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COMMENTS

ASSESSING NEPA'S EFFECT ON NPDES NEW SOURCE PERMIT ISSUANCE: DO THE NEW NPDES REGULATIONS STRIKE THE PROPER BALANCE?

by Kathleen Maloney

TWO major statutes, the National Environmental Policy Act of 1969 (NEPA)¹ and the Clean Water Act,² protect United States' waters from environmental damage. NEPA's goal is the protection and improvement of all aspects of the environment.³ The Clean Water Act regulates water pollution.⁴

The basic premise of the Clean Water Act is that the discharge of any pollutant into the waters of the United States is unlawful.⁵ Exceptions are provided for polluting sources that obtain permits pursuant to the National Pollutant Discharge Elimination System (NPDES)⁶, which is section 402 of the Clean Water Act. The NPDES permits are the cornerstone of the Clean

Editor's Note: The following acronyms are used throughout this Comment:

CEQ	Council on Environmental Quality
EDF	Environmental Defense Fund
EIS	environmental impact statement
EPA	Environmental Protection Agency
FWPCA	Federal Water Pollution Control Act
NEPA	National Environmental Policy Act of 1969
NPDES	National Pollutant Discharge Elimination System
NRDC	Natural Resources Defense Council

1. 42 U.S.C. §§ 4321-4347 (1982).

2. 33 U.S.C. §§ 1251-1376 (1982).

3. NEPA § 101, 42 U.S.C. § 4331 (1982). The sections of both NEPA and the Clean Water Act (CWA) are referred to in the literature alternately by the section numbers of the uncodified statute and the section numbers of the act as codified in the United States Code. Throughout this Comment both citations will be provided.

4. Congress passed the Act in 1948 as the Federal Water Pollution Control Act. Congress made extensive revisions in 1972 to provide a more effective regulatory framework. Congress in 1977 enacted major amendments establishing greater emphasis on control of identified priority pollutants. See J. ARBUCKLE, G. FRICK, R. HALL, M. MILLER, T. SULLIVAN, T. VANDERVER, ENVIRONMENTAL LAW HANDBOOK 81-83, 94-97 (7th ed. 1983) [hereinafter cited as HANDBOOK]. See generally W. RODGERS, ENVIRONMENTAL LAW 354-61 (1977) (history of federal water pollution control law through enactment of the 1972 amendments).

5. CWA § 301, 33 U.S.C. § 1311 (1982).

6. 33 U.S.C. § 1342 (1982).

Water Act.⁷ The permits provide effluent limitations,⁸ monitoring and reporting requirements, and other compliance measures.⁹ NPDES permits issued for new sources of pollutants are called new source permits.¹⁰ Under section 511 of the Clean Water Act a new source permit is the only industrial NPDES permit the issuance of which is a major federal action subject to the environmental impact statement provisions of NEPA.¹¹

The Environmental Protection Agency (EPA) has recently taken final action on proposed amendments to the NPDES regulations concerning NEPA's effect on new source permitting.¹² The amendments were proposed pursuant to a settlement agreement between the EPA and industry litigants.¹³ The industry petitioners agreed to dismiss their petitions if the regulations in their final form and the associated preamble language were substantially the same as that set forth in the settlement agreement. The regulations as promulgated differ substantially from the proposed language.¹⁴ Consequently, the industry lawsuit has been reactivated.¹⁵

7. ENVIRONMENTAL L. INST., AIR & WATER POLLUTION CONTROL LAW 433 (P. Reed & G. Wetstone eds. 1982).

8. Effluent limitations are restrictions on "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that are discharged by the polluting source. CWA § 502(11), 33 U.S.C. § 1362(11) (1982).

9. *Id.* § 402(a)(2), 33 U.S.C. § 1342(a)(2). See *infra* text accompanying notes 27-32 for a more detailed description of the types of conditions commonly included in NPDES permits.

10. Section 306 of the Act defines a new source as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance . . . applicable to such source, if such standard is thereafter promulgated in accordance with this section." 33 U.S.C. § 1316(a)(2) (1982). A discharging source, which may in reality be new, is, therefore, classified as an existing source rather than a new source unless the EPA has issued a new source performance standard applicable to the source's particular industrial category prior to the source's construction. See *infra* notes 37-43 and accompanying text. Confusion remains over whether construction of the source must begin after promulgation of the performance standard or after its proposal. See *Pennsylvania Dep't of Env'tl. Resources v. EPA*, 618 F.2d 991, 998-99 (3d Cir. 1980) (on rehearing).

11. 33 U.S.C. § 1371(c)(1) (1982). The provision of federal financial assistance for publicly owned waste treatment plants is also a major federal action subject to NEPA. *Id.*

12. 49 Fed. Reg. 37,998 (1984).

13. The NPDES settlement agreement was signed on June 7, 1980, and was a partial resolution of a number of suits that had been consolidated in the District of Columbia Circuit as *Natural Resources Defense Council, Inc. v. EPA*, No. 80-1607 (D.C. Cir. filed June 2, 1980). See 49 Fed. Reg. 37,998, 37,998-99 (1984) for a narrative of the events leading up to final action on the NPDES regulations.

14. The proposed regulations are published at 47 Fed. Reg. 52,072 (1982) (proposed Nov. 18, 1982). The EPA proposed to limit severely the impact of NEPA on the new source permitting process. This proposal was a retreat from the agency's prior position that NEPA provides a basis for the EPA to act on new source permit applications in light of the totality of effects that the new source would have upon the environment. The regulations as promulgated largely retain the EPA's historic position.

15. On Dec. 24, 1984, industry, as petitioners, filed a motion to consolidate joint review and establish a briefing schedule, and on Dec. 31, 1984, the EPA filed a response. Telephone interview with the clerk's office, United States Court of Appeals for the District of Columbia Circuit (Jan. 4, 1985). "Industry" is used throughout this Comment to refer to a large group of petitioners from industry. The EPA uses this terminology. See 47 Fed. Reg. 52,072 (1982). For a list of those included in the term "industry," see Settlement Agreement on NPDES Issues, *Natural Resource Defense Council, Inc. v. EPA*, No. 80-1607 (D.C. Cir., filed June 2, 1982) (settlement agreement is available from the Office of General Counsel of EPA or the Regional Counsels).

This Comment addresses the extent to which NEPA affects NPDES new source permit issuance under the new regulations. The Comment focuses on: (1) whether NEPA authorizes the inclusion of nonwater related environmental conditions in the NPDES permit; (2) whether the EPA may properly impose a ban on the construction of a new source until the environmental review is complete and a discharge permit for the source approved; and (3) whether the EPA may exclude certain environmental impacts from consideration in new source permit hearings. The Comment reviews the new source permit process under the Clean Water Act and NEPA's requirements and discusses each of the amendments in light of the legal authority supporting the EPA's position.

I. NEW SOURCE PERMITTING UNDER THE CLEAN WATER ACT

The objective of the Clean Water Act is "to restore and maintain the chemical, physical and biological integrity of the nation's waters."¹⁶ The principal mechanism for achieving this objective is a system that imposes effluent limitations or otherwise prevents discharge of pollutants into the nation's navigable waters.¹⁷ The Clean Water Act, therefore, requires that any person responsible for the discharge of any pollutant into any waters of the United States must apply for, obtain, and comply with a permit.¹⁸

Section 402 of the Act establishes the NPDES, an elaborate nationwide permitting system.¹⁹ Section 402 conditions the issuance of an NPDES permit on compliance with the applicable requirements of certain technical sections of the Act.²⁰ Those sections establish technology-based effluent limitations,²¹ permit imposition of more stringent effluent limitations when necessary to meet water quality standards,²² create special standards for new sources²³ and ocean discharges,²⁴ and establish monitoring requirements.²⁵ The Administrator of the EPA is authorized to condition NPDES permits as he deems appropriate to assure compliance with these requirements.²⁶ Typi-

16. CWA § 101, 33 U.S.C. § 1251 (1982).

17. See HANDBOOK, *supra* note 4, at 83-84.

18. CWA § 301, 33 U.S.C. § 1311 (1982).

19. 33 U.S.C. § 1342 (1982). Under § 402 the EPA is the issuing authority for NPDES permits. Each state may, however, take over administration of the program for discharges into waters within its jurisdiction. The state must submit a description of its program to the EPA, and the EPA must approve the program if the Administrator determines that the program is adequate to ensure compliance with the Act. Upon EPA approval the state becomes the issuing authority for NPDES permits in that state. State-issued permits are sent to the EPA for review, and the Administrator may object and halt their issuance. *Id.*; see HANDBOOK, *supra* note 4, at 87.

20. 33 U.S.C. § 1342 (1982). Section 402(a)(1) specifically lists §§ 301, 302, 306, 307, 308, and 403 (33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, and 1343, respectively) as the sections that must be complied with.

21. CWA §§ 301, 307, 33 U.S.C. §§ 1311, 1317 (1982).

22. *Id.* § 302, 33 U.S.C. § 1312.

23. *Id.* § 306, 33 U.S.C. § 1316.

24. *Id.* § 403, 33 U.S.C. § 1343.

25. *Id.* § 308, 33 U.S.C. § 1318.

26. *Id.* § 402(a)(2), 33 U.S.C. § 1342(a)(2). Pursuant to that authority and the broader authority of § 501, 33 U.S.C. § 1361, the EPA has promulgated regulations to implement the

cal conditions include specifying the duration of the permit;²⁷ schedules of interim compliance steps leading to full compliance by the statutory deadline;²⁸ requirements for proper operation and maintenance of pollution control systems;²⁹ monitoring, reporting, and record-keeping requirements;³⁰ and circumstances in which noncompliance with effluent limitations may be excusable.³¹

Technology-based effluent limitations are a critical condition included in all NPDES permits.³² Section 301 of the Act deals with the establishment of effluent limitations for existing industrial sources.³³ The EPA Administrator sets the limitations on an industry-by-industry basis after studying available pollution control technology and the costs of using that technology.³⁴ Effluent limitations for new sources are established in the form of new source performance standards pursuant to section 306 of the Act.³⁵ New source

NPDES program. 40 C.F.R. pts. 122, 124 (1984). Permitting procedures when the state is the issuing authority are similar, and in many cases identical, to those regulations. *See* 40 C.F.R. § 123.25 (1984).

27. 40 C.F.R. § 122.46 (1984).

28. *Id.* § 122.47.

29. *Id.* § 122.41(e).

30. *Id.* §§ 122.41(j), (l), 122.48. Section 308 of the Clean Water Act, 33 U.S.C. § 1318 (1982), authorizes the EPA to require the discharger to install, use, and maintain monitoring equipment, take effluent samples, and establish and maintain records. These monitoring and reporting requirements are the means of assuring compliance with all other requirements and are, therefore, critical to the effectiveness of the permit program. HANDBOOK, *supra* note 4, at 90. The requirements include allowing an enforcing authority entry to the discharger's premises and access to records and monitoring equipment. CWA § 308, 33 U.S.C. § 1318 (1982); 40 C.F.R. § 122.41(i) (1984).

31. 40 C.F.R. § 122.41(m), (n) (1984). Such circumstances include diversion of waste streams from a portion of the treatment facility to prevent personal injury or serious property damage and the unintentional and temporary noncompliance with the permit due to no fault of the permittee. *Id.*

32. *Id.* § 122.44.

33. 33 U.S.C. § 1311(b) (1982). Three levels of effluent limitations are required to be established. The first is the level that can be achieved through application of "the best practicable control technology currently available." The Act set July 1, 1977, as the date for nationwide achievement of this goal. The second level of effluent limitation is a level that can be achieved through application of "the best available technology economically achievable." The date set for achievement of that goal was July 1, 1984. The third level of effluent limitation requires the application of "the best conventional pollutant control technology" to identified conventional pollutants by July 1, 1984. *Id.* *See* Comment, *Industry Effluent Limitations Program in Disarray as Congress Prepares for Debate on Water Act Amendments*, 12 ENVTL. L. REP. (ENVTL. L. INST.) 10033, 10034-38 (1982), for a discussion of the effluent limitation goals and the successes and failures met in attempting to achieve them. Water quality-based limitations under § 303 of the Act supplement technology-based effluent limitations when necessary to achieve a specific level of water quality. CWA § 303, 33 U.S.C. § 1313 (1982). *See generally* Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167 (1983) (discussion of water quality standards and both the state and federal governments' role in setting them).

34. CWA § 304(b), 33 U.S.C. § 1314(b) (1982), sets out factors to be considered in establishing effluent limitations pursuant to each of the three standards. The legislative history of the Act provides additional guidance. *See* W. RODGERS, *supra* note 4, at 463-66. To the extent that effluent limitations are not applicable in a given case or have not been set for a particular industry, the permit writer considers the statutory factors and sets the limitations on a case-by-case basis. 40 C.F.R. § 125.3(c)(2) (1984).

35. CWA § 306, 33 U.S.C. § 1316 (1982). New source performance standards are also set by the industrial category of the source and may be further broken into subcategories. *Id.*

performance standards are potentially the most stringent of the technology-based effluent limitations established under the Clean Water Act.³⁶ The standards must reflect "the greatest degree of effluent reduction . . . achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, standards permitting no discharge of pollutants."³⁷ In setting effluent standards for new sources, the Clean Water Act requires the EPA to consider alternative industrial production processes and operating methods as well as available pollution control technology.³⁸

The legislative history of section 306 clearly indicates why Congress decided to establish such stringent requirements for new sources. According to the Senate Report, the purpose of section 306 was to assure that the design and operation of new stationary sources of pollution minimized the discharge of pollutants.³⁹ Section 306 has been characterized as among the most significant in the legislation because the section requires the maximum use of available means to prevent new pollution problems and to attain the goal of no-discharge.⁴⁰ Congress considered the maximum feasible control of new source discharge at the time of construction as the most effective and, in the long run, least expensive approach to pollution control.⁴¹ In so doing, Congress recognized the flexibility possessed by a discharger who has not yet built the polluting source.⁴²

The flexibility available to new sources and the potential for implementation of environmentally beneficial alternatives led to distinctive treatment of new sources in areas other than effluent limitations. Apart from the more stringent effluent requirements, the most important statutorily established difference between new and existing sources is that the permitting of new sources is subject to the environmental impact statement (EIS) requirements of NEPA.⁴³ Section 511 of the Clean Water Act specifies that the only ac-

36. See HANDBOOK, *supra* note 4, at 102.

37. CWA § 306, 33 U.S.C. § 1316 (1982).

38. CONFERENCE COMMITTEE REPORT, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE FEDERAL POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 311 (Comm. Print 1973) [hereinafter cited as LEGISLATIVE HISTORY]. Consideration of alternative production methods in establishing new source performance standards is appropriate when the polluting source has not been built and can, therefore, accommodate any design changes necessary to ensure compliance. Since the new source performance standards are established with the idea that compliance may require knowledge of the effluent restrictions prior to construction, CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2) (1982), the Act applies the standards only to sources for which the limitations are established. See *supra* note 10 for definition of new sources.

39. S. REP. NO. 414, 92d Cong., 1st Sess. 57 (1971), reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 1475.

40. *Id.* at 57-58, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 1475-76.

41. *Id.* at 58, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 1476.

42. See SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 172; see also W. RODGERS, *supra* note 4, at 467-68 (new sources are presumed to be models of pollution control and are the last practical chance for implementation of the 1985 no-discharge goal).

