ *Id.* at 1119.

mental impact and alternative courses of action.³² The CAB followed these mandates of Congress, the courts, and the executive branch in issuing the original Part 312³³ of its administrative regulations. This action brought the Board's procedures in line with NEPA and the guidelines issued by the CEQ for the preparation of environmental impact statements. This rule sets a minimum level of environmental investigation for *all* air carrier licensing proceedings.³⁴ The threshold for further environmental study was established by specifically identifying a number of significant effects,³⁵ as well as certain Board actions, which the Board had determined to have a potential for serious impact on the environment.³⁶ Significant environmental effects included air and noise pollution; destruction or derogation of recreational, historical, cultural, educational or scientific areas; adverse aesthetic or visual effects; and detriments to safety.³⁷

The environmental study requirement could be satisfied by a finding, based on certain preliminary documents, that an EIS was not needed. The initial document, an "environmental evaluation," forecast the effects of proposed service. It was prepared and submitted by every airline applying for certification to serve a new market.³⁸ Part 312 set out the data required and allowed the use

³² *Id.* at 1115, 1117-18. In *Calvert Cliffs*, the court ruled that NEPA enabled the Atomic Energy Commission to consider nonradiological data in the licensing procedure. *Id.* at 1112, 1119. NEPA empowers agencies to protect the environment even though the enabling legislation does not. McGarity, *supra* note 10, at 864-65.

³³ Implementation of NEPA, 14 C.F.R. § 312 (1979), established as Board policy the preservation and enhancement of the environment by viewing "traditional policies and missions in the light of national environmental objectives." *Id.* § 312.4(b).

³⁴ 14 C.F.R. § 312.12 (1979).

³⁵ *Id.* § 312.10(a).

³⁶ *Id.* § 312.9-10. Certain other proceedings, especially actions resulting in first-time, increased or reduced service, as well as service that may impact a park or national monument, service likely to have highly "controversial" environmental impact, and rulemaking or legislative proposals which might cause similar changes in service were also identified as requiring environmental evaluation. *Id.* § 312.9(a)(2).

³⁷ *Id.* § 312.10(a).

³⁸ *Id.* § 312.12. An environmental evaluation contained: descriptions of existing and proposed service including number of flights, times of arrival and departure; type of aircraft; block hours per flight; a profile of the airports to be used; description of impact on resources; forecast of additional

of standard formulas in the Screening Tests³⁹ to determine the threshold levels of noise and air pollution which would trigger further environmental investigation.⁴⁰ Using information available from the Federal Aviation Administration and their own sources and experience, many airlines developed the computer capability to produce environmental evaluations routinely.⁴¹ After reviewing the evaluation, the responsible CAB official⁴² either issued a summary notice stating that he found no environmental consequences (the "environmental rejection")⁴³ or he required an "environmental assessment"⁴⁴ to supplement the information available to him. Based on the assessment, the official issued either an "environmental negative declaration"⁴⁵ or a finding that a draft EIS must be prepared.⁴⁶ Federal and local governmental agencies, as well as

passengers to be carried; and the results of the Noise Screening Test and Pollutants Screening Test. *Id.*

³⁹ *Id.* § 312 App. I(A), (B).

⁴⁰ The Screening Tests establish a percentage increase in pollutants and an acreage increase in noise which proposed service must exceed in order to require an EIS. *Id.*

⁴¹ Interview with Gary A. Barron, Vice-President for Corporate Services, Southwest Airlines, at Dallas, Tex. (Feb. 2, 1980).

⁴² Part 312 designated the Director of the Bureau of Fares and Rates and the Director of the Bureau of Operating Rights or their designees as the "responsible officials" in the preparation of environmental documents. 14 C.F.R. § 312.8(a) (1979). That responsibility is currently performed by the Bureau of Domestic Aviation. *See, e.g.*, Brief of the Bureau of Domestic Aviation to the Board, Interstate Service to Love Field, CAB Docket Nos. 34,582, 32,711, and 33,019 (Aug. 16, 1979).

⁴³ 14 C.F.R. § 312.13(b) (1979).

⁴⁴ *Id.* § 312.14(b). The environmental assessment "will contain sufficient information to enable the responsible official to begin preparation of a draft environmental impact statement." *Id.*

⁴⁵ *Id.* § 312.14(b). The responsible official prepared an environmental negative declaration when he found that an action raising legitimate environmental concerns would not have a significant effect on the environment under the standards of 14 C.F.R. § 312.10(a) (1978). *Id.* See note 25 *supra*.

⁴⁶ 14 C.F.R. § 312.13(c) (1978).