43. Early in NEPA's history case law established that private activity requiring federal approval in the form of a permit may be subject to NEPA and the EIS because such federal approval may be considered a major federal action. See *Conservation Counsel v. Constanzo*,

tions taken pursuant to the Clean Water Act for which an EIS may be required are the issuance of new source permits and the provision of federal financial assistance for the construction of publicly owned treatment works.⁴⁴ Both of these actions involve facilities that have not been built. The legislative history of the Clean Water Act indicates that Congress believed that new source owners or operators have a degree of adaptability in planning, design, construction, and location not available to existing sources.⁴⁵ Congress, therefore, concluded that new sources could benefit from the review of alternatives that the EIS requires.⁴⁶ Conversely, Congress realized that forcing existing sources, which do not possess such flexibility, to comply with the EIS requirements would not be appropriate.⁴⁷

The actual process of obtaining a new source permit is complicated. The process is governed by both the Clean Water Act and EPA regulations promulgated pursuant to the Act.⁴⁸ To obtain a permit, any person proposing a new discharge must submit a permit application to the EPA⁴⁹ at least 180 days before the date on which the proposed discharge is to begin.⁵⁰ The permit applicant must submit sufficient information to the EPA so that a determination can be made as to whether the facility is a new source and, therefore, subject to EIS procedures.⁵¹ After the application is filed, the

398 F. Supp. 653, 671 (E.D.N.C.), *aff'd*, 528 F.2d 250 (4th Cir. 1975); National Forest Preservation Group v. Butz, 485 F.2d 408, 411-12 (9th Cir. 1973); Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829, 834 (D.C.D.C. 1974). A wide range of other federal sanctions or involvement in private activity also may serve to bring the activity within the scope of NEPA. W. RODGERS, *supra* note 4, at 761-62. Another important difference between existing and new sources is that once a new source meets the applicable standards of performance, it will not be subject to any more stringent technology-based standards for 10 years or the period of depreciation, whichever ends first. CWA § 306(d), 33 U.S.C. § 1313(d) (1982); see HANDBOOK, *supra* note 4, at 103-04.

44. 33 U.S.C. § 1371(c)(1) (1982). The issuance of new source permits by an authorized state does not involve direct federal action and has been held not to trigger the EIS requirements. See District of Columbia v. Schramm, 631 F.2d 854, 862 (D.C. Cir. 1980); Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd., 453 F. Supp. 122, 125 (E.D. Va. 1978); see also 40 C.F.R. §§ 6.602(a), 122.29(c) (1984) (stating that a new source permit may be a major action subject to NEPA).

45. LEGISLATIVE HISTORY, *supra* note 38, at 182-83.

46. See SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 182-83.

47. *Id.* Modifications of existing sources are also exempted from the EIS requirement. See CONFERENCE COMMITTEE REPORT 128-29, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 311-12.

48. 40 C.F.R. pts. 122 & 124 (1984) govern NPDES permitting by the EPA. 40 C.F.R. § 122.29 (1984) applies specifically to new sources. In addition, the EPA has promulgated regulations supplementing the Council on Environmental Quality (CEQ) NEPA implementation regulations discussed *infra* notes 83-87. The EPA regulations that apply the CEQ regulations specifically to the issuance of new source permits are set out at 40 C.F.R. §§ 6.600-607 (1984).

49. This discussion of permitting procedures deals with issuance by the EPA, not by states with approved NPDES programs, although in many cases the procedures are virtually identical. See 40 C.F.R. § 123.25 (1984).

50. *Id.* § 122.21(c). Section 122.21(f) lists the information required in the application.

51. *Id.* § 122.21(k). Once the determination is made that the facility is a new source, the EPA evaluates the environmental information to determine if significant impacts will occur, thereby requiring an EIS. *Id.* §§ 6.604, .605. In *Simons v. Gorsuch*, 715 F.2d 1248, 1252 (7th Cir. 1983), the court held that new source permit issuance did not automatically require prepa-

Corps of Engineers and other federal agencies are provided an opportunity to review the application.⁵² The state in which the discharge will take place is then required to certify that the discharge will comply with all state water quality standards and other compliance requirements established pursuant to state law.⁵³ The EPA then draws up a draft permit that includes a tentative determination of conditions with which the permittee must comply⁵⁴ based in part on the evaluations in the EIS.⁵⁵ At least thirty days are required for public comment on the draft permit,⁵⁶ and a public hearing may be required.⁵⁷ A final determination on the permit application is made on the basis of the public comments, and, after review of the final determination, a final permit containing all appropriate conditions is issued.⁵⁸

In addition to making new source permits the only industrial permits subject to NEPA's EIS requirement, Congress limited the uses of that environmental review.⁵⁹ Section 511(c)(2) of the Clean Water Act⁶⁰ precludes the use of any NEPA process for the review or imposition of effluent limitations on new sources. The section also forbids the use of NEPA to review any other requirement established pursuant to the Clean Water Act, such as

ration of an EIS because such an interpretation conflicted with the purpose of CWA § 511, 33 U.S.C. § 1371 (1982), and would strip the EPA of substantial discretion. One of the new NPDES regulations provides that a hearing may be held on the new source determination issue upon request. 49 Fed. Reg. 37,998, 38,047 (1984) (to be codified at 40 C.F.R. § 122.21(k)(4)). The prior regulation had required deferral of an evidentiary hearing on a new source determination until after a final NPDES permit decision had been reached. 40 C.F.R. § 122.21(k)(4) (1984). Apparently all commenters supported the change, which should provide greater certainty as to what effluent requirements must be met by the discharger and allow NEPA review to begin sooner. See 49 Fed. Reg. 37,998, 38,042-43 (1984) (preamble explanation of the new regulation).

52. 40 C.F.R. § 124.10(e) (1984); HANDBOOK, *supra* note 4, at 88.

53. CWA § 401, 33 U.S.C. § 1341 (1982).

54. 40 C.F.R. §§ 122.43, 124.6 (1984). See *supra* text accompanying notes 27-32 for a list of typical conditions. The EIS for new source permits must be sufficiently complete by this point so that it serves as an important contribution to the decisionmaking processes of drafting the permit. See 40 C.F.R. § 1502.5 (1983) (CEQ's NEPA regulations).

55. 40 C.F.R. § 122.49(g) (1984).

56. *Id.* § 124.10(b).

57. *Id.* § 124.11-12.

58. *Id.* § 124.15.

59. 33 U.S.C. § 1371(c)(2)(A) (1982). Section 511(c)(2) was enacted to overrule, with regard to Clean Water Act requirements, a specific portion of the holding of *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). *Calvert Cliffs'* had held that the Atomic Energy Commission (AEC) could not accept without analysis water quality standards for nuclear power plants approved under the Federal Water Pollution Control Act (FWPCA). *Id.* at 1122. Instead the court held that NEPA required the AEC to independently review such standards on a plant-by-plant basis. *Id.* at 1123. In response to *Calvert Cliffs'* Congress enacted § 511(c)(2) to clarify that the EPA and state determinations of water quality made pursuant to the FWPCA were binding on other federal agencies. See Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 781-83 (E. Dolgin & T. Guilbert eds. 1974). The legislative history makes clear that § 511(c)(2) was designed to "ensure that no source of discharge which is in lawful compliance with an effluent limitation established pursuant to the FWPCA will be required to meet a different standard as a condition of a license or permit granted by another Federal Agency such as the Atomic Energy Commission." SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 183.

60. 33 U.S.C. § 1371(c)(2)(A) (1982).

monitoring or reporting requirements,⁶¹ apparently eliminating the use of NEPA to establish any permit conditions or requirements related to water quality considerations.⁶² The next section in this Comment discusses the general requirements of NEPA and the policy underlying those review procedures. The purposes of NEPA review of new source permitting are discussed below in the section on the EPA's authority to include nonwater related environmental conditions in NPDES new source permits.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA⁶³ establishes a broad national environmental policy. The Act contains a plan requiring federal agencies to implement that policy and creates a new governmental agency, the Council on Environmental Quality (CEQ), to aid the implementation effort.

NEPA declares that the policy of the federal government is to ensure that the general welfare is protected for present and future generations.⁶⁴ That policy is distilled into six distinct goals, for which all branches of the federal government are responsible.⁶⁵ Congress set out eight specific implementation procedures with which all federal agencies must comply to the fullest extent

61. *Id.*

62. Senator Jackson commented on this restriction noting that "under section 511(c)(2), the impact statement is limited to the review of only the non-water quality considerations." SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 204.

63. 42 U.S.C. §§ 4321-4347 (1982).

64. Section 101(a) of NEPA states in part:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a) (1982).

65. NEPA § 101(b), 42 U.S.C. § 4331(b) (1982) lists the six goals as follows:

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

possible.⁶⁶ The agencies are to: (1) use a systematic, interdisciplinary approach to planning and decisionmaking that affects the environment;⁶⁷ (2) develop procedures to ensure consideration of environmental values in decisionmaking;⁶⁸ (3) prepare a detailed statement of the result to the environment of every major federal action significantly affecting the environment;⁶⁹ (4) develop and study alternatives to proposals that involve conflicts over uses of resources;⁷⁰ (5) recognize the worldwide and long-range character of environmental problems and support prevention of further declines in the world environment;⁷¹ (6) make available to the public useful environmental information;⁷² (7) initiate and utilize ecological information in the development of resource-oriented projects;⁷³ and (8) assist the CEQ.⁷⁴

The most important and most utilized procedure is that requiring agencies to prepare an EIS for all major federal actions significantly affecting the quality of the human environment.⁷⁵ NEPA requires that impact statements address in detail all environmental considerations of the proposed action including all adverse environmental effects.⁷⁶ In addition, and perhaps most importantly, alternatives to the proposed action must be discussed.⁷⁷ The agencies are required to consult with and include the comments of all other governmental agencies that have expertise or control over any environmental impact involved.⁷⁸ Finally, the impact statement must be made available to the President, the CEQ, and the public, and must accompany the proposal for action through all agency review processes.⁷⁹ The EPA also has the responsibility to review all impact statements.⁸⁰

In addition to establishing policy and procedures, NEPA created the CEQ. The CEQ was initially intended to serve as an advisory body to the President on environmental matters.⁸¹ The Council's powers have been expanded since its creation,⁸² and the CEQ is now responsible for the promul-

66. One commentator has described the list of agency requirements in NEPA as an unprecedented attempt to achieve change by altering agency procedures rather than by directly changing each agency's substantive statutory mandate. R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE 2, 17 (1976).

67. NEPA § 102(2)(A), 42 U.S.C. § 4332(2)(A) (1982).

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

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

70. *Id.* § 102(2)(E), 42 U.S.C. § 4332(2)(E).

71. *Id.* § 102(2)(F), 42 U.S.C. § 4332(2)(F).

72. *Id.* § 102(2)(G), 42 U.S.C. § 4332(2)(G).

73. *Id.* § 102(2)(H), 42 U.S.C. § 4332(2)(H).

74. *Id.* § 102(2)(I), 42 U.S.C. § 4332(2)(I).

75. See HANDBOOK, *supra* note 4, at 57.

76. NEPA § 102(2)(C)(i), (ii), 42 U.S.C. § 4332(2)(C)(i), (ii) (1982).

77. *Id.* § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii).

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

79. *Id.*

80. This responsibility is assigned to the EPA in § 309 of the Clean Air Act, 42 U.S.C. § 7609 (1982). For a discussion of EPA-EIS review, see W. RODGERS, *supra* note 4, at 708-09.

81. NEPA § 204, 42 U.S.C. § 4344 (1982).

82. The Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4374 (1982), gives the Chairman of the CEQ the power to aid the President in coordinating federal programs and activities that affect environmental qualities and the power to assist "the Federal departments and agencies in the development and interrelationships of environmental quality criteria and standards established through the Federal Government." *Id.* § 4372(d)(5), (6).

gation of regulations governing agency implementation of the procedural provisions of NEPA, especially the impact statement requirements.⁸³ The CEQ's detailed regulations are binding on the agencies⁸⁴ and are an important supplement to the more general requirements listed in section 102 of NEPA.⁸⁵ The regulations are also intended to establish formal guidance on the requirements of NEPA for use by the courts in interpreting that Act,⁸⁶ and the Supreme Court has held that the regulations are entitled to substantial deference by the courts.⁸⁷

A large body of case law has developed interpreting all of the provisions of NEPA, especially the specific requirements of environmental impact statements.⁸⁸ The courts have generally required that environmental impact statements fully discuss and document all environmental effects and alternatives in a comprehensible, yet scientific matter.⁸⁹ Painstaking compliance with this NEPA procedure has been uniformly demanded.⁹⁰ One of the early and most influential judicial interpretations of NEPA is *Calvert Cliffs'*

Executive Order 11514, issued in March 1970, authorizes and directs the CEQ to issue guidelines designed to aid federal agencies in the development of environmental impact statements. 35 Fed. Reg. 4247 (1970). Three succeeding sets of guidelines were issued by the CEQ pursuant to Executive Order 11514. As guidelines rather than official regulations, the CEQ procedures were not always accorded full authority by reviewing courts and, thus, their effectiveness in generating agency compliance was less than anticipated. See generally N. ORLOFF & G. BROOKS, *THE NATIONAL ENVIRONMENTAL POLICY ACT: CASES AND MATERIALS* 41-42 (1980) [hereinafter cited as *NEPA MATERIALS*] (discussion of CEQ's guidelines and the weight accorded them by courts and agencies).

83. President Carter issued Executive Order 11991 in May 1977, changing the status of the guidelines to that of regulations and directing that new regulations be promulgated for the implementation of the procedural provisions of NEPA. 3 C.F.R. § 123, 124 (1978). In addition to giving the CEQ's guidance the status of regulations, Executive Order 11991 also expands the coverage of those regulations to all of the procedural provisions of NEPA, rather than just the preparation of the EIS. *Id.* Pursuant to Executive Order 11991, the CEQ published NEPA regulations on November 29, 1978. 43 Fed. Reg. 55,978 (1978).

84. 40 C.F.R. § 1500.3 (1983). Compare *NEPA MATERIALS*, *supra* note 82, at 43-44 (authors question ability of President to authorize the issuance of binding regulations), with *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (CEQ's advisory guidelines have been transformed into mandatory federal regulations that are entitled to substantial deference). See also Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843, 846 (1980) (the inherently flexible doctrine of substantial deference may change if courts find CEQ's rules inconsistent with the language of NEPA, its legislative history, or previous Supreme Court interpretations).

85. NEPA § 102, 42 U.S.C. § 4332 (1982).

86. 43 Fed. Reg. 55,978 (1978).

87. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979); see *supra* note 84.

88. See, e.g., *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972) (EIS must list benefits and risks of proposed project); *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (commission to conduct NEPA balancing analyses), *cert. denied*, 404 U.S. 942 (1972). See generally F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973) (analyzing judicial interpretation of NEPA during the first three years after passage); W. RODGERS, *supra* note 4, at 716-38 (a more recent analysis of case law interpreting NEPA's procedural requirements).

89. W. RODGERS, *supra* note 4, at 727; see, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123, 1136 (5th Cir. 1974); *Iowa Citizens for Env'tl. Quality v. Volpe*, 487 F.2d 849, 851 (8th Cir. 1974).