Draft statements shall set forth in detail: (1) The environmental impact of the proposed or contemplated action; (2) any adverse environmental effects which cannot be avoided . . . ; (3) alternatives to the proposed or contemplated action; (4) the relationship between local short-term uses of man's environment . . . and . . . long-term productivity; and (5) any irreversible or irretrievable commitments of resources which would be involved in the . . . action should it be implemented.

Id. § 312.14(c).

private groups and individuals,⁴⁷ had forty-five days to submit their comments after a draft EIS was filed.⁴⁸ The comments were attached to a final EIS⁴⁹ which was filed with the Board prior to any hearing or final decision on the Board action which had precipitated the EIS.⁵⁰

Since 1975, Board actions under Part 312 have rarely required the preparation of an EIS.⁵¹ Of nearly one hundred cases heard by the Board, only five were determined to require statements.⁵² Three of the cases⁵³ involved multiple awards of route authority, a major procedural change instituted by the Board as part of its policy of deregulation.⁵⁴ Under this new procedure, which was introduced in the *Oakland Service Case*,⁵⁵ the Board considered granting certificates to many airlines for permissive authority to serve several markets, consolidating these decisions in one proceeding.⁵⁶ The environmental evaluations submitted by each airline indicated only the impact of its own anticipated activity, based on an illustrative proposal rather than on intended service.⁵⁷

⁴⁷ *Id.* § 312.14(d). The emphasis was on contacts with other federal agencies and local governmental bodies for environmental input to supplement data provided by airline applicants; public hearings were not normally held for the formulation of documents. *Id.* § 312.15.

⁴⁸ *Id.* § 312.14(e).

⁴⁹ *Id.* § 312.14(f). From this stage to the end of the proceeding, although further supplementation of the EIS was possible, it was termed the final EIS. *Id.*

⁵⁰ The draft EIS must have been on file ninety days, and the final EIS thirty days prior to final Board action; the final EIS must have been on file fifteen days before any hearing on it. *Id.* § 312.16(b).

⁵¹ Proposed Rulemaking, *supra* note 1, at 45,638.

⁵² *Id.* See notes 53, 59, 60 *infra*.

⁵³ Chicago-Midway Low-Fare Route Proceeding, CAB Order No. 78-8-203 (Aug. 31, 1978); Oakland Service Case, CAB Order No. 78-4-121 (Apr. 19, 1978); Caribbean Area Service Investigation, CAB Order No. 78-3-114 (Mar. 23, 1978).

⁵⁴ See *Oakland Service Case*, CAB Order No. 78-4-121 (Apr. 19, 1978) (a definitive discussion of the legal, economic and policy issues raised by the procedural change to an open entry policy). The prevailing policy of the last forty years required the comparative selection of one carrier per market in each route proceeding. *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ See, e.g., Caribbean Area Service Investigation, CAB Order No. 78-3-114 (Mar. 23, 1978) which involved the application of seventeen airlines for most of the United States-Caribbean and intra-Caribbean markets.

⁵⁷ E.g., Oakland Service Case, CAB Order No. 78-9-96, Attachment H at 1 (Sept. 21, 1978); Chicago-Midway Low-Fare Route Proceeding, CAB Order No. 78-7-41, at 11 (July 12, 1978).

Independent study by the Board, resulting in the preparation of an EIS, was necessary to determine the cumulative effects of possible multiple awards.⁵⁸ The *Chicago-Midway Low-Fare Route Proceeding* required that the Board investigate not only the environmental impact of proposed service by newly-organized airlines, but also the possible diversion of flights from O'Hare Airport.⁵⁹ A fourth case involved first-time jet service to Lake Tahoe⁶⁰ and a fifth case pertained to an air carrier agreement to limit and allocate frequencies in transcontinental markets.⁶¹ Most applications for routine authority involved the addition of a few flights to a market already served by a number of daily flights by similar aircraft, causing only slight increases in the levels of noise and air pollution.⁶²

II. STATUTORY AND ADMINISTRATIVE CONFLICTS

In May, 1978, National Airlines, concerned that multiple permissive award proceedings would render the Part 312 environmental evaluations useless, petitioned the CAB for a new rulemaking to address the problem of analyzing the cumulative effect of multiple awards.⁶³ The anticipated passage of the Airline De-

⁵⁸ Oakland Service Case, CAB Order No. 78-10-78, at 2 (Oct. 19, 1978); Chicago-Midway Low-Fare Route Proceeding, CAB Order No. 78-7-41, at 61-67 (July 12, 1978). Applicants' evaluations also fail to consider incumbents' responses to the route awards. Proposed Rulemaking, *supra* note 1, at 45,638.