90. W. RODGERS, *supra* note 4, at 736-37.

Coordinating Committee v. United States Atomic Energy Commission.⁹¹ *Calvert Cliffs*' involved a review of the Atomic Energy Commission's (AEC) rules, promulgated pursuant to NEPA, governing consideration of environmental matters. In holding that the rules failed to live up to the requirements of NEPA, the District of Columbia Circuit Court clearly recognized that NEPA imposed obligations on the federal agencies.⁹² The court stated that while NEPA does not require particular substantive results in particular instances, the Act does make environmental protection part of the mandate of every federal agency.⁹³ The AEC argued that it had no statutory authority to consider the environmental consequences of its actions. The court rejected this argument and held that after passage of NEPA federal agencies are compelled to consider environmental values.⁹⁴ The court clarified that the requirements listed in section 102 of NEPA were designed to provide a careful and informed decisionmaking process and must be complied with unless statutory obligations clearly conflict.⁹⁵ *Calvert Cliffs*' established that NEPA imposed obligations upon the agencies that the courts would enforce and provided agencies with the needed authority to go outside their individual authorizing statutes to consider environmental consequences of their actions.⁹⁶

While holding that an agency cannot refuse to comply with the action-forcing, procedural provisions of NEPA, the court in *Calvert Cliffs*' concluded that reviewing courts probably cannot reverse a substantive decision on its merits unless such a decision is clearly arbitrary.⁹⁷ Over the years the courts have attempted to keep NEPA from turning into simply an environmental full disclosure law⁹⁸ by placing varying degrees of emphasis on the final decision reached by the agencies pursuant to NEPA procedures. The question of whether courts could review the agencies' substantive results, as well as their procedures, produced a split of judicial opinion. Some courts held that only review of agency compliance with NEPA's procedures was

91. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

92. 449 F.2d at 1114.

93. *Id.* at 1112.

94. *Id.*

95. *Id.* at 1115 n.12. The court also stated: "Unless those [statutory] obligations are plainly mutually exclusive with the requirements of NEPA, the specific mandate of NEPA must remain in force." *Id.* at 1125; *see* NEPA § 105, 42 U.S.C. § 4335 (1982).

96. The court referred to the legislative history of NEPA to find additional support for the conclusion that NEPA provided blanket authority for each agency to consider environmental protection. 449 F.2d at 1112-13. NEPA § 105, 42 U.S.C. § 4335 (1982) explicitly states: "The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies." *See* Tobias & McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority*, 41 MONT. L. REV. 177, 180-92 (1980), in which the authors offer a detailed analysis of the legislative history of §§ 101, 102, and 105 of NEPA. One conclusion that the authors draw from this analysis is that although the list of goals in § 101 of NEPA is not explicitly defined as new and additional statutory authority for the federal agencies, the legislative history of NEPA supports such an interpretation. *Id.* at 185-86.

97. 449 F.2d at 1115.

98. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

proper,⁹⁹ while other courts held that a court could review the merits of agency decisions in light of NEPA's goals.¹⁰⁰ The United States Supreme Court may have settled the question in *Strycker's Bay Neighborhood Council v. Karlen*.¹⁰¹ The court in *Strycker's Bay* held that although NEPA requires consideration of environmental consequences, the reviewing court may not properly second-guess the agency as to the wisdom of the action taken.¹⁰² That decision may end intensive judicial review of the merits of agency decisions based on NEPA and, thus, mean that NEPA does not require agencies to make decisions in favor of environmental protection.¹⁰³ The question remains, however, how far NEPA authorizes, as opposed to requires, the agencies to go in acting on the environmental consequences brought to their attention by the NEPA process. Specifically, does NEPA expand the authority of the agencies to act upon, or just to consider, the environmental consequences of their actions?¹⁰⁴

That question is important in the new source permitting context because, as discussed above, the Clean Water Act makes new source permitting subject to NEPA. The EPA has amended the NPDES regulations governing this permitting process. The three amended regulations discussed in this Comment deal with: (1) whether the EPA can properly include nonwater related environmental conditions in NPDES new source permits; (2) whether the EPA can properly impose a ban on the construction of a new source until the environmental review is complete and a discharge permit for such a source has been approved; and (3) whether the EPA can exclude certain environmental repercussions from consideration in new source permit hearings. The following sections of this Comment focus on each of these three regulations in light of the distinctions between new and existing sources in the Clean Water Act, the requirements of NEPA, the EPA's historic position, and current case law.

99. *Matsumoto v. Brinegar*, 568 F.2d 1289, 1290 (9th Cir. 1978) (NEPA is essentially a procedural statute, and judicial review of agency decision on merits is not appropriate); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (NEPA mandates are procedural only and do not control agency decisionmaking).

100. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 492 F.2d 1123, 1139 (5th Cir. 1974) (agency's decisions should be tested against goals in § 101 of NEPA); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973) (NEPA creates substantive rights, but an agency decision must be arbitrary and capricious to be overturned).

101. 444 U.S. 223 (1980).

102. *Id.* at 227-28.

103. The decision may not, however, have entirely abolished substantive review. The court in *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980), interpreted *Strycker's Bay* as restating the familiar arbitrary and capricious rule of review that allows substantive review to the extent that it requires good faith consideration of the environmental consequences of an action.

104. The majority of NEPA litigation has been brought by citizens in attempts to force agency action. The agencies, on the whole, have not taken the NEPA ball and run with it. Lack of affirmative use of NEPA on the part of the agencies is one reason that the issue of the extent of agency power under NEPA has not been settled. Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW 294-95* (E. Dolgin & T. Guilbert eds. 1974).

III. INCLUSION OF NONWATER RELATED CONDITIONS IN NEW SOURCE PERMITS

All of the permit conditions discussed in the previous section related in some way to water quality. For example, compliance schedule conditions involve the times at which certain levels of water pollution improvement will be reached, and monitoring conditions are geared towards checking levels of effluents in the discharge at certain times. The Clean Water Act does not expressly mention the inclusion in new source NPDES permits of conditions that are not water related. The Act does, however, make the issuance of new source permits subject to the requirements of NEPA and that statute's EIS process.¹⁰⁵ The Act also apparently prohibits use of the NEPA process to establish water quality related permit conditions.¹⁰⁶ Questions arise, therefore, as to the purpose of an EIS for new source permitting and whether the EIS provides a basis for the inclusion of nonwater quality related conditions in new source permits. Industry claims that NEPA conditions cannot be imposed if the conditions are not related to the discharge.¹⁰⁷ According to industry, NEPA may expand the factors that the EPA can consider in granting or conditioning a permit, but NEPA does not expand the EPA's authority to impose conditions on the construction of the discharge facility.¹⁰⁸ This section examines the EPA's position and the minor changes made by the new regulations. This Comment then discusses the issue in light of the CEQ's NEPA regulations and judicial interpretation of how NEPA affects the ability of federal agencies to act on environmental matters.

A. *The EPA's Position*

1. *Historic Position*

The congressional retention of new source permits within NEPA's EIS requirements via section 511(c)(1) of the Clean Water Act¹⁰⁹ was presumably intended to accomplish something. The EPA's General Counsel reached this conclusion in his Opinion of September 23, 1976.¹¹⁰ That opinion stated the EPA's position that the new source NEPA-EIS process is designed to assess nonwater quality related environmental impacts such as air quality and solid waste disposal.¹¹¹ The opinion concluded that NEPA authorizes the EPA to deny or condition new source discharge permits solely on the basis of nonwater quality related environmental effects.¹¹² Under NEPA

105. CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (1982); *see supra* notes 43-47 and accompanying text.

106. CWA § 511(c)(2)(A), 33 U.S.C. § 1371(c)(2)(A) (1982); *see supra* notes 59-62 and accompanying text.

107. Utility Water Act Group, Comments on Proposed Revisions to Consolidated Permit Regulations 9 (submitted to the EPA on Jan. 17, 1983) [hereinafter referred to as Industry Comments].

108. *Id.* at 10.

109. 33 U.S.C. § 1371(c)(1) (1982).

110. EIS Regulations for NPDES Permits, Op. EPA Gen. Counsel No. 76-18, Sept. 23, 1976 (available from EPA Regional Offices) [hereinafter cited as EPA Opinion No. 76-18].

111. *Id.*

112. *Id.* The General Counsel noted that this opinion marked a change from previously

and the Clean Water Act, therefore, the EPA claimed the right to condition or deny NPDES new source permits on the basis of environmental considerations not expressly identified in the Clean Water Act.¹¹³

The EPA has consistently maintained that position in its regulations and has explained and defended it in the preambles of its regulations on several occasions. The first appearance of this position in EPA's NPDES regulations was on August 21, 1978, when the EPA proposed rules extensively revising the NPDES regulations to comply with the 1977 amendments to the Federal Water Pollution Control Act (FWPCA).¹¹⁴ Among those proposed rules was a rule mandating that permits ensure compliance with any requirements, conditions, or limitations incorporated into a new source permit under NEPA and section 511 of the Clean Water Act.¹¹⁵ Some commenters criticized the proposed amendment during the comment period on the grounds that nonwater related EIS concerns cannot be placed in permits.¹¹⁶ In the preamble to the publication of the final regulations, the EPA reiterated its belief that EIS-related conditions may properly be imposed in new source permits to minimize any adverse environmental impact regardless of its relation to water pollution.¹¹⁷ The rule in question was promulgated without change.¹¹⁸ The agency stated that any other position would negate the purpose and intent behind the EIS requirement.¹¹⁹ In support of its position the EPA cited the September 23, 1976, Opinion of the General Counsel and a former EPA regulation.¹²⁰ The regulation cited by the EPA provided that the agency could issue, condition, or deny a new source permit based on any significant impacts on the human environment.¹²¹ The EPA explained that such environmental impacts were broad enough to include even socio-economic effects.¹²² The EPA's regulation providing for inclusion

announced EPA policy. Previous policy limited conditioning or denying of permits based on nonwater quality related environmental effects solely to matters over which the EPA had separate statutory authority. *Id.*

113. See Inclusion of Conditions in New Source Permits Based on EPA, Op. EPA Gen. Counsel No. 76-19, Sept. 23, 1976 (available from EPA Regional Offices). This opinion and EPA Opinion No. 76-18, *supra* note 110, were issued on the same day. The two opinions cover much of the same subject matter, but are not identical.

114. 43 Fed. Reg. 37,078 (1978). The 1977 Amendments ushered in the name "Clean Water Act." 33 U.S.C. § 1251 (1982). Prior to those amendments the Act was known as the Federal Water Pollution Control Act. See *supra* note 4.

115. 43 Fed. Reg. 37,078, 37,094, § 122.15(f)(8) (1978) (codified at 40 C.F.R. § 122.15(f)(8) (1984)).

116. See 44 Fed. Reg. 32,854, 32,864 (1979).

117. *Id.*

118. *Id.* at 32,907, § 122.15(f)(9). The rule was renumbered because of an addition to another section.

119. *Id.* at 32,864.

120. *Id.* (citing former 40 C.F.R. § 6.918). This rule was one of several EPA regulations promulgated under the old CEQ guidelines, see *supra* note 82 and accompanying text, and was designed to provide procedures for applying NEPA to the EPA issuance of new source NPDES permits. 42 Fed. Reg. 2450 (1977). At the time that the EPA cited this regulation, June 7, 1979, the regulation was still in effect. Revision was not proposed until June 8, 1979, and the proposal was published on June 18, 1979, at 44 Fed. Reg. 35,158 (1979).

121. 42 Fed. Reg. 2450, 2456 (1977).

122. *Id.* at 2542. The final form of the cited regulation, while authorizing action on a permit in light of any environmental impact, was not as specific as the proposed regulation that

in EPA-issued new source permits of NEPA conditions over and above Clean Water Act requirements has remained substantially unchanged.¹²³

2. *How the New NPDES Regulations Affect the EPA's Position*

The preamble to the new regulations expressly states that the regulations reaffirm the EPA's position that it may condition or deny new source permits to mitigate or prevent adverse environmental effects found through the EIS process.¹²⁴ The language of the regulation itself is changed from requir-

expressly stated that the EPA's legal authority to act included, but was not limited to, the Federal Water Pollution Control Act, the National Environmental Policy Act, the Clean Air Act, the Solid Waste Disposal Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Atomic Energy Act, and the Safe Drinking Water Act. 40 Fed. Reg. 47,714, 47,717, § 6.918 (1975). The more general nature of the final regulation should probably be viewed as simply a less complicated phrasing and not as a limitation of the authority provided for in the proposed regulation since the discussion of the comments received does not indicate any objection to the broad authority claimed in the proposal. 42 Fed. Reg. at 2452, § 6.918.

123. The week after that first regulation was promulgated it was incorporated into the proposed Consolidated Permit Regulations substantially unchanged. 44 Fed. Reg. 34,244, 34,247, 34,266 (1979). The consolidated regulations brought together the EPA permit program requirements governing the Hazardous Waste Management Program under the Resource Conservation and Recovery Act, the Underground Injection Control permit program under the Safe Drinking Water Act, the Prevention of Significant Deterioration program under the Clean Air Act, and the National Pollutant Discharge Elimination System under the Clean Water Act. The consolidation was an effort to establish uniform procedures and program requirements among EPA permit programs to achieve more comprehensive management control of pollution as well as to make the requirements more consistent, predictable, and cost efficient for the regulated community. *See id.* at 34,244-45. The regulations were renumbered when proposed to be consolidated, and the June 7, 1979, regulation, to be codified at 40 C.F.R. § 122.15(f)(9), was reassigned to 40 C.F.R. § 122.69(f)(9). 44 Fed. Reg. at 34,290. The regulation was promulgated in the final Consolidated Permit Regulations, again substantially unchanged. 45 Fed. Reg. 33,290, 33,449 (1980). The regulation was renumbered again, however, so that the proposed rule to be codified at 40 C.F.R. § 122.69(f)(9) was reassigned to 40 C.F.R. § 122.62(d)(9). 44 Fed. Reg. at 34,290. This rule was a section of a regulation governing NPDES permit conditions over and above those that were required in all NPDES permits. In the final consolidated version of the regulation, the subsection of the regulation under which the rule dealing with NEPA conditions in new source permits is found was given a heading. That heading was "Water Quality Standards and State Requirements." *Id.* at 33,449, § 122.62(d). All of the rules listed under that subsection with the exception of subsection (9), the NEPA section, deal explicitly with water quality related issues or state certification. Because the preamble to the final consolidated regulations contains no discussion or explanation, the subheading should not be read to limit NEPA conditions to water quality related considerations. Such a change would have been a major departure from the EPA's emphatically announced position and would certainly have warranted discussion in the preamble. The proposed amendments leading to the final regulations discussed in this Comment were proposed before the EPA deconsolidated the Consolidated Permit Regulations; the EPA deconsolidated after determining that the consolidated regulations were difficult for regulated parties to use and understand. 48 Fed. Reg. 14,146, 14,146-47 (1983). The deconsolidation made no substantive changes, but the EPA did once again renumber the NPDES regulations so that the proposal dealing with inclusion of NEPA conditions in new source permits was to be codified at 40 C.F.R. § 122.62(d)(9). Because of deconsolidation and final action, the new regulation will now be codified at 40 C.F.R. § 122.44(d)(9). 49 Fed. Reg. 37,998, 38,049 (1984).

124. 49 Fed. Reg. 37,998, 38,033 (1984). The preamble also states that while the EPA is authorized to include NEPA conditions, NEPA does not mandate that the EPA take any particular action. The EPA emphasizes that it has discretion to determine what action based on the NEPA review is appropriate in each permit situation. *Id.* These statements are consistent with both the EPA's long-standing position and judicial interpretation of NEPA's requirements. *See supra* notes 88-104 and accompanying text.

ing inclusion of any conditions, "under the National Environmental Policy Act . . . and Section 511 of [the] CWA"¹²⁵ to requiring inclusion of any condition "(other than effluent limitations) . . . to the extent allowed by [The] National Environmental Policy Act . . . and Section 511 of the CWA."¹²⁶ Since the language of the old regulation would logically exclude any action not authorized by the Clean Water Act and NEPA, including review of effluent limitations, the change in the wording of the regulation itself would seem to be largely irrelevant.¹²⁷

B. The CEQ's NEPA Implementation Regulations

The CEQ's regulations are a major source of guidance concerning proper agency implementation of NEPA.¹²⁸ One of those regulations directs the federal agencies to adopt procedures to ensure that agency decisions are made in accordance with the policies and purposes of NEPA.¹²⁹ Another regulation requires that once the agency has considered all relevant factors including the EIS and has made a decision, any EIS conditions committed as part of the agency's final decision shall be included as conditions in the agency's grant, permit, or other approval.¹³⁰ For example, if the EPA's impact statement considered an alternative site or an alternative method of solid waste disposal for a proposed new source¹³¹ and the EPA decided that the EIS alternative was preferable to what the source had proposed, then the alternative methods would be written into the new source permit as conditions. The CEQ implemented this regulation as a means for agencies to provide for the mitigation of environmental effects discovered in the EIS process.¹³² The regulation directly supports the EPA's position that nonwater related conditions may be incorporated into new source permits.¹³³

125. 45 Fed. Reg. 33,290, 33,449, § 122.62(d)(9) (1980); 40 C.F.R. § 122.44(d)(9) (1984).