⁵⁹ Chicago-Midway Low-Fare Route Proceeding, CAB Docket No. 30,277 (Aug. 31, 1978) (dissenting opinion of Richard O'Melia).

⁶⁰ Lake Tahoe Service Investigation, CAB Order No. 78-5-77 (May 12, 1978). The CAB granted certification conditional on the use of Lockheed Electra (non-jet) aircraft or other aircraft permitted under the environmental regulations of the California Public Utility Commission. *Id.* at 3.

⁶¹ Capacity Reduction Agreements Case, CAB Docket No. 22,908 (1973). The CAB has indicated that this type of action, involving agreements not to compete, is against current policy, and unlikely to be repeated. Proposed Rulemaking, *supra* note 1, at 45,638.

⁶² See *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972), *rev'd on other grounds*, 541 F.2d 442 (4th Cir. 1976); Burger, *supra* note 10, at 538-40. Burger argues that CAB actions cannot have a significant impact on the environment, and that the Federal Aviation Administration and the Environmental Protection Agency have more direct control over the environmental effects of aircraft operations. *Id.*

⁶³ Advanced Notice of Rulemaking, 43 Fed. Reg. 38,025 (1978). The Board recognized National's concern as one factor leading to a revision of Part 312. *Id.*

regulation Act⁶⁴ and adoption of new guidelines by the Council on Environmental Quality⁶⁵ added further impetus for change. The CAB issued an advance notice of proposed rulemaking in August, 1978, which recognized the necessity for changes in Part 312.⁶⁶

The Airline Deregulation Act, passed in October, 1978, amended the Federal Aviation Act of 1958 to facilitate market entry through a streamlined certification procedure.⁶⁷ It also created two new route application procedures, the Automatic Market Entry (AME)⁶⁸ and the Unused Authority Procedure (dormant authority).⁶⁹ The burden of proof is shifted from the airlines applying for certification and requires that parties opposed to the certification prove that the grant of authority is inconsistent with the public convenience and necessity.⁷⁰ The Board is required to issue AME certificates within sixty days unless it finds the applicant is not "fit, willing and able."⁷¹ Under extraordinary circumstances the Board may issue an emergency rule modifying the AME program to "prevent harm to the national air transportation system."⁷² Any

⁶⁴ Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. §§ 1301-1542 (Supp. 1979)).

⁶⁵ New CEQ Guidelines, *supra* note 9.

⁶⁶ The Board announced that Part 312 would be revised after the new CEQ Guidelines were adopted and experience under the ADA could be reviewed. 43 Fed. Reg. 38,025 (1978).

⁶⁷ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401, 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371 (Supp. 1979)). "The Board shall promulgate rules establishing *simplified procedures* for (A) the disposition of applications for a certificate to engage in air transportation . . ." 49 U.S.C.A. § 1371(p)(1) (Supp. 1979).

⁶⁸ The AME provision allows each certificated carrier to apply in January of 1979, 1980 and 1981 for authority to provide round trip service between two chosen points. 49 U.S.C.A. § 1371(d)(7) (Supp. 1979). See note 71 *infra*.

⁶⁹ Airlines may apply for authority to serve routes to which the certificated airline has failed to provide minimum service of five round trips per week for at least thirteen weeks during any twenty-six week period. 49 U.S.C.A. § 1371(d)(5) (Supp. 1979).

⁷⁰ Under the Federal Aviation Act the applicant airline was required to prove that the authority to be awarded was "required by public convenience and necessity." 49 U.S.C. § 1371(d) (1976).

⁷¹ 49 U.S.C.A. § 1371(d)(7)(A) (Supp. 1979). The fitness standard is a measure of financial viability only. See Southwest Airlines AME Investigation, CAB Order No. 79-9-192 (Sept. 28, 1979).

⁷² Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d)(7)(D), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371(d)(7)(D) (Supp. 1979)).

application submitted pursuant to the Unused Authority provision is presumed to be consistent with the public convenience and necessity, and must be granted within fifteen days.⁷³

The mandatory language of the statute leaves little room for the CAB to exercise its discretion in granting the authority under the two new entry provisions.⁷⁴ The Senate Transportation Committee, reporting on the proposed AME program, characterized it as a "mechanism through which eligible carriers will be able to enter a limited number of new routes automatically and without CAB review."⁷⁵ In the recent CAB order granting the application of Southwest Airlines to serve the Dallas Love Field-New Orleans route under the AME procedure, the Board held that environmental arguments "have no bearing on the AME authority"⁷⁶ because Congress has determined that the AME applications shall be granted by ministerial action of the Board.⁷⁷ Public convenience and necessity are not at issue in these new certification procedures,⁷⁸ and the time limits for final action by the Board are too short to allow for the preparation of environmental documents.⁷⁹

The procedural regulations adopted by the CAB implementing the provisions of the ADA⁸⁰ reflect the Board's position that Con-

This limited exception is not related to environmental issues. See Southwest Airlines AME Investigation, CAB Order No. 79-9-192 (Sept. 28, 1979).

⁷³ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d)(5)(F)(ii), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371 (Supp. 1979)).

⁷⁴ The AME section provides: "Not later than the sixtieth day . . . the Board shall issue a certificate to the applicant. . . ." 49 U.S.C.A. § 1371(d)(7)(B) (emphasis added). The unused authority provision states "the Board shall issue a certificate to the first applicant who . . . submits an application which certifies that its aircraft meet all requirements established by the Secretary of Transportation . . . and that it is able to conform to the rules, regulations and requirements of the Board" (emphasis added). *Id.* § 1371(d)(5)(A). See text accompanying note 73, *supra*.

⁷⁵ S. REP. NO. 631, 95th Cong., 2d Sess. 58-59 (1978).

⁷⁶ Southwest Airlines AME Investigation, CAB Order No. 79-9-192, at 8 (Sept. 28, 1979).

⁷⁷ *Id.* at 6.

⁷⁸ See text accompanying notes 62 and 63 *supra*.

⁷⁹ See, e.g., Southwest Airlines AME Investigation, CAB Order No. 79-9-192 (Sept. 28, 1979). The final order, delayed by the Administrative Law Judge and the Board on environmental grounds, was issued seven months after the statutory deadline for certification. *Id.*, see Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d)(7)(B), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371(d)(7)(B) (Supp. 1979)).

⁸⁰ 14 C.F.R. §§ 321, 322 (1979).

gress did not intend for environmental issues to be considered in granting AME or dormant authority.⁸¹ Thus, in direct conflict with the original Part 312,⁸² the new regulations expressly provide that environmental evaluations are not required of applicants.⁸³ These contradictory CAB rules point to the policy conflict between the ADA and NEPA. The desire of the Ninety-fifth Congress to accelerate agency action to promote the public interest in airline competition⁸⁴ is in conflict with the decision of the Ninety-first Congress to slow down agency actions to protect the environment and the public interest in the full disclosure of environmental information.⁸⁵ The need to resolve these conflicts in policy and express regulatory provisions was one of the precipitating factors in the proposed rulemaking.⁸⁶

A second source of conflict arose from President Carter's decision to adopt an administrative policy of reducing the burden of governmental paper work on the economy.⁸⁷ In his executive order of May 24, 1977, he directed the Council on Environmental Quality to develop new regulations under the NEPA with a goal of making the process more useful to decision-makers and the public and less burdensome to regulated industries.⁸⁸ The CEQ subsequently issued guidelines implementing the President's directives, effective July 31, 1979.⁸⁹ The new CEQ guidelines suggest that agencies revise their environmental regulations to include criteria for identifying categories of actions that either will or will

⁸¹ See Southwest Airlines AME Investigation, CAB Order No. 79-9-192, at 8 (Sept. 28, 1979). Proposed Rulemaking, *supra* note 1.

⁸² See note 38 *supra*, and accompanying text.

⁸³ Unused Authority Procedure, 14 C.F.R. § 321.5 (1979) and AME Procedure, 14 C.F.R. § 322.7 (1979). Both regulations state: "Notwithstanding any provision of Part 312 . . . a person filing an application under this subpart is not required to file an environmental evaluation . . . with the application." (emphasis added).

⁸⁴ See Dubuc, *Significant Legislative Developments in the Field of Aviation Law*, 45 J. AIR L. & COM. 1, 21-25 (1979) for a general analysis of the policy underlying the Airline Deregulation Act of 1978.

⁸⁵ See McGarity, *supra* note 10, at 804-07.

⁸⁶ Proposed Rulemaking, *supra* note 1, at 45,637.

⁸⁷ Executive Order 11,991, 13 C.F.R. § 808 (1977).