126. 49 Fed. Reg. 37,998, 38,049, § 122.44(d)(9) (1984). This section is the main section of the regulations dealing with the inclusion of NEPA-based conditions in permits. Other sections, however, also deal with this topic and are similarly affected. 49 Fed. Reg. at 38,048, § 122.29(c)(3); *id.* at 38,050, § 122.49(g).

127. The preamble language also clarifies that NEPA cannot be used to review effluent limitations or other requirements established under the Clean Water Act. Such would be the logical interpretation of § 511(c)(2) of the Clean Water Act, 33 U.S.C. § 1371(c)(2) (1982), and does not seem to represent a change in the EPA's previously announced position. 49 Fed. Reg. at 38,033; *see supra* notes 59-62 and accompanying text.

128. *See supra* notes 83-87 and accompanying text.

129. 40 C.F.R. § 1505.1 (1983).

130. *Id.* § 1505.3.

131. The EPA has determined that the factors to be considered in determining those situations in which a new source will have a significant environmental impact, and therefore require preparation of an EIS, include situations in which the new source will have an adverse effect on land use, air quality, noise levels, or wildlife. 40 C.F.R. § 6.605(b) (1984). Presumably the factors taken into account in deciding whether an EIS is required are indicative of the environmental concerns to be considered in the EIS itself.

132. 43 Fed. Reg. 55,978, 55,986 (1978).

133. The EPA has in fact promulgated a very similar rule that states "[t]he mitigation measures derived from the EIS process shall be incorporated as conditions of the permit." 40 C.F.R. § 6.606(b) (1984). The EPA's rule was prompted by a provision in the CEQ regula-

C. *Judicial Interpretation of NEPA*

The courts have generally held that NEPA grants the agencies power to act, solely on environmental grounds, upon those activities that the agency is already authorized to control pursuant to the agency's authorizing statutes. In *Zabel v. Tabb*¹³⁴ landholders sought permission to dredge and fill on their property in a Florida bay. The Corps of Engineers denied their permit because the planned activity, although not an impediment to navigation, would have had a harmful effect on fish and wildlife. The Fifth Circuit reversed the district court's order compelling issuance of the permit.¹³⁵ The court reasoned that the Rivers and Harbors Act allowed denial or conditioning of a permit and did not restrict the basis of such actions to solely navigational considerations.¹³⁶ The court also held that the statutory governmental policies set out in the Fish and Wildlife Coordination Act¹³⁷ and NEPA provided authority to deny the permit on conservation grounds.¹³⁸ In NEPA, therefore, the court found a basis outside the agencies' authorizing statutes for an agency to act upon environmental considerations.

Although the actual holding of the Fifth Circuit in *Zabel v. Tabb* is that the agency can deny a permit on NEPA grounds,¹³⁹ the reasoning of the court would seem to allow conditioning of a permit on NEPA grounds as well. Early in the opinion the court decided that the agency had the power under its authorizing statute either to condition or deny a permit if the situation did not allow the necessary conditions to be met.¹⁴⁰ The court then considered whether the agency could include conservation considerations as such necessary conditions.¹⁴¹ The court concluded that agencies must take account of other governmental policies in carrying out their particular statutory responsibilities and that the Fish and Wildlife Coordination Act and NEPA were such policies.¹⁴²

*Henry v. Federal Power Commission*¹⁴³ involved a gas company request for Federal Power Commission (FPC) approval to construct and operate tap and valve facilities for the introduction of gas produced from coal into a

tions directing the agencies to promulgate supplementary regulations in conformity with NEPA and the CEQ regulations. 40 C.F.R. § 1507.3 (1983).

134. 430 F.2d 199 (4th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

135. 430 F.2d at 201.

136. *Id.* at 207. The Rivers and Harbors Act prohibits both the building of structures that obstruct the navigable capacity and the excavating and filling in of navigable waters unless approval is granted by the Secretary of the Army after recommendation of the Chief of the Corps of Engineers. 33 U.S.C. § 403 (1982); *see* 430 F.2d at 207.

137. The Fish and Wildlife Coordination Act requires that any entity intending to dredge or fill pursuant to a governmental permit must consult with the United States Fish and Wildlife Service, Department of the Interior, with a view toward conservation of wildlife resources. 16 U.S.C. § 662(a) (1982); *see* 430 F.2d at 209.

138. 430 F.2d at 214. Although NEPA was not in effect at the time that the permit was denied, the court held that the correctness of the decision to deny "must be determined by the applicable standards of today." *Id.* at 213.

139. *Id.* at 214.

140. *Id.* at 207.

141. *Id.*

142. *Id.* at 209.

143. 513 F.2d 395 (D.C. Cir. 1975).

natural gas pipeline. The District of Columbia Circuit court decided that even if the FPC's jurisdiction under its own authorizing statute extends only to the interconnect facility and not to the production of the gas itself, NEPA requires the FPC to consider the environmental costs of the entire project.¹⁴⁴ Accordingly, such environmental effects would be relevant in deciding whether to grant, deny, or condition the requested authorizations.¹⁴⁵ The court did not specify how far the FPC could go in conditioning the authorization to construct and operate the tap and valve facilities. That lack of specificity leaves open the possibility that the FPC might, via conditions in such authorizations, properly regulate the production of the gas in any number of ways to protect the environment.

In 1981 the Ninth Circuit dealt directly with agency authority under NEPA to condition permits in *Grindstone Butte Project v. Kleppe*.¹⁴⁶ In *Grindstone Butte* the Department of the Interior granted two irrigation rights-of-way over federal lands to the Grindstone Butte Project (Grindstone). The Department imposed terms and conditions on the grants requiring Grindstone to take steps to prevent and to mitigate any environmental damage that might occur as a result of use of the rights-of-way. Grindstone challenged the Secretary of the Interior's authority to condition the grants. The court held that under the Department's governing statutes the Secretary has authority to impose reasonable terms and conditions to protect the public interest upon grants of irrigation rights-of-way. The court also stated that NEPA required the department to take environmental values into account in establishing those conditions.¹⁴⁷

In *Environmental Defense Fund v. Mathews*¹⁴⁸ a district court considered the effect of NEPA on the Food and Drug Administration (FDA). *Mathews* involved the FDA's general interpretation of its authority to base decisions on NEPA considerations rather than agency action in regard to a specific permit. In *Mathews* the Environmental Defense Fund (EDF) charged that an amendment to the FDA's regulations governing that agency's obligations under NEPA unlawfully limited the scope of those obligations. The amendment prohibited the Commissioner of the FDA from acting solely on the basis of environmental considerations not listed in the FDA's authorizing statutes. The court overturned the amendment on the grounds that it directly contravened the mandate of NEPA.¹⁴⁹ The court held that in the absence of a clear statutory provision excluding consideration of environmental factors, NEPA provides the FDA with supplementary authority to

144. *Id.* at 406-07.

145. *Id.*

146. 638 F.2d 100 (9th Cir.), *cert. denied*, 454 U.S. 965 (1981).

147. 638 F.2d at 103. The court stated, "[T]he Secretary of the Interior is not only permitted but required to take environmental values into account in carrying out regulatory functions . . . unless there is a clear and unavoidable conflict of statutory authority prohibiting the Secretary from complying with NEPA's mandate." *Id.* (citations omitted).

148. 410 F. Supp. 336 (D.D.C. 1976).

149. *Id.* at 338. Citing *Calvert Cliffs*, the court reasoned that because the FDA is required to consider environmental factors, allowing the agency to prohibit action based solely on those factors would render the NEPA process futile. *Id.* at 339.

act upon all environmental considerations.¹⁵⁰

The First Circuit recently applied the analysis of the above cases to the EPA's action under the Clean Water Act in a case involving the imposition of siting conditions and other nonwater quality related conditions in EPA-issued, NPDES new source permits. *Roosevelt Campobello International Park v. United States Environmental Protection Agency*¹⁵¹ involved a challenge to the EPA's final decision to issue a new source NPDES permit to a company that proposed to construct and operate an oil refinery and associated deepwater terminal in Eastport, Maine. The case involved a number of complex legal and factual issues, and the First Circuit vacated the EPA's decision to issue the permit and remanded the case to the EPA for further proceedings.¹⁵² The court held that the EPA was statutorily required to include in the permit the conditions imposed by Maine in the state's certification of the discharge.¹⁵³ The court also implied that siting considerations raised by the EIS would provide a direct NEPA basis for agency action on the permit.¹⁵⁴ Although the court finally determined that the EPA did not fail to give reasonable consideration to alternative sites,¹⁵⁵ the discussion of the EPA's duty under NEPA to consider alternative sites clearly indicated that the EPA might properly have taken action on the permit based on siting considerations.¹⁵⁶ The EPA, the court concluded, must conduct further studies to meet its obligations under the Endangered Species Act (ESA) and to consider if conditions of navigation needed to be included in the permit to minimize the risk of oil spills.¹⁵⁷ The court did not clearly articulate the basis for the imposition of navigational conditions. Because the approval of the permit hinged on the EPA's duty under the ESA to ensure that the project was not likely to jeopardize the continued existence of an endangered species, and since the low risk of oil spills was critical to that insurance, the ESA would seem to be a sufficient basis upon which to condition the permit.¹⁵⁸ The court also stated, however, that NEPA provided an additional ground for overturning issuance of the permit pending completion of naviga-

150. *Id.* at 338. Although the FDA claimed that a direct statutory conflict existed, the court determined that the FDA's existing statutory duties were not in direct conflict with its duties under NEPA. *Id.* Although the court did not specify, presumably this broad supplementary power could be used by the agency in either conditioning or denying their approval absent direct statutory conflict.

151. 684 F.2d 1041 (1st Cir. 1982).

152. *Id.* at 1057.

153. *Id.*

154. *Id.* at 1046-47.

155. *Id.* at 1047-48.

156. *Id.* The court held that the EPA did not act in an arbitrary and capricious manner in concluding that none of the alternative sites provided a significantly greater degree of environmental protection. *Id.* at 1048. If the EPA had been precluded from requiring an alternative site, such a lengthy discussion of the correctness of their decision not to require an alternative site would not have been necessary. The court did not clarify whether such action would properly take the form of denial or conditioning. Denial of a permit solely because a superior alternate site exists could easily be viewed as a conditioned approval, however, since upon the condition of relocating to the superior site the permit would probably be approved.

157. *Id.*

158. *See id.* at 1048, 1050-55; *see also* 40 C.F.R. § 122.49(c) (1984) (dealing with imposition of conditions in NPDES permits based on the Endangered Species Act).

tional studies, thus indicating that NEPA might also be a basis for the imposition of navigational conditions.¹⁵⁹

D. Conclusion

Since the Clean Water Act does not expressly give the EPA the power to condition new source permits on nonwater quality bases, whether the EPA has that power depends on whether it can be (1) implied from the Clean Water Act, or (2) derived from NEPA and the EIS process. In the Clean Water Act Congress gave the EPA the power to condition permits to meet the requirements of the Act, including section 511's requirement that NEPA be applied to new source permit issuance.¹⁶⁰ The legislative history of the Act overwhelmingly indicates that Congress was determined to ensure that new sources be environmentally excellent and that Congress expected the EIS to aid in accomplishing that goal.¹⁶¹ At the same time that Congress subjected new source permits to the NEPA-EIS process, however, it forbade the use of that process to establish water quality related permit conditions.¹⁶² The conclusion that Congress must have intended the EPA to use the EIS to review and act upon nonwater quality related conditions is all but inescapable. Since Congress intended this environmental action and incorporated the EIS requirement into the Clean Water Act, the power to include nonwater quality conditions in new source permits is implied in the Clean Water Act.

The NEPA case law clearly indicates that NEPA itself expands the bases for authorized agency action to include the environmental aspects of the major federal action under consideration. The cases demonstrate a judicial willingness to find that NEPA grants the agencies power to base their substantive decisions solely on environmental factors identified by an EIS so long as two conditions are met. First, the agency's enabling statute¹⁶³ must not directly preclude consideration of the environmental factors; and second, the agency's enabling statute must authorize the basic action, such as conditioning or denying a permit, that the agency is deciding to take.

Since the EPA is already authorized to condition permits, NEPA broadens the scope of the EPA's authority in issuing NPDES permits to allow conditioning on any environmental grounds, not only water quality related environmental grounds.¹⁶⁴ This reasoning is precisely how the courts deter-

159. 684 F.2d at 1055.

160. CWA §§ 402(a), 501(a), 33 U.S.C. §§ 1342(a), 1361(a) (1982). The power to condition permits is also clearly and broadly stated in the NPDES regulations. 40 C.F.R. § 122.43(a) (1984). For a discussion of § 511's requirements, see *supra* notes 44-47.

161. See *supra* notes 38-46 and accompanying text.

162. See *supra* notes 59-62 and accompanying text.

163. An agency's enabling statute is the underlying statute that authorizes the agency's existence and actions.

164. Not all of the cases that deal with this issue clearly distinguish between conditioning and denying as two distinct agency actions. A big difference between the two actions, however, is apparent. For example, if a new source permit is denied because of adverse environmental consequences, the effects are clear and immediate; the source may not discharge. If, however, the permit is granted but it includes conditions designed to mitigate adverse environ-

mined that NEPA influenced agency authority in the cases of *Zabel v. Tabb*,¹⁶⁵ *Henry v. Federal Power Commission*,¹⁶⁶ *Environmental Defense Fund v. Mathews*,¹⁶⁷ and *Grindstone Butte Project v. Kleppe*.¹⁶⁸ *Roosevelt Campobello International Park*,¹⁶⁹ which dealt specifically with EPA action under the Clean Water Act, is a strong and recent indicator that the EPA's long-standing position on this issue is a well-supported one.

IV. BAN ON CONSTRUCTION OF NEW SOURCES PENDING ENVIRONMENTAL REVIEW

The EPA's NPDES regulations have for a number of years reflected the agency's position that NEPA requires a ban on on-site construction of a new source until either a final permit has been issued incorporating EIS-related conditions or until a legally binding document assuring compliance with those conditions has been signed.¹⁷⁰ The purpose of the ban is to ensure that no adverse environmental impacts occur and no alternatives are foreclosed prior to completion of the EIS. This position is both a logical corollary to the use of NEPA and the EIS requirement for purposes of siting control and a logical interpretation of NEPA's mandate to protect the environment. Industry, on the other hand, claims that under the Clean Water Act the EPA has the authority to control discharge, but does not have the authority to ban construction.¹⁷¹ NEPA does not expand this authority, according to industry, because the construction of a private facility is not a federal action, and issuance of a permit by a federal agency cannot transform the action

mental consequences, violation of those conditions will subject the source to the enforcement and penalty provisions of the Clean Water Act. CWA § 309, 33 U.S.C. § 1319 (1982). Congress arguably never intended to subject a permit holder to these provisions for violation of a nonwater quality environmental permit condition. Given that Congress expressly acted to ensure that new sources are environmentally excellent by subjecting them to NEPA review, however, an equally strong argument can be made that Congress intended the enforcement provisions to apply with equal strength to all environmental permit conditions. An apparently less punitive alternative would be to allow a source to discharge upon conditions, rather than to prohibit it from discharging altogether.

165. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *see discussion supra* notes 134-42 and accompanying text.

166. 513 F.2d 395 (D.C. Cir. 1975); *see discussion supra* notes 143-45 and accompanying text.

167. 410 F. Supp. 336 (D.D.C. 1976); *see discussion supra* notes 148-50 and accompanying text.

168. 638 F.2d 100 (9th Cir.), *cert. denied*, 454 U.S. 965 (1981); *see discussion supra* notes 146-47 and accompanying text.

169. 684 F.2d 1041 (1st Cir. 1982); *see discussion supra* notes 151-59 and accompanying text.

170. 40 C.F.R. § 122.29(c)(4), (5) (1984). Litigation has arisen over whether the EPA's current regulation, *id.*, allows execution of such an agreement prior to the issuance of a final EIS or whether such an agreement is allowable only after issuance of the final EIS and before the issuance of the final NPDES new source permit. *See* Natural Resources Defense Council, Inc. v. Zeller, 688 F.2d 706 (11th Cir. 1982). The court in *Zeller* held that the regulation allows construction to begin upon execution of an agreement prior to issuance of the final EIS when the agreement requires compliance with what the EPA later determines to be appropriate EIS-related requirements. *Id.* at 710. Environmentalists generally dispute the EPA's authority to waive the ban prior to issuance of the final EIS. *See discussion of this issue infra* notes 259-68 and accompanying text.

171. Industry Comments, *supra* note 107, Attachment 1, at 6-7.

into a federal action subject to NEPA.¹⁷² Industry finds support for this position in Congress's creation of a federal-nonfederal dichotomy in NEPA application.¹⁷³ This dichotomy would not exist according to industry if NEPA were meant to apply to private construction.¹⁷⁴ Environmentalists claim that the EPA's historic position is correct because any actions taken prior to completion of the EIS could foreclose certain alternatives and circumvent the purpose of the NEPA review.¹⁷⁵ This section reviews the history of the EPA's position regarding the construction ban and the legal authority affecting the EPA's ability to impose the ban. In light of the conclusions drawn from that review, this section also addresses the EPA's authority to lift the ban upon execution of an agreement, prior to the final EIS, that requires compliance with EIS-related conditions that the EPA later determines to be appropriate.

A. *The EPA's Position*

1. *Historic Position*

The current regulation provides that if construction begins in violation of the rule, the EPA will advise the applicant that such construction activities constitute grounds for denial of a permit and the EPA may seek a court order to enjoin construction.¹⁷⁶ At the time that the EPA's present rule was originally proposed,¹⁷⁷ many commenters criticized the rule during the comment period.¹⁷⁸ Upon issuance of the final regulation, the EPA stated its position that NEPA and section 511(c) of the Clean Water Act¹⁷⁹ imply that the expected environmental impacts studied in the EIS process should not be allowed to occur until the environmental assessment has been concluded.¹⁸⁰ The agency stated that the proposed rule represented the EPA's long-standing position,¹⁸¹ and the regulation was promulgated as proposed.¹⁸² In support of its position the EPA cited one of its former¹⁸³ regulations promulgated in January 1977 that dealt with new source determination procedures.¹⁸⁴ That 1977 regulation was very similar to the EPA's current rule.

172. *Id.* at 7.

173. *Id.* at 7-9.

174. *Id.*

175. Natural Resources Defense Council, Inc., Comments on Proposed Consolidated Permit Regulations: Revision In Accordance With Settlement And Suspension Of NPDES Application Requirements 9-12 (submitted to EPA on Jan. 17, 1983) [hereinafter cited as NRDC Comments].

176. 40 C.F.R. § 122.29(c) (1984).

177. 43 Fed. Reg. 37,078, 37,102, § 122.47(c) (1978).

178. See 44 Fed. Reg. 32,854, 32,872 (1979). The criticisms are not listed in the preamble, but the EPA merely notes that many commenters disagreed with the construction ban.

179. 33 U.S.C. § 1371 (1982).

180. 44 Fed. Reg. at 32,872.

181. *Id.*

182. *Id.* at 32,915, § 122.47(c)(4), (5).

183. See *supra* note 120 and accompanying text for the actual status of this rule at the time that the EPA referred to it as "former."

184. 42 Fed. Reg. 2450, 2454, § 6.906 (1977). This rule was promulgated to supplement the old CEQ guidelines and was one of several EPA regulations designed to apply NEPA to the issuance of new source NPDES permits.

The preamble to the 1977 regulation indicated that the EPA had considered such a requirement necessary to meet the substantive demands of NEPA since approximately 1975.¹⁸⁵

A 1976 opinion of the EPA's General Counsel specifically addressed the authority of the agency to impose a construction ban.¹⁸⁶ The General Counsel concluded that both the FWPCA and NEPA authorized preconstruction review.¹⁸⁷ He emphasized that NEPA required an agency to consider all reasonable alternatives, including site alternatives, in the case of new construction.¹⁸⁸ The General Counsel pointed out that siting alternatives can be meaningfully considered only if the environmental evaluation is completed prior to the commencement of construction.¹⁸⁹ He concluded that the intent of Congress in making NEPA applicable to the EPA's issuance of new source permits was to promote construction of the best designed plants in the most environmentally acceptable areas.¹⁹⁰ The counsel also noted that NEPA had been viewed as an expansion of an agency's organic statutes¹⁹¹ and that the most recent CEQ guidelines directed agencies to limit actions that an applicant may take prior to completion of the environmental review.¹⁹² The conclusion reached by the General Counsel was that the EPA's NEPA obligation to consider alternatives allowed the agency, under the FWPCA, to impose a ban on construction prior to completion of the environmental review.¹⁹³ That conclusion has consistently been incorporated into the EPA's new source NPDES regulations.¹⁹⁴

2. *How the New NPDES Regulations Affect the EPA's Position*

The new regulation reaffirms and retains the EPA's long-standing general ban on construction of new sources.¹⁹⁵ The preamble discusses the EPA's

185. *Id.* at 2451.

186. EPA Opinion 76-18, *supra* note 110.

187. The General Counsel cited § 501 of FWPCA, which authorizes the Administrator to "prescribe such regulations as are necessary," as additional authority upon which to base a preconstruction review requirement. *Id.* This opinion was rendered prior to the 1977 amendments to FWPCA that ushered in the name Clean Water Act.

188. He also noted other significant environmental matters such as land use, aesthetics, air quality degradation, and solid waste disposal that can appropriately be dealt with only prior to construction. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (citing *Environmental Defense Fund v. Mathews*, 410 F. Supp. 336 (D.D.C. 1976)). An agency's organic statute or legislation is that statute, or several statutes, under which the agency acts and that the agency has a mission to enforce or administer. *See NEPA MATERIALS*, *supra* note 82, at 311, 376.

192. 40 C.F.R. § 1500.7(a) (CEQ Guidelines No. 7) (1975).

193. EPA Opinion 76-18, *supra* note 110, at 311. The General Counsel did not, however, conclude that the agency was obligated to impose the ban. *See id.*

194. *See* 40 C.F.R. § 122.29(c) (1984); *see also* §§ 6.600-.607 (EPA's NEPA implementation regulations).

195. 49 Fed. Reg. 37,998, 38,016-18 (1984) (preamble to the new regulation to be codified at 40 C.F.R. § 122.29(c)(4), (c)(5)). The proposed regulation would have rescinded the ban on pre-permit construction, essentially abandoning the EPA's long-standing claim that it is authorized to impose the ban. Such a radical change would have left the agency in a much weaker position to assure that environmentally superior alternatives are not foreclosed prior to being evaluated. *See* the preamble explanation of the proposed regulation at 47 Fed. Reg.

history of support for the ban and answers industry's objection that the agency is not authorized to impose such a ban.¹⁹⁶ The EPA strongly concludes that the pre-permit construction ban is appropriate and necessary to ensure that all of the results of the NEPA review are fully considered.¹⁹⁷ The agency notes that once construction begins significant environmental options may be foreclosed because of the impracticalities and costs involved in attempting remedial measures.¹⁹⁸

The language of the regulation itself is altered in one minor and somewhat confusing way. The EPA added a subparagraph to the regulation to clarify that the agency considers violation of the construction ban to be grounds for permit denial.¹⁹⁹ The regulation in existence prior to this action, however, already seems to have made that clear, and the addition of the subparagraph appears redundant.²⁰⁰ Nevertheless, substantively the change reinforces the agency's regulation generally banning pre-permit construction of new sources.

B. The CEQ's NEPA Regulations

In the preamble to the final promulgation of the construction ban regula-

52,072 (1982). The proposed amendment was to have been codified at 40 C.F.R. § 122.66(c)(4), and was numbered accordingly. The numbering change between proposed and final action was a result of deconsolidation of the Consolidated Permit Regulations. *See supra* note 123 (discussing deconsolidation).

196. 49 Fed. Reg. at 38,016-18. Of the regulatory changes requested by industry in the settlement agreement that precipitated this rulemaking, *see supra* notes 13-14 and accompanying text, the EPA most strongly rejects the lifting of the construction ban. That this issue was hotly contested is evident by both the content and length of the preamble to the final action. The difference between the proposed and finally enacted wording is greater with regard to this regulation than the others discussed in this Comment. The EPA's decision not to comply with the settlement agreement by promulgating the regulation as proposed seems to indicate the agency's belief both in the environmental importance of retaining the ban and in the ability to win industry's legal challenge to the regulation.

197. 49 Fed. Reg. at 38,018.

198. *Id.* As a general rule, once resources have been committed to a project, the amount of money already expended and the cost of undoing any damage that has already been done must be weighed in the NEPA process of balancing costs and benefits. Those costs tend to put the equities on the side of completing the project when alternatives are considered. *See Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 240 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Sierra Club v. Callaway*, 499 F.2d 982, 988 (5th Cir. 1974); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1333-34 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

199. 49 Fed. Reg. at 38,048; *see also id.* at 38,018 (preamble explanation of purpose of addition).

200. The regulation, prior to this amendment read:

The permit applicant must notify the Regional Administrator of any on-site construction which begins before the times specified in paragraph (c)(4) of this section. If on-site construction begins in violation of this paragraph, the Regional Administrator shall advise the owner or operator that it is proceeding with construction at its own risk, and that such construction activities constitute grounds for denial of a permit. The Regional Administrator may seek a court order to enjoin construction in violation of this paragraph.

40 C.F.R. § 122.29(c)(5) (1984). This paragraph has been redesignated as subsection (c)(5)(ii). 49 Fed. Reg. at 38,048. Subsection (c)(5)(i), was added and reads: "The commencement of on-site construction in violation of paragraph (c) of this section shall constitute grounds for denial of a permit." 49 Fed. Reg. at 38,048.

tion in 1979, the EPA cited the NEPA regulations published by the CEQ.²⁰¹ Although the preamble did not list a specific section, several of the CEQ regulations reinforce the EPA's position of banning pre-approval construction. The CEQ regulations emphasize that NEPA procedures must provide environmental information to public officials and citizens before decisions are made or actions taken.²⁰² The regulations describe the EIS as a means of assessing environmental impacts rather than justifying decisions already made,²⁰³ forbid agencies to commit resources prejudicing selection of alternatives,²⁰⁴ and characterize the discussion of alternatives as the heart of the EIS.²⁰⁵ All of these statements stress the importance of preventing environmentally detrimental actions before the environmental analysis is complete.

In the part of the regulations addressed specifically to NEPA and agency planning,²⁰⁶ the CEQ emphasizes that agencies must integrate the NEPA process into early planning to ensure both appropriate consideration of NEPA's policies and to eliminate delay.²⁰⁷ To ensure that planning and decisions reflect environmental values, the CEQ requires the agencies to make special provisions for cases in which private applicants are planning actions prior to agency involvement.²⁰⁸ In such a case the regulations require the agency to consult with the private applicant as soon as agency involvement is reasonably foreseeable.²⁰⁹ In another section the CEQ regulations expressly address necessary limitations on actions during the NEPA process.²¹⁰ That section sets out the fundamental policy forbidding action that would have an adverse environmental impact or limit the choice of reasonable alternatives until after a final decision, incorporating the EIS conclusions, has been made.²¹¹ If an agency is considering an application from a

201. 43 Fed. Reg. 55,978 (1978) (codified as amended at 40 C.F.R. §§ 1500-1508 (1983)). See *supra* notes 81-87 and accompanying text for an explanation of CEQ action in the area of NEPA's application to the federal agencies.

202. 40 C.F.R. § 1500.1(b) (1983).

203. *Id.* §§ 1502.2(g), .5.

204. *Id.* § 1502.2(f); see *id.* § 1506.1.

205. *Id.* § 1502.14.

206. *Id.* §§ 1501.1-.8.

207. *Id.* § 1501.1(a).

208. *Id.* § 1501.2(d).

209. *Id.* § 1501.2(d)(2). The regulations also direct the agencies to advise potential applicants of information that the agency may later require for federal action, *id.* § 1501.2(d)(1), and to commence the NEPA review at the earliest possible time, *id.* § 1501.2(d)(3). In 1980 the CEQ held a series of meetings with people involved in the NEPA process. A number of questions were answered at those meetings, and the CEQ subsequently compiled a list of the 40 most asked questions and published the questions and answers in the Federal Register. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981) [hereinafter cited as Forty Questions]. Question number 8 asked what an agency could do to apply NEPA early as required by § 1501.2(d) of the NEPA regulations. *Id.* at 18,028. In a detailed answer, the CEQ suggested such procedures as development of an outreach program. *Id.* at 18,028-29. The CEQ emphasized that the procedures should ensure that environmental factors are considered at an early stage to avoid situations in which the applicant for a federal permit has eliminated all alternatives to the proposed action before the EIS process has been completed. *Id.* at 18,028.

210. 40 C.F.R. § 1506.1 (1983).

211. *Id.* § 1506.1(a). The CEQ's policy is reiterated in the answer to number 10a of the CEQ's memorandum of questions and answers. See Forty Questions, *supra* note 209, at

nonfederal entity and the agency knows that the action is within its jurisdiction and would have an adverse environmental impact or limit the choice of reasonable alternatives, then the agency must notify the applicant that the agency will take appropriate steps to ensure that the objectives and procedures of NEPA are achieved.²¹²

The CEQ regulations thus clearly point out the importance of preventing activity that will limit the usefulness of the NEPA process.²¹³ The EPA's regulation banning on-site construction of new sources prior to completion of the environmental assessment and a final EPA decision on the permit accomplishes that goal, particularly since the regulation is combined with the ability to seek a court-ordered injunction. The next question is whether on-site construction of new sources is an action within the EPA's jurisdiction so that the EPA is authorized to impose such a ban by regulation.²¹⁴

The CEQ regulations define "jurisdiction by law" as "agency authority to approve, veto, or finance all or part of the proposal."²¹⁵ That definition raises more questions than it answers since the definition does not clarify whether the agency's jurisdiction would extend only to that part of the proposed project that it has the authority to approve, in this case pollution discharge into water, or whether the authority to approve a part of the project means that the agency has jurisdiction over all of the project. In the case of new sources, the ability to condition new source permits in order to achieve certain environmental outcomes indirectly affects the construction of the new source.²¹⁶ Does the fact that the EPA can impose conditions affecting on-site construction bring on-site construction within the agency's jurisdiction?²¹⁷ Conversely, in order for on-site construction to be within the EPA's jurisdiction must the EPA be authorized to control directly the on-site construction?²¹⁸

18,029. The CEQ emphasized in its answer that until the EIS has been finalized no action may be taken by an applicant or an agency that would have an adverse environmental impact or limit the choice of reasonable alternatives. *Id.*

212. 40 C.F.R. § 1506.1(b) (1983). Section 1506.1(d) makes it clear that activities such as development of plans or designs or performance of other work necessary to support a permit application are not precluded. *Id.* § 1506.1(d).