⁸⁸ *Id.*

⁸⁹ 40 C.F.R. §§ 1500-1508 (1979).

not normally require environmental investigation.⁹⁰ Emphasizing the informational function of the EIS,⁹¹ the new guidelines direct agencies to "concentrate on issues that are truly significant to the action in question."⁹² In addition, the new guidelines require that agencies invite public participation in providing, as well as commenting on, information.⁹³ The CEQ also suggests various measures which agencies may employ in reducing delay caused by compliance with NEPA.⁹⁴

III. THE NEW RULE

Faced with changes in congressional and Board policies defining the regulatory role of the CAB, conflicts among the procedural regulations, and the need to conform to the President's policy of reducing the burden and delay associated with NEPA procedures, the CAB proposed to reissue Part 312 as a new regulation.⁹⁵ The new rule reduces the informational burden on the airlines by eliminating the requirement that airlines prepare an environmental evaluation for submission with every application for route authority.⁹⁶ Instead, airlines will be required to provide necessary information to the CAB staff on request.⁹⁷ Another provision establishes

⁹⁰ Agencies are to "reduce paperwork [by] using categorical exclusions to define categories of actions which do not . . . have a significant effect on the human environment . . ." *Id.* § 1500.4(p). Such procedures shall include: "specific criteria for and identification of those typical classes of action (i) which normally do require environmental impact statements." *Id.* § 1507.3(a)(2)(i).

⁹¹ "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* § 1500.1(b).

⁹² *Id.*

⁹³ *Id.* § 1506.6(a)-(f). The regulation requires public involvement through giving public notices, holding hearings and soliciting information from the public. *Id.*

⁹⁴ Agencies are urged to reduce delay by establishing time limits using categorical exclusions to exempt certain types of actions and using a "finding of no significant effect" to eliminate the EIS requirement. *Id.* § 1500.5(e), (k), (1).

⁹⁵ Proposed Rulemaking, *supra* note 1. The final rulemaking reflects the same policy as the proposed rulemaking, but uses more explanatory language. 45 Fed. Reg. 16,132 (1980).

⁹⁶ Proposed Rulemaking, *supra* note 1, at 45,638. The Board states that the evaluations "have served their purpose and should no longer be routinely required." *Id.* See note 38 *supra*, describing the content of an environmental evaluation.

⁹⁷ Part 312, 45 Fed. Reg. 16,132, 16,134 (1980) (to be codified at 14 C.F.R. § 312.15).

categories of action that will or will not require environmental investigation,⁹⁸ starting with the premise that many Board actions will not normally require the preparation of an EIS.⁹⁹ A designated responsible CAB official will prepare an "environmental assessment"¹⁰⁰ for those actions in which "the Board has decision-making power"¹⁰¹ and

- (a) that involve first time service by air carriers to an airport;
- (b) that involve first time service to an airport by jet, SST, helicopter or V/STOL; or (c) that would substantially increase the scope of operations at an airport, such as an increase in total daily operations by more than 25 percent.¹⁰²

The rule includes a list of actions which normally do not require the preparation of any type of environmental document.¹⁰³ Among them are ministerial acts¹⁰⁴ of the Board and other actions causing minimal reduction or changes in service. The Board's objective in setting out these categories of actions is to "create a rebuttable presumption that none of the Board's actions other than authorization of first time services and first time authorization of specified types of equipment, significantly affect the environment."¹⁰⁵

⁹⁸ *Id.* (to be codified at 14 C.F.R. § 312.11(a)(1)-(10)). See text accompanying note 79 *supra*, for corresponding requirement in the CEQ Guidelines.

⁹⁹ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.11(a)).

¹⁰⁰ Under the proposed rule the environmental assessment shall include discussions of the need for the proposal, alternatives, environmental impact of both proposal and alternatives and the names of agencies and persons consulted in preparation of the assessment. *Id.* (§ 312.4). See note 44 *supra*.

¹⁰¹ Part 312, 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.10). Discretionary actions are those where the Board determines public convenience and necessity, as distinguished from ministerial actions such as granting AME certificates. See text accompanying notes 74-77 *supra*.

¹⁰² Part 312, 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. §§ 312.10(a)-(c)).

¹⁰³ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.11) provides that actions which do not require the preparation of an environmental impact statement are those in which the Board's role is ministerial, such as registering air taxis and air freight forwarders and granting dormant or automatic market entry.

¹⁰⁴ Suspension of authority, termination of authority, the granting of emergency, temporary authority, authorizing service to airports already receiving the same type of service, rate-setting and actions impacting points outside the United States are listed in section 312.11(a)(2)-(10) as actions not requiring environmental investigation. *Id.*

¹⁰⁵ Proposed Rulemaking, *supra* note 1, at 45,639.