213. *Id.* § 1506.1(f).

214. The preamble to final action on the CEQ regulations seems to indicate that the CEQ and commenters thought that the agencies had broad jurisdiction. Commenters were concerned that the agencies would be able to stop the development of proposals for agency approval if the agency viewed such proposals as limiting alternatives. To clarify the reach of the agency, the CEQ added a new paragraph, § 1506.1(d), that expressly authorized certain limited activities before completion of the environmental review process. 43 Fed. Reg. 55,978, 55,986 (1978).

215. 40 C.F.R. § 1508.15 (1983).

216. See *supra* note 38 and accompanying text.

217. An example of a condition that significantly affects construction is a siting condition. Consideration of siting alternatives is clearly one of the benefits of the NEPA process that Congress sought to obtain by making new source permitting subject to NEPA's EIS requirement. See SENATE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, October 4, 1972 [hereinafter cited as SENATE CONSIDERATION], reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 182-83. Considering alternative sites in the new source permitting process is now an accepted practice. See *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-48 (1st Cir. 1982).

218. For example, opponents to the EPA's ban on construction argue that the EPA does

C. *Judicial Interpretation of NEPA's Effect on Agency Jurisdiction*

Conditioning of new source permits is within the EPA's authority.²¹⁹ NEPA demands that the EPA exercise that authority on the basis of all environmental grounds, not just water quality related environmental grounds.²²⁰ NEPA, therefore, broadens the scope of authority upon which to base agency actions, but NEPA may not necessarily broaden the range of actions that the agency is authorized to take.²²¹ In *Environmental Defense Fund v. Mathews* the District of Columbia district court held that NEPA not only required the FDA to consider environmental factors but also supplemented the agency's existing authority to act on those considerations.²²² Neither the holding of the court nor the factual situation in *Mathews* specifically limit NEPA-based agency action to specific types of action that the agency is already authorized to take under its enabling statute. Essentially *Mathews* directed the agency to act unless its enabling statute expressly forbids action.²²³

This precise issue of expansion of agency jurisdiction has come before the courts only a few times. In *Kitchen v. Federal Communications Commission*²²⁴ the petitioners sought to halt construction of a telephone building. Petitioners claimed that the construction of the building required Federal Communications Commission (FCC) approval and, therefore, an EIS must be prepared. The District of Columbia district court found that the FCC had no jurisdiction over either the building or any equipment that would be housed in the building.²²⁵ The FCC, therefore, had no power to regulate construction of the building on its own, and NEPA did not separately grant that power.²²⁶ This case demonstrates judicial rejection of an attempt to impose extremely broad NEPA powers on an agency. Not only did the FCC lack power over such buildings, but the federal action alleged to bring

not have jurisdiction over on-site construction because the Clean Water Act regulates discharges, not construction. See 49 Fed. Reg. 37,998, 38,017 (1984); 47 Fed. Reg. 52,072, 52,077 (1982).

219. CWA §§ 402(a), 501, 33 U.S.C. §§ 1342(a), 1361 (1982); 40 C.F.R. § 122.43(a) (1984).

220. See *supra* note 126 and accompanying text.

221. Compare McGarity, *The Courts, The Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 867 (1977), wherein the author suggests that the appropriate role of NEPA is limited to allowing agencies to take any action that they are already authorized to take for environmental reasons, with Anderson, *supra* note 104, at 289-95, in which the author postulates that NEPA empowers agencies to act within the large gray area that exists between simply using environmental factors as a basis in decisions that the agency is already empowered to make and launching a totally new regulatory program without specific congressional authority.

222. 410 F. Supp. 336, 338 (D.D.C. 1976). See notes 148-50 *supra* and accompanying text for a discussion of *Mathews*.

223. See NEPA MATERIALS, *supra* note 82, at 376-77.

224. 464 F.2d 801 (D.C. Cir. 1972).

225. *Id.* at 802-03. The court relied in part on a long-standing FCC interpretation that agency certification was not required for construction of facilities that serviced local areas. *Id.* at 801, 803.

226. *Id.* at 803.

NEPA into play was not proposed agency action, but rather complete inaction.

In *Henry v. Federal Power Commission*²²⁷ the court addressed the situation in which the federal agency, the FPC, clearly had jurisdiction over a portion of the project, which was a multifaceted coal gasification project. As a result of that jurisdiction, the court held that NEPA required the FPC to consider the environmental effects of the entire project.²²⁸ The court held that such consideration was required even if the Commission's jurisdiction under its own authorizing statute extended only to transmission facilities and not to production of the gas.²²⁹ The *Henry* court did not determine the exact scope of the FPC's jurisdiction either under its authorizing statute or under NEPA. Consequently, while *Henry* made it clear that the FPC could attach to the transportation facilities permit conditions dealing with the production facility,²³⁰ the court did not indicate whether the Commission could act directly on the production facility by, for example, delaying construction of the facility pending environmental review.²³¹

In two other cases appellate courts have expressly refused to deal with the issue of whether NEPA enlarges the scope of an agency's jurisdiction. In both of these cases the courts relied on the agency's authorizing statutes rather than NEPA to determine the scope of agency jurisdiction. The petitioner in *Public Service Co. v. United States Nuclear Regulatory Commission*²³² challenged a Nuclear Regulatory Commission (NRC) order to reroute transmission lines tying a proposed nuclear power plant to an electricity transmission grid. The challenged order was designed to minimize environmental injury in routing the lines. Petitioners claimed that the NRC did not have jurisdiction over transmission lines and, therefore, could not exercise control over their routing. The First Circuit relied heavily on the Commission's own interpretation of its jurisdictional reach in holding that the NRC had jurisdiction over transmission lines under its organic statute.²³³ That finding allowed the court expressly to avoid deciding whether

227. 513 F.2d 395 (D.C. Cir. 1975).

228. *Id.* at 407.

229. *Id.* at 406-07.

230. *Id.* at 407.

231. The court distinguished *Kitchen v. FCC* by noting that in *Kitchen* the FCC had no jurisdictional toe-hold over the project, whereas in this case the FPC did have jurisdiction over a portion of the project. That jurisdiction gave the agency authority to consider and act upon the environmental effects of those aspects of the project over which the agency did not have outright jurisdiction. *See id.* at 407 n.33 and accompanying text. This discussion by the court has led to speculation that the basis for the decision may have been that NEPA expanded the jurisdictional toe-hold to give the FPC jurisdiction over the entire project. NEPA MATERIALS, *supra* note 82, at 377. The Nuclear Regulatory Commission adopted that interpretation in at least one case. *See infra* note 234. Such an interpretation would fit well with one of the possible interpretations of the CEQ's definition of "jurisdiction by law." *See supra* note 215 and accompanying text.

232. 582 F.2d 77 (1st Cir. 1978).

233. *Id.* at 81-84. The court determined that the agency's authorizing statutes conferred broad regulatory functions on the agency and anticipated that the agency would promulgate regulations to fill in any definitional gaps left open by Congress. The Commission's longstanding inclusion of transmission lines within its jurisdiction, therefore, was entitled to great weight. The court also reasoned that because the NRC is closely supervised by Congress,

NEPA enlarges the scope of an agency's jurisdiction.²³⁴ The Sixth Circuit avoided the same question in *Detroit Edison Co. v. United States Nuclear Regulatory Commission*.²³⁵ The court relied on *Public Service Co.* and held that regulation of off-site transmission lines is within the NRC's authority under the Atomic Energy Act.²³⁶

The problem of agency authority to halt construction prior to environmental review has arisen in two other lines of cases, involving timing and segmentation. The issue involved in the timing cases is not whether the project is within the agency's jurisdiction, but rather when the project becomes a federal action, thereby authorizing the federal agency to act upon it. The vast majority of these cases have arisen when state or private parties start work on a project that later receives federal aid.²³⁷ Actions taken before submitting a project for funding may cause adverse environmental impacts and narrow alternatives before those environmental impacts and alternatives may be studied and conditions imposed on the funding to minimize adverse environmental impacts.²³⁸ The issue arises when suit is brought, often by environmentalists, to preserve the environmental status quo by enjoining construction undertaken by private parties.²³⁹

For a nonfederal party to remain eligible for federal funding it must comply with federal funding requirements. To that end, a federal agency usually provides ongoing review and planning assistance to the nonfederal party.²⁴⁰ In analyzing these cases courts have looked at the continuum of federal involvement to determine at what point the federal action of funding, which will bring the project within NEPA, becomes more of an inevitability than a possibility.²⁴¹ Most of these funding cases failed to set clear guidelines as to

congressional silence regarding the Commission's interpretation signaled de facto approval. The NRC's interpretation of transmission lines as within its jurisdiction is essentially a working administrative interpretation based on a long-standing assertion of jurisdiction. *Id.* at 82. In its opinion in *Public Service Co.* the First Circuit cited to a five-year-old decision by the D.C. Circuit, *Gage v. United States Atomic Energy Comm'n*, 479 F.2d 1214 (D.C. Cir. 1973). That case involved whether NEPA required the AEC to promulgate a regulation barring acquisition of land prior to the Commission's environmental review of the nuclear facility proposed to be built upon such land. The court declined to officially reach the issue of jurisdiction because the court itself did not have jurisdiction to review the claim. *Id.* at 1217-18. Nevertheless, the court, in a dictum, stated that "NEPA does not mandate action which goes beyond the agency's organic jurisdiction." *Id.* at 1220 n.19. The court did not discuss whether NEPA might allow, rather than mandate, the agency to take action beyond its organic jurisdiction. The court also failed to address the extent of the agency's jurisdiction under its organic legislation.

234. 582 F.2d at 81 n.7. The NRC contended before the court that NEPA did enlarge agency jurisdiction, citing *Henry v. Federal Power Commission*. The court declined to deal with the issue. *Id.*

235. 630 F.2d 450, 452 (6th Cir. 1980).

236. *Id.* The court again explicitly refused to decide whether NEPA is an independent source of substantive jurisdiction. *Id.*

237. Comment, *Applying NEPA to Joint Federal and Non-Federal Projects*, 4 ENVTL. AFF. 135, 135 (1975).

238. F. ANDERSON, *supra* note 88, at 64.

239. *Silva I: The Need for HUD "Status Quo" Regulations*, 3 ENVTL. L. REP. (ENVTL. L. INST.) 10,155, 10,155 (1973) [hereinafter cited as *Silva I*].

240. See Comment, *supra* note 237, at 137.

241. F. ANDERSON, *supra* note 88, at 63.

what conduct was enjoined,²⁴² but did generally hold that federal action for purposes of NEPA must be found early to preserve the utility of NEPA's environmental review.²⁴³ In *City of Boston v. Volpe*²⁴⁴ the First Circuit held that a project would not be considered a federal action until the federal agency had made a final decision to fund it. That ruling would make NEPA review virtually meaningless because NEPA would not apply until the agency decision that NEPA review was intended to influence had already been made.²⁴⁵ The same court came up with a different test in a case decided the year after *City of Boston*. In *Silva v. Romney*²⁴⁶ the court decided that federal action exists at whatever point in the planning process a partnership between the federal and nonfederal parties may be found. This somewhat ambiguous test²⁴⁷ seems to emphasize the consideration of when in the course of a project federal action becomes inevitable.

The second line of cases addresses such considerations as when a project may be segmented so that either (1) the overall environmental impacts are not studied because separate impact statements are prepared for each segment; or (2) some segments avoid NEPA's requirements altogether because viewed alone the impacts of those segments are not significant. The courts have looked at projects in light of several different factors in determining when segmentation is proper.²⁴⁸ Those factors include: (1) whether a given part of a project has utility independent of the overall project and thus may appropriately be viewed separately;²⁴⁹ and (2) whether completion of a part of a project represents an irreversible commitment to complete the entire project, in which case the project must be viewed as a whole.²⁵⁰ Although the courts look closely at these and other factors in each case, the general judicial attitude toward segmentation is demonstrated in *City of Rochester v. United States Postal Service*.²⁵¹ The issue in *City of Rochester* was whether construction of a new postal facility could properly be separated from an overall postal service plan that included abandonment of an old facility and hundreds of personnel terminations and relocations. The court disallowed

242. *Silva I*, *supra* note 239, at 10,155.

243. Comment, *supra* note 237, at 138-40; *see e.g.*, *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16-17 (8th Cir. 1973) (private party submits to federal regulation through voluntary involvement with federal agency); *Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't*, 446 F.2d 1013, 1028 (5th Cir. 1971) (deliberate delay of federal involvement in order to avoid NEPA-EIS requirements is not permissible); *Sierra Club v. Volpe*, 351 F. Supp. 1002, 1007 (N.D. Cal. 1972) (EIS would be futile gesture if private parties could ignore NEPA while causing adverse environmental effects, yet still keep federal funding option open).

244. 464 F.2d 254, 259 (1st Cir. 1972).

245. Comment, *supra* note 237, at 141.

246. 473 F.2d 287, 290-91 (1st Cir. 1973).

247. *Silva I*, *supra* note 239, at 10,156.

248. *See Note, Conservation Society of Southern Vermont: The Retreat on Delegation and Scope of Environmental Impact Statements*, 2 COLUM. J. ENVTL. L. 369, 388-95 (1976).

249. *See, e.g.*, *Sierra Club v. Callaway*, 499 F.2d 982, 990 (5th Cir. 1974); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 19 (8th Cir. 1973).

250. *See, e.g.*, *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 239-40 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

251. 541 F.2d 967 (2d Cir. 1976).

the segmentation and held that NEPA required a comprehensive, cumulative analysis of the project.²⁵²

The analysis of the Second Circuit in *Rochester* was cited approvingly in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*.²⁵³ In that case the Third Circuit held that the district court must consider whether the NRC improperly segmented its proposal to decontaminate the Three Mile Island Nuclear Power Station.²⁵⁴ The court emphasized that improper segmentation can result in the foreclosure of potentially desirable alternatives and is, therefore, forbidden under NEPA.²⁵⁵

D. Conclusion

1. The EPA's Authority to Impose a Construction Ban

The Clean Water Act does not expressly give the EPA the authority to control construction of new sources directly. A court might, nevertheless, find that the EPA has jurisdiction over new source construction either directly, under the Clean Water Act, or on the theory that the EPA's admitted jurisdiction to deny discharge permits extends the agency's jurisdiction under NEPA. The courts have been manifestly unwilling to declare that NEPA expands an agency's jurisdiction. A base could be built, however, from which such a decision could be reached. First, the courts have liberally construed NEPA as requiring the agencies to consider all of the project-wide environmental effects when deciding whether to grant, deny, or condition permits. Second, at least two cases, *Mathews*²⁵⁶ and *Calvert Cliffs*,²⁵⁷ have recognized the futility of considering effects that an agency is powerless to act upon. From those cases comes a mandate for the agency to act upon those effects that the agency is required to consider absent a specific statutory provision to the contrary. Despite the fact that a reading of the cases indicates support for the proposition that NEPA expands agency jurisdiction, a pronouncement to that effect is unlikely to be forthcoming from a judiciary that is historically reluctant to speak to this issue.²⁵⁸ The courts have, however, broadly construed the range of issues that NEPA authorizes agencies to consider. The cases of *Public Service Co. v. United States Nuclear Regulatory Commission* and *Detroit Edison Co. v. United States Nuclear Regulatory Commission* also indicate a judicial willingness to construe broadly the jurisdiction of an agency under the agency's organic statutes,

252. *Id.* at 972.