The CAB has changed the types of determinations responsible officials, or ultimately, the Board, may make with respect to the environment.¹⁰⁶ Having eliminated the "environmental evaluation"¹⁰⁷ and the "environmental rejection,"¹⁰⁸ and limiting the "environmental assessment" to specific types of cases,¹⁰⁹ the Board sets out procedures to be followed in those cases where the responsible official finds sufficient impact to require an EIS.¹¹⁰ Once prepared, a draft EIS must be filed and distributed to interested governmental agencies and private groups or persons.¹¹¹ There is no time limit for submission of comments, but ninety days must elapse from the date notice is published of filing before the Board can take final action.¹¹² A final EIS must be on file thirty days from the date the *Federal Register* gives notice of filing before final Board action which will have significant impact on the environment.¹¹³ On the other hand, the responsible official may find that an action raising legitimate environmental concerns does not require an EIS and he may issue a "Finding of No Significant Impact."¹¹⁴

Public participation is encouraged through provisions that invite input at an early stage in the certification process.¹¹⁵ The re-

¹⁰⁶ Compare 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. §§ 312.15-.18), with 14 C.F.R. § 312.13-.14 (1979).

¹⁰⁷ See note 38 *supra*. Although not expressly eliminated, the environmental evaluation is not included in the new rule.

¹⁰⁸ See note 43 *supra*. While it is not expressly eliminated, the environmental negative declaration is not carried over in the new rule.

¹⁰⁹ See text accompanying notes 100-02 *supra*.

¹¹⁰ The new section 312.15 requires that the responsible official make the initial determination of significant impact. He may require information from applicants or other persons. Section 312.5(a) designates the Bureau directors as the responsible officials. 45 Fed. Reg. 16,132, 16,133 (1980).

¹¹¹ Sections 312.18-.20 set out the filing and distribution requirements for environmental impact statements. *Id.*

¹¹² The time limits in new section 312.20(c) for filing and using the EIS are the same as in the old regulation unless "earlier action is required to comply with the Board's statutory mandates." *Id.* See note 50 *supra*.

¹¹³ 45 Fed. Reg. 16,132, 16,134 (1980) (to be codified at 14 C.F.R. § 312.20(c)). See note 112 *supra*.

¹¹⁴ 45 Fed. Reg. 16,132, 16,133 (1980). See note 94 *supra*.

¹¹⁵ To maximize the public's involvement, section 312.13(a) requires public notice when an action is proposed. 45 Fed. Reg. 16,132, 16,133 (1980). Under the original regulation the first opportunity for public participation was after the publication of a draft EIS. 14 C.F.R. § 312.15 (1979).

sponsible official is required to notify agencies, groups and persons who may have an interest when an action is proposed that may be "highly controversial on environmental grounds."¹¹⁶ Any person may present the Board with any information he believes demonstrates that an action will significantly affect the environment, stating the source of the information relied upon, assumptions used and justification for their use, and the base period to which the proposed action is compared.¹¹⁷ Public notice of the availability of a draft EIS must appear in the *Federal Register* and the news media,¹¹⁸ and copies of the draft must be distributed to agencies and persons who have indicated an interest in receiving one.¹¹⁹ In addition, every EIS prepared under the new rule will include an explanation of the public's right to appeal final Board decisions.¹²⁰

IV. EFFECTS OF THE NEW RULE

The new rule incorporates procedures instituted under the ADA which have already been exempted from environmental analysis by other CAB regulations.¹²¹ By categorizing these new procedures with others which will not require environmental study under the new rule,¹²² the CAB has eliminated a major conflict among its own regulations¹²³ and brought its environmental rule in line with the policy of economic deregulation. The rule expressly distinguishes Board actions which are ministerial¹²⁴ from

¹¹⁶ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.13). In addition, the Board proposes to facilitate public input by discontinuing the use of air and noise pollution screening standards in a future notice. Proposed Rulemaking, *supra* note 1, at 45,638 n.7.

¹¹⁷ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.14(b)).

¹¹⁸ News releases are required in section 312.13(a). *Id.*

¹¹⁹ Section 312.13(a) states that agencies to receive copies include the EPA, federal agencies having expertise or jurisdiction by law, state and local agencies authorized to develop and enforce environmental standards, and appropriate state and regional clearinghouses. *Id.*

¹²⁰ This provision in section 312.18(b) encourages public pursuit of environmental issues throughout the certification process. *Id.*

¹²¹ See note 82 *supra*.

¹²² See notes 103-05 *supra*, and accompanying text.

¹²³ See text accompanying notes 81-83 *supra*.

¹²⁴ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified in 14 C.F.R. § 312.11(a)(1)). Proposed Rulemaking, *supra* note 1, at 45,639.

those that are discretionary,¹²⁵ in accordance with the ADA¹²⁶ and recent Board action under it.¹²⁷ Added flexibility in EIS filing deadlines to meet statutory time limits¹²⁸ makes the new rule responsive to the ADA requirement that the Board expedite certification proceedings.¹²⁹ In eliminating the environmental evaluations, the Board is recognizing that these documents, which analyze the noise and air pollution resulting from the minimum new service contemplated by one airline, are not reliable in multiple-award proceedings under the regime of deregulation.¹³⁰

The adoption of the rule brings the CAB environmental regulation in line with the Administration's policies set out in the CEQ guidelines: reduced paper work, less delay, and concentration on significant environmental effects.¹³¹ Paper work is reduced by eliminating the airlines' environmental evaluations¹³² and restricting environmental investigation to limited categories of actions¹³³ which present potentially significant environmental issues. Delay is reduced by exempting ministerial actions of the Board from the environmental procedures,¹³⁴ and making the time limits for filing statements and acting on them more flexible.¹³⁵

The CEQ guidelines also call for increased public participation in environmental procedures.¹³⁶ In compliance with this policy, the Board has established standards for raising environmental objections that may allow the public to present evidence without regard to current thresholds and methodologies.¹³⁷ The proposed

¹²⁵ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.10).

¹²⁶ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371(d) (Supp. 1979)). See text accompanying note 77, *supra*.

¹²⁷ See Southwest Airlines AME Investigation, CAB Order No. 79-9-192 (Sept. 28, 1979).

¹²⁸ 45 Fed. Reg. 16,132, 16,134 (1980) (to be codified at 14 C.F.R. § 312.20(c)).

¹²⁹ See note 67 and text accompanying notes 67-73 *supra*.

¹³⁰ See text accompanying note 58 *supra*.

¹³¹ See text accompanying notes 87-94 *supra*.

¹³² See text accompanying note 96 *supra*.

¹³³ See text accompanying notes 100-05 *supra*.

¹³⁴ See notes 103-05 *supra*, and accompanying text.

¹³⁵ See note 112 *supra*.

¹³⁶ See note 93 *supra*.

¹³⁷ See notes 116 and 117 *supra*, and accompanying text. Currently, environ-

rule also includes provisions for public notice and public hearings that clearly reflect the CEQ mandate.¹³⁸

In exempting most CAB certification procedures from any type of environmental study, the rule raises questions of statutory and policy conflict with NEPA.¹³⁹ NEPA mandates that federal agencies not only include environmental values in their decision making, but also that they prepare detailed environmental statements to inform the public, as well as governmental agencies whose interests are affected by "major Federal actions significantly affecting the quality of the human environment."¹⁴⁰ In calling for the gradual deregulation of the airline industry, Congress enacted a statute that restricts the powers of the Board to the point where the requirements of NEPA cannot be fulfilled.¹⁴¹ This statutory conflict between NEPA and the ADA may be resolved by the provision of NEPA which requires compliance only to "the fullest extent possible."¹⁴² The current CEQ guidelines define that phrase as meaning that each agency shall comply with NEPA unless "existing law applicable to the agency's operations expressly prohibits or makes compliance impossible."¹⁴³ The CAB therefore may fully comply with the ADA and subjugate environmental objectives to economic goals.

The primary function of NEPA is informational: to elicit environmental data and place it before the public and responsible government agencies.¹⁴⁴ The objective of NEPA is to influence agency decision makers to consider the environmental conse-

mental data is submitted and evaluated according to noise and air pollution screening tests set out in Appendix I of 14 C.F.R. § 312 (1978). If the forecast for increased noise or air pollution due to certain proposed service does not bring the pollution level of a certain airport above a predetermined threshold, the effect is not deemed significant.

¹³⁸ See note 93 *supra* and text accompanying notes 115-20.

¹³⁹ The Board defends the new rule as increasing rather than decreasing its attention to environmental matters. Proposed Rulemaking, *supra* note 1, at 45,638.

¹⁴⁰ 42 U.S.C. § 4332(c) (1976).

¹⁴¹ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401, 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371 (Supp. 1979)). See notes 21-23, 82 *supra*.

¹⁴² 42 U.S.C. § 4332 (1976). See 45 Fed. Reg. 16,132 (1980) (to be codified at 14 C.F.R. § 312.1).

¹⁴³ 40 C.F.R. § 1500.6 (1979). Prof. McGarity points out that statutory conflicts arise "most clearly" when an agency cannot prepare an EIS in the time frame provided by the enabling statute. McGarity, *supra* note 10, at 870.