253. 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

254. 619 F.2d at 241.

255. *Id.* at 240.

256. 410 F. Supp. 336 (D.D.C. 1976). For a discussion of the case, see *supra* notes 148-50, 222-23 and accompanying text.

257. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 918 (1972). For a discussion of the case, see *supra* notes 91-96 and accompanying text.

258. For examples of the courts' reluctance to discuss this issue, see discussion of *Henry v. Federal Power Comm'n* and *Public Serv. Co. v. United States Nuclear Regulatory Comm'n*, *supra* notes 227-36 and accompanying text.

especially when the agency has a long-standing interpretation of its own favoring such construction.

Based on the above discussion, courts would probably hold the EPA's ban on pre-permit construction as within its jurisdiction under the Clean Water Act. The EPA has consistently maintained an assertion of jurisdiction over construction of new sources in the form of construction bans. In addition, the legislative history of the Clean Water Act indicates that Congress intended the EPA to have such jurisdiction over new sources. Without such ability the EPA would be virtually powerless to control the siting and other land use considerations that Congress considered important with regard to new source operations. Given the fact that jurisdiction over new source construction is the only way to assure the effective review of environmental alternatives mandated by the Clean Water Act, and the fact that nothing in the Act prohibits the EPA's jurisdiction over construction, the EPA's long-standing assertion that construction of new sources is within its jurisdiction to the extent necessary to ensure meaningful application of NEPA should be given great weight by the courts.

The timing and segmentation cases resolve scope and timing problems with regard to projects that without question are or have the potential to be actions within the agency's jurisdiction. The timing cases are useful in the construction ban context because they indicate that a project becomes federalized once the federal action is inevitable. In the new source permitting context federal action in the form of a permit is inevitable from the beginning because achievement of the nonfederal party's goal of discharge from the source without a permit is not possible. If the EPA's jurisdiction extends to construction of the source, then the EPA may exercise that jurisdiction and ban construction prior to environmental review as soon as the applicant indicates an intent to seek a permit. The segmentation cases are instructive because they indicate the courts' tendency generally to favor agency action that prevents foreclosure of alternatives prior to environmental review.

2. *The EPA's Ability to Waive the Ban Upon Agreement*

If the EPA has jurisdiction over the construction of new sources, the question then arises whether the ban is mandatory or if the EPA may exercise discretion to allow construction prior to the completion of the EIS. The EPA's regulation banning new source construction prior to permit issuance provides for a waiver if the applicant executes a legally binding written agreement that requires compliance with all appropriate EIS-related conditions.²⁵⁹ In *Natural Resources Defense Council, Inc. v. Zeller*²⁶⁰ the Eleventh Circuit construed the regulation to mean that an agreement executed at any time during the permit process could be used to lift the ban. The Natu-

259. 40 C.F.R. § 122.29(c)(4) (1984). The EPA's ability to issue a waiver is maintained in the newly amended regulation and is commented upon in the preamble. 49 Fed. Reg. 37, 998, 38,017 (1984).

260. 688 F.2d 706, 710-11 (11th Cir. 1982).

ral Resources Defense Council (NRDC) contended that only an agreement executed after issuance of a final EIS could lawfully lift the ban.

An agreement concluded prior to completion of an EIS could not include conditions subsequently found necessary by the environmental study. Allowing waiver of the construction ban prior to EIS completion, therefore, presents the same problems as not having a construction ban at all. If construction is started before the environmental effects have been studied, alternatives that should be considered may be foreclosed due to irreversible environmental damage or due to the shift in the balance of costs and benefits that occurs once money has been invested in the project.

Some notable differences, however, are apparent between no ban at all and allowing waiver in the case of an agreement to comply with conditions yet to be determined. Although no construction ban would allow construction in every case, a discretionary waiver ostensibly requires the agency to make a reasoned decision that alternatives are not likely to be foreclosed. The EPA points out in the preamble that such a waiver is necessary to allow flexibility and to avoid unnecessary delay in situations that the agency determines are not likely to involve irreparable harm to the environment.²⁶¹

The waiver also requires the execution of a legally binding agreement that the source will comply with those conditions that an EIS later determines are appropriate.²⁶² That agreement might be viewed as knowing acceptance of risk on the part of the source such that construction expenditures could properly be excluded from the cost-benefit balancing process in determining what EIS conditions should be imposed.²⁶³ Such an interpretation would alleviate some of the danger that alternatives might be foreclosed by allowing construction to proceed.

On the other hand, environmentalists have raised the question whether the EPA's execution of the agreement is itself a major federal action that requires a wholly separate EIS.²⁶⁴ The discretionary waiver allows the EPA to determine unilaterally whether irreversible damage is likely to occur. No provisions require the public comments or consultation with other federal

261. 49 Fed. Reg. 37,998, 38,017 (1984) (to be codified at 40 C.F.R. § 122.29(c)(4), (5)).

262. 40 C.F.R. § 122.29(c)(4) (1984).

263. This interpretation is apparently the way that the EPA views the regulation. The agency stated in the preamble: "EPA recognizes that all uncertainties for permit applicants are not eliminated under the existing regulations, since even if the Regional Administrator allows pre-permit construction, there is no guarantee that the final permit will be consistent with that construction." 49 Fed. Reg. at 38,018. Whether the reality of a major investment could be ignored in the cost-benefit balancing process even with a legally binding agreement remains to be seen.

264. Actions that have required an EIS include: (1) administration of the National Park Service's grizzly bear management program in Yellowstone; (2) issuance of a permit to a water discharger under the Corps of Engineers Refuse Act Permit Program; and (3) a Federal Housing Administration loan for the construction of a golf course and park. W. RODGERS, *supra* note 4, at 755-58. NEPA has been held not to apply to: (1) EPA funding of a sewer outfall and fishing pier costing approximately \$4 million; (2) a single shipment of nerve gas from Bangor, Washington, to Umatilla, Oregon; and (3) restrictions on the use of motor vehicles within certain wildlife refuges. *Id.* at 758-61.

and state agencies that are part of the EIS process and that tend to provide a check on agency action.

The CEQ's NEPA regulations direct federal agencies considering applications from private parties to take appropriate actions to ensure that reasonable alternatives are not foreclosed prior to completion of the EIS.²⁶⁵ The regulations do not define appropriate action, nor do they specifically mention construction bans. The regulations do, however, emphasize the importance of preventing activity that would limit the usefulness of the NEPA review process.²⁶⁶ The CEQ regulations require each federal agency, in consultation with the CEQ, to develop procedures to supplement the CEQ regulations and provide implementation procedures.²⁶⁷ The EPA's regulations promulgated in response to that CEQ directive incorporate the ban on construction and the discretionary waiver.²⁶⁸

While a discretionary waiver of the construction ban may not perfectly preserve alternatives, the discretionary waiver is substantially more protective than no construction ban. The EPA's regulation appears to be appropriate action within the requirements of the CEQ regulations because the regulation would not foreclose alternatives prior to environmental review. The EPA seems to be making a good faith effort to comply fully with NEPA obligations under the Clean Water Act by forbidding construction prior to environmental review. Although the discretionary waiver could be viewed as a tool designed to thwart NEPA's goals while maintaining the appearance of compliance, the waiver has not proved to be used in that manner. The waiver could be viewed alternatively as appropriate in order to give flexibility in cases in which the environmental risks appear small and the new source is willing to accept the monetary risk of going ahead with construction.

V. EXCLUSION OF CERTAIN ENVIRONMENTAL IMPACTS FROM CONSIDERATION IN NEW SOURCE PERMIT HEARINGS

After the EPA issues a final NPDES new source permit, EPA regulations provide that any interested person may request an evidentiary hearing to reconsider or contest the permit and its conditions.²⁶⁹ If a hearing is granted the regulations detail the procedures under which the hearing will take

265. 40 C.F.R. § 1506.1 (1983).

266. See *supra* notes 202-13 and accompanying text.

267. 40 C.F.R. § 1507.3 (1983). Each agency's regulations must be approved by the CEQ. *Id.*

268. 40 C.F.R. § 6.603 (1984). Other agencies allow waiver of the pre-construction ban. For example, the NRC requires that an EIS be prepared and circulated prior to issuance of a permit to construct a nuclear facility. 10 C.F.R. § 51.5 (1984). Nevertheless, the NRC retains the right to grant an exemption from that requirement upon the agency's determination that such an exemption is authorized by law and is in the public interest. *Id.* § 51.4. The Federal Highway Administration also requires completion of an EIS prior to construction of highways within the Administration's jurisdiction. 23 C.F.R. § 771.113 (1984). Apparently the only time exceptions to the EIS requirement will be considered is in the case of an emergency. *Id.* § 771.131.

269. 40 C.F.R. § 124.74 (1984).

place.²⁷⁰ The EPA has added a new provision to the hearing regulations affecting the admission of evidence on the environmental impacts of the new source.²⁷¹ The new regulation excludes from evidence certain environmental effects if the source of those effects holds a permit under other environmental protection programs such as the Resource Conservation Recovery Act.²⁷² This section of the Comment discusses the new amendment, how the evidence regulation fits with current procedures, and how the regulation might be interpreted. The Comment then reviews the legal authority affecting the validity of the new regulation.

A. *The EPA's Position*

1. *Hearing Regulations*

The Presiding Officer²⁷³ at the hearing has broad discretion to rule on, admit, exclude, or limit evidence presented at the hearing.²⁷⁴ The regulations mandate, however, that the administrative record be admitted and received into evidence,²⁷⁵ and a method is provided to allow cross-examination of witnesses with regard to the administrative record.²⁷⁶ Because the final EIS is part of the administrative record,²⁷⁷ all NEPA issues included in the EIS would appear to be automatically admitted into evidence with cross-examination allowed. None of these regulations was amended in the recent EPA rulemaking.

2. *The New Regulation*

The new regulation states that the Presiding Officer may admit evidence on any environmental impacts of the new source if such evidence is relevant to the EPA's obligation to consider the EIS in making permit decisions.²⁷⁸

270. *Id.* § 124.85.

271. 49 Fed. Reg. 38,052 (1984). For the complete text of the regulation, see *infra* note 278.

272. 49 Fed. Reg. 38,052 (1984).

273. The Presiding Officer is defined as an Administrative Law Judge. 40 C.F.R. § 124.72 (1984).

274. *Id.* § 124.85(b)(9).

275. *Id.* § 124.85(d)(2). The administrative record is the record maintained by the EPA upon which the agency bases the permit decision. The record consists of the application and various supporting documents and comments and the final EIS and any supplements thereto. *Id.* § 124.18.

276. *Id.* § 124.85(d)(2).

277. See *supra* note 275.

278. 49 Fed. Reg. 37,998, 38,052 (1984) (to be codified at 40 C.F.R. § 124.85(e)). The regulation in full reads:

(e) *Admission of Evidence on Environmental Impacts.* If a hearing is granted under this Subpart for a new source subject to NEPA, the Presiding Officer may admit evidence relevant to any environmental impacts of the permitted facility if the evidence would be relevant to the Agency's obligation under § 122.29(c)(3). If the source holds a final EPA-issued RCRA, PSD, or UIC permit, or an ocean dumping permit under the Marine Protection, Research, and Sanctuaries Act (MPRSA), no such evidence shall be admitted nor shall cross-examination be allowed relating to: (1) Effects on air quality, (2) effects attributable to underground injection or hazardous waste management practices, or (3) effects of ocean dumping subject to the MPRSA, which were considered or could have

The regulation goes on, however, to exclude certain environmental effects from evidence if the source holds a final Resource Conservation Recovery Act (RCRA)²⁷⁹ permit, Underground Injection Control (UIC) permit,²⁸⁰ Prevention of Significant Deterioration (PSD) permit,²⁸¹ or Marine Protection Research and Sanctuaries Act (MPRSA)²⁸² ocean dumping permit. If the applicant has one of these permits no evidence may be presented at the new source permit hearing that either was or could have been considered in the proceedings for issuance of that permit.²⁸³ The environmental effects encompassed in those permit proceedings are listed in the proposed regulation as effects on air quality,²⁸⁴ effects attributable to underground injection of waste²⁸⁵ and hazardous waste management practices,²⁸⁶ and effects of ocean dumping.²⁸⁷ The only type of evidence regarding environmental effects that the Presiding Officer may allow is relevant portions of the record of PSD, RCRA, UIC, or MPRSA permit issuance proceedings.²⁸⁸ The regulation provides that such evidence is not subject to cross-examination.²⁸⁹

This new regulation is obviously intended to limit the evidence on NEPA issues allowed at new source permit hearings. Exactly how the regulation is to function, however, is not clear. Assuming that some of the effects that the regulation seeks to exclude from evidence are covered in the EIS, the regulation could be interpreted as a limited exception to the requirement that the administrative record be entered into evidence and subject to cross-examination. This interpretation would be the narrowest reading of the regulation. A broader interpretation would be that the regulation is intended to limit substantively the scope of the EIS itself. Such a broad interpretation could restrict the application of NEPA to the new source permitting process.

The EPA's explanation in the preamble is not particularly illuminating as to the regulation's proper interpretation. The agency states that the limitation on evidence is designed in part to carry out the Clean Water Act provision that requires minimization of paperwork, duplication, and delay.²⁹⁰ The agency maintains that the proposal eliminates relitigation of issues while

been considered in the PSD, RCRA, UIC, or MPRSA permit issuance proceedings. However, the presiding officer may admit without cross-examination or any supporting witness relevant portions of the record of PSD, RCRA, UIC, or MPRSA permit issuance proceedings.

Id.

279. 42 U.S.C. §§ 6901-6986 (1982).

280. The UIC program is established under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1982).

281. The PSD program is established under the Clean Air Act, 42 U.S.C. §§ 7401-7641 (1982).

282. 33 U.S.C. §§ 1401-1472 (1982).

283. 49 Fed. Reg. at 38,052; *see supra* note 278.

284. These effects would be associated with the PSD, Clean Air Act proceedings.

285. These effects would be associated with the UIC, Safe Drinking Water Act proceedings.

286. These effects would be associated with the Hazardous Waste Management Program that is established under RCRA.

287. These effects would be associated with proceedings under MPRSA.

288. 49 Fed. Reg. at 38,052.

289. *Id.*

290. 49 Fed. Reg. at 38,034 (citing CWA § 101(f), 33 U.S.C. § 1251(f) (1982)).

continuing to ensure that the EPA will meet its NEPA review responsibilities.²⁹¹ That statement indicates that the EPA did not intend to limit the scope of the EIS. The next statement the agency made, however, indicates that the EPA may have intended to limit the scope of the EIS itself, rather than just the evidence allowed at the hearing. The preamble states, "EPA does not interpret the limited applicability of NEPA to new source NPDES permit proceedings . . . to authorize re-examination of determinations made by EPA under other statutes to which NEPA does not apply."²⁹² The impact of the regulation and the EPA's authority to implement the regulation depend on whether the regulation is intended to be a procedural or substantive limitation. The next sections of this Comment discuss both possibilities.