¹⁴⁴ See McGarity, *supra* note 10, at 804-07. See note 22 *supra*.

quences of their acts.¹⁴⁵ In opening up the certification proceedings to public participation, encouraging members of the public to raise environmental concerns, and requiring that the public have notice of pending actions, hearings, and studies in progress,¹⁴⁶ the new rule adheres to the informational policy of NEPA. Ten years of CAB action under NEPA have demonstrated that Board decisions rarely have significant environmental impact¹⁴⁷ and the re-issuance of Part 312 reflects that experience.¹⁴⁸

V. CONCLUSION

The new rule is needed to resolve conflicts between procedural regulations promulgated by the CAB under the ADA¹⁴⁹ and the original environmental regulation.¹⁵⁰ The rule supports the policies of deregulation by exempting most Board actions from environmental analysis¹⁵¹ and the paper work and delay associated with it. The elimination of the environmental evaluation may prove to be ineffective as a means of reducing paper work. The use of computers to store and produce the needed information,¹⁵² and the minimum schedule requirements of current application procedures¹⁵³ have already combined to make the environmental evaluation a simple, routine activity for the airlines. On the other hand, the Board's decision to encourage greater public involvement by accepting any evidence believed to demonstrate environmental effect without regard for existing thresholds¹⁵⁴ may result in more

¹⁴⁵ 42 U.S.C. § 4332(a) (1976).

¹⁴⁶ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.13). See text accompanying notes 115-20 *supra*.

¹⁴⁷ See, e.g., Burger, *supra* note 10, at 540, 545-49 (describing the two-year delay caused by the investigation of the environmental impact of proposed service in the Miami-Los Angeles Competitive Nonstop Investigation, CAB Order No. 76-3-93 (Mar. 15, 1976)). See text accompanying notes 51-62 *supra*.

¹⁴⁸ The categories requiring study under the new rule embrace the actions which have proved significant in the past. See text accompanying notes 52-60, 102 *supra*.

¹⁴⁹ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371(d) (Supp. 1979)).

¹⁵⁰ 14 C.F.R. § 312 (1978). See text accompanying notes 81-86 *supra*.

¹⁵¹ See notes 103, 104 *supra*.

¹⁵² See note 41 *supra*, and accompanying text.

¹⁵³ See note 57 *supra*.

¹⁵⁴ Proposed Rulemaking, *supra* note 1, at 45,638 n.7. See notes 115-16 *supra*,

paper work for airlines. If the Board does not establish standards for the public to follow in raising environmental objections, most of the gains in efficiency will be lost and the routine burden lifted from the airlines will return in the form of requests for information from the CAB staff.¹⁵⁵ The information requested may be unusual and therefore not readily available to the airlines.

NEPA¹⁵⁶ and the new CEQ guidelines¹⁵⁷ both require attention to significant effects and major actions. The ADA stresses simplified procedures to the point of impeding environmental investigation.¹⁵⁸ The CAB has implemented these policies in most provisions of the rule, yet has designed a format for public participation which may prove to be at cross purposes with them.

The rule conforms to the realities of current CAB decision-making processes under the ADA,¹⁵⁹ while preserving the informational function of NEPA.¹⁶⁰ The regulation subordinates the CAB's environmental responsibilities to its economic concerns, but allows the public ample opportunity to press for the protection of environmental values. The rule would better serve the goal of reducing government's burden on the airlines if standards for the submission of data from the public were established more clearly.

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and accompanying text. See Administrative Procedure Act, 5 U.S.C. § 553(b) (1976) which commands that whenever an agency engages in rulemaking, it shall publish notice and afford an opportunity for the public to participate, and 40 C.F.R. § 1506.6 (1979), the CEQ mandate for public involvement.

¹⁵⁵ 45 Fed. Reg. 16,132, 16,133 (1980) (to be codified at 14 C.F.R. § 312.15). See notes 97, 110 *supra*.

¹⁵⁶ 42 U.S.C. § 4332 (1976).

¹⁵⁷ 40 C.F.R. § 1500.1(b) (1979).

¹⁵⁸ Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 401(d) and (p), 92 Stat. 1705 (1978) (codified at 49 U.S.C.A. § 1371(d) & (p) (Supp. 1979)); Southwest Airlines AME Investigation, CAB Order No. 79-9-192, at 8 (Sept. 28, 1979). See note 67 and text accompanying note 79, *supra*.

¹⁵⁹ *E.g.*, Southwest Airlines AME Investigation, CAB Order No. 79-9-192 (Sept. 28, 1979).

¹⁶⁰ See notes 22-23 *supra*.

Current Literature