B. *The Regulation as a Procedural Limitation*

If the hearing regulation does not limit the scope of the EIS itself, then the effects listed in the regulation will still be covered in the EIS to the extent that the effects are relevant. The CEQ regulations require that environmental impact statements be made available for comments by both the public and the appropriate federal and state agencies.²⁹³ The agencies are directed to consider and respond to these comments and to include the comments as part of the final EIS.²⁹⁴ The agencies are also required to make a diligent effort to involve the public in the EIS process, and if public meetings or hearings are held, public notice of such meetings must be provided.²⁹⁵

Once the EIS is completed it becomes part of the administrative record of the new source permit issuance process.²⁹⁶ If the new regulation is solely a procedural limitation, the regulation would eliminate cross-examination with regard to those portions of the EIS discussing the environmental effects listed in the regulation. Those portions of the EIS would, however, remain a part of the administrative record. As part of the record those environmental effects would be considered in the decisionmaking process since the Presiding Officer must base his decision on the entire record.²⁹⁷

The procedural limitation does not eliminate all consideration of the effects listed in the regulation, but the limitation is significant because it potentially eliminates all cross-examination on those effects. Although opportunity for public comment on those issues is assured by the EIS process, agencies are not required to provide an opportunity for public hearings or for cross-examination on EIS considerations. The only CEQ requirement

291. 49 Fed. Reg. at 38,034.

292. The preamble language accompanying the proposed regulation was even stronger. 47 Fed. Reg. 52,072, 52,078 (1982). In that preamble the EPA referred to the regulation as providing a limited res judicata effect in new source permit proceedings. *Id.* The regulation was promulgated as proposed except for a clarification that the limitation applies to the listed permit proceedings only if the permit was issued by the EPA. 49 Fed. Reg. at 38,034.

293. 40 C.F.R. § 1503.1 (1983).

294. *Id.* § 1503.4.

295. *Id.* § 1506.6.

296. *See supra* notes 275-76 and accompanying text.

297. Administrative Procedure Act § 7(d), 5 U.S.C. § 556(d) (1982).

is that if NEPA-related hearings are held, the public must be notified.²⁹⁸

Even if the regulation is intended to be a procedural limitation rather than a substantive limitation on the scope of the EIS, questions remain as to how the regulation should be applied. The language of NEPA lists "effects," "alternatives," and "impacts" separately in the section of the Act that details what must be included in an EIS.²⁹⁹ The new NPDES regulation does not clarify whether the regulation seeks to exclude all EIS considerations listed above or just the actual facts of the effects themselves.

An additional problem is raised because the regulation states that the listed effects are to be excluded if they either were, or could have been, considered in the PSD, RCRA, UIC, or MPRSA permit issuance proceedings. The method to be used in determining what could have been considered in each of those proceedings, however, is not clear. Perhaps the EPA intends for this regulation to open up new source permit hearings as forums for the legal analysis of each of the statutes governing the listed proceedings.

C. *The Regulation as a Substantive Limitation*

If the EPA intends this regulation to limit the scope of the EIS review, the impact of the regulation extends beyond that of a procedural rule.³⁰⁰ The preamble to the regulation indicates that the exclusion of evidence would apply even though the environmental impacts excluded would ordinarily be within the proper scope of NEPA as applied to new source permitting.³⁰¹ The regulation would thus limit the diligence required by NEPA to that level of review applied to the environmental issues in question in the initial permit proceeding. Since the EPA does not apply NEPA's requirements to those proceedings,³⁰² any issues that might have been considered in such proceedings are completely exempted from NEPA's procedural EIS requirements. The EPA's legal ability to limit the scope of NEPA review in such a manner is not at all clear.

The CEQ regulations provide for limitation on the scope of the EIS in certain circumstances.³⁰³ Issues that have been covered by a prior EIS, or draft EIS, may be eliminated from detailed study in the current EIS.³⁰⁴ The issues may be eliminated, however, only if the prior EIS or draft EIS met the standards for an adequate EIS as required by the CEQ regulations.³⁰⁵

The CEQ provision limiting the scope of the EIS does not apply to the new EPA hearing regulation because the EPA does not apply NEPA's requirements to the proceedings listed in the new hearing regulations.³⁰⁶ The

298. 40 C.F.R. § 1506.6 (1983).

299. NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c) (1982).

300. The NRDC's comments indicate that the NRDC views the regulations as a substantive limit on the scope of the NEPA analysis. NRDC Comments, *supra* note 175, at 13-15.

301. 49 Fed. Reg. at 38,034.

302. See *infra* notes 307-13 and accompanying text.

303. See 40 C.F.R. § 1501.7 (1983).

304. *Id.* The current EIS must contain a reference to the prior EIS. *Id.*

305. *Id.* § 1506.3. Section 1506.3 is incorporated by reference into § 1501.7, the general scoping provision. *Id.* § 1501.7.

306. See *infra* note 312 and accompanying text.

materials used in the earlier proceedings, therefore, do not meet the requirement of an adequate EIS. As a result, any issues that might have been considered in such proceedings would be completely exempted from NEPA's procedural requirements. The question, therefore, must be whether the EPA can rely on the level of review applied in those proceedings as adequate to satisfy the EPA's NEPA obligation with regard to new source permitting.

1. *The EPA's Position*

Whether NEPA applies to actions of the EPA has been questioned since the establishment of the EPA.³⁰⁷ NEPA does not set out an exemption for any agency, but evidence in the legislative history suggests that environmentally protective federal agencies should not be subject to the Act.³⁰⁸ The issue was reasserted during passage of the 1972 amendments to the FWPCA. During discussion of section 511(c)(1),³⁰⁹ Congress debated whether that section exempted all FWPCA actions from NEPA's EIS requirements except the two specifically listed, or whether all of the EPA's actions were already exempted from NEPA and section 511(c)(1) selectively subjected those two actions to the EIS requirement.³¹⁰ When Congress enacted the legislation the EPA maintained that section 511 clarified the EPA's exemption from NEPA and that all FWPCA actions of the EPA except the two specifically mentioned were exempt from all NEPA provisions.³¹¹

The EPA continues to assert that most of the agency's regulatory actions are exempt from NEPA except for the two actions specified in section 511 of

307. The EPA was not created until after the enactment of NEPA. See NEPA MATERIALS, *supra* note 82, at 44-45.

308. See Anderson, *supra* note 104, at 243; F. ANDERSON, *supra* note 88, at 106, 108-09. The legislative history of NEPA is generally referred to as highly ambiguous and inconclusive on this point. *Id.* at 108-09.

309. Codified at 33 U.S.C. § 1371(c)(1) (1982). See *supra* notes 44-47 and accompanying text for a discussion of this section.

310. Senator Muskie contended that Congress never intended the EPA to be subject to NEPA and that § 511(c)(1) was clearly intended to make the issuance of a new source permit and the provision of federal aid for publicly owned sewage treatment plants the only EPA actions subject to any of the provisions of NEPA. SENATE CONSIDERATION, *supra* note 217, at 180-83. Congressman Jones concurred with Senator Muskie's views. HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, OCTOBER 4, 1972 [hereinafter cited as HOUSE CONSIDERATION], reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 234-35. On the other side of the issue Senator Jackson maintained that the EPA was subject to NEPA's requirements and that § 511(c)(1) provided an exemption from the EIS provision for all but two actions. SENATE CONSIDERATION, *supra* note 217, at 199-204. Senator Jackson was joined in his views by Senator Nelson, *id.* at 207, Senator Hart, *id.* at 210-11, and Senator Buckley, *id.* at 195-98. Senator Buckley, however, was afraid that § 511(c)(1) might be read as exempting the FWPCA actions of the EPA from all of NEPA's requirements rather than just the EIS requirement. *Id.* Congressman Dingell also shared Senator Jackson's view of the effect of § 511(c)(1). HOUSE CONSIDERATION, *supra*, at 256; HOUSE DEBATE ON OVERRIDING THE PRESIDENT'S VETO OF S. 2770, OCTOBER 18, 1972, reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 105-08.

311. Letter from William Ruckelshaus, Administrator of the Environmental Protection Administration, Recommending Presidential Approval of S. 2770, The Federal Water Pollution Control Act Amendments of 1972 (October 11, 1972), reprinted in LEGISLATIVE HISTORY, *supra* note 38, at 151.

the Clean Water Act.³¹² The EPA bases its exemption in part on case law that the agency interprets as holding that the EPA is not required to comply with NEPA because the agency's procedures provide environmental review that is functionally equivalent to that of NEPA's EIS requirements.³¹³ In addition to the EPA's functional equivalency claim to exemption, the EPA is now statutorily exempted from NEPA's EIS requirement for all the agency's regulatory actions under the Clean Air Act.³¹⁴ Despite the EPA's continued claim of exemption from NEPA, the agency has willingly complied with the NEPA-EIS review process for the publicly owned treatment facilities grant program and new source permitting.³¹⁵ The EPA's procedures for applying NEPA to those actions reflect a high level of compliance consistent with the CEQ's NEPA regulations.³¹⁶

2. *Judicial Interpretation*

In the preamble to the proposed regulation the EPA referred to cases that reveal a judicial willingness to exempt the EPA from NEPA's requirements only in certain fact-specific situations.³¹⁷ Each of these cases turned on a finding that the procedures employed by the EPA were functionally equivalent to those required by NEPA. In *Portland Cement Association v. Ruckelshaus*³¹⁸ industry petitioners challenged the establishment of new source standards of performance under section 111 of the Clean Air Act³¹⁹ on the ground that the EPA did not comply with NEPA by filing an EIS. After considering the language of NEPA, its legislative history, and the policies underlying it, the District of Columbia Circuit Court refused to find that the EPA is exempt from NEPA.³²⁰ The court looked at the decisionmaking process required by section 111 of the Clean Air Act and determined that section 111 required the functional equivalent of a NEPA impact statement,³²¹ and, therefore, the EPA was not required to file an EIS.³²² The court emphasized that it established a narrow exemption from NEPA, exempting EPA determinations only under section 111 of the Clean Air Act.³²³

312. 44 Fed. Reg. 34,247, 35,158, 64,174 (1979). Despite this claim of exemption, EPA has adopted a policy of voluntarily preparing an EIS on certain agency actions. See NEPA MATERIALS, *supra* note 82, at 50.

313. 44 Fed. Reg. at 34,247, 35,158, 64,174 (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); *Maryland v. Train*, 415 F. Supp. 166 (D. Md. 1976)).

314. 15 U.S.C. § 793(c)(1) (1982).

315. See 40 C.F.R. §§ 6.100-607 (1984).

316. See *id.*

317. 47 Fed. Reg. 52,078 (1982). See *supra* note 313 for list of cases that the EPA has relied on in the past to claim exemption from NEPA.

318. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

319. 42 U.S.C. § 7411 (1982).

320. 486 F.2d at 384.

321. *Id.*

322. *Id.*

323. *Id.* at 387.

In *Wyoming v. Hathaway*³²⁴ the Tenth Circuit held that, at least in certain circumstances, the EPA is not compelled to comply with NEPA's procedural requirements.³²⁵ In *Hathaway* users of certain poisons challenged the EPA's decision to cancel a chemical toxicants registration under the Federal Insecticide, Fungicide and Rodenticide Act³²⁶ because the EPA had not filed an EIS detailing the effects of the cancellation. The court concluded that the EPA had been faced with an imminently hazardous situation³²⁷ and had relied on a detailed research document in making its decision.³²⁸ In such circumstances the court held that the EPA was not required to follow the procedures set out in NEPA.³²⁹ The court discussed at length the possibility that the EPA is not subject to NEPA's requirements under any circumstances since the agency's sole purpose is to improve the quality of the environment and application of NEPA would be redundant.³³⁰ The court, nevertheless, declined to make such a broad decision and limited its holding to the facts of the case.³³¹

In *Maryland v. Train*³³² the EPA issued a permit to the city of Camden, New Jersey, under the Ocean Dumping Act³³³ that allowed Camden to dump sewage sludge at a site fifty miles southeast of the mouth of Delaware Bay. Maryland challenged the permit on the ground that the EPA did not prepare an EIS as required by NEPA. The court held that when an agency with recognized environmental expertise follows decisionmaking procedures that provide the functional equivalent of an EIS, formal compliance with NEPA is not required unless Congress has specifically so directed.³³⁴ The *Train* holding is a broad one because it is not limited to the facts of the case nor does it limit its functional equivalency exemption solely to the EPA. The court did, however, appear to require a judicial finding of the functional equivalency of the decisionmaking procedures in question.

3. Congressional Action

In passing the Clean Water Act Congress specifically acted to make sure that new source permitting by the EPA would be subject to NEPA-EIS review.³³⁵ That action of Congress indicates a desire to subject all of the environmental impacts affected by new sources to the very specific and detailed

324. 525 F.2d 66 (10th Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

325. 525 F.2d at 69, 71.

326. 7 U.S.C. §§ 136-136y (1981).

327. 525 F.2d at 68.

328. *Id.* at 69.

329. *Id.*

330. *Id.* at 71.

331. *Id.* at 72. Although the court went on to determine that the EPA had substantially complied with NEPA in its rulemaking process, *id.* at 71-72, the holding of the case did not appear to be based on that determination.

332. 415 F. Supp. 116 (D. Md. 1976).

333. The Marine Protection, Research and Sanctuaries Act of 1972, codified at 33 U.S.C. §§ 1401-1412 (1982), is commonly called the Ocean Dumping Act. That act forms the basis for broad federal regulation of dumping in ocean waters. 415 F. Supp. at 118.

334. 415 F. Supp. at 122.

335. See *supra* notes 43-47 and accompanying text.

analysis required in an EIS. If Congress had wanted to exempt certain impacts from that analysis it could have done so and, in fact, did so in section 511(c)(2)(A) of the Clean Water Act when it exempted water quality considerations.³³⁶ Congressional action in including new source permitting within the EIS requirement while specifically limiting its scope would, therefore, appear to preclude the EPA from further limiting the scope of NEPA's applicability absent express congressional approval.

Another example of congressional action precluding agency action in the area of exempting certain actions from NEPA is the limited congressional reversal of a portion of *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*.³³⁷ The AEC claimed in *Calvert Cliffs'* that NEPA did not permit it to undertake de novo review of water quality standards approved by the federal government under the FWPCA.³³⁸ The court held that the Commission's claim was in fundamental conflict with the basic purposes of NEPA and that the federal agency with overall responsibility for the proposed federal action must undertake de novo review of certifications or standards set by other agencies.³³⁹ Congress was aware of this portion of *Calvert Cliffs'*, and the legislative history of the Clean Water Act demonstrates that section 511(c)(2)(B)³⁴⁰ of the Clean Water Act was enacted to overrule that part of the *Calvert Cliffs'* holding. Again, however, Congress did not go so far as to eliminate the rule of *Calvert Cliffs'* for all EPA actions, or even all Clean Water Act actions, but rather only for effluent limitations established pursuant to the Clean Water Act.³⁴¹

Furthermore, in spite of the EPA's persistent claim of exemption from NEPA, Congress apparently determined that congressional action was required to exempt Clean Air Act actions statutorily from NEPA's EIS requirements. In 1974 Congress passed a law exempting all activities under the Clean Air Act from the EIS requirements of NEPA.³⁴² When the 1974 law was passed, case decisions differed over whether the EPA was exempt from NEPA's requirements.³⁴³ Congress could easily have acted to ensure that other EPA actions would also be exempt from NEPA by excluding them when it exempted the Clean Air Act actions.

336. See 33 U.S.C. § 1371(c)(2)(A) (1982).

337. 449 F.2d 1109 (D.C. Cir. 1971). See notes 91-97 and accompanying text for a detailed discussion of *Calvert Cliffs'*.

338. *Id.* at 1122. The AEC made the same claim of NEPA inapplicability with regard to "those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State and regional agencies" *Id.* (quoting 10 C.F.R. § 50, app. D, at 249). Compare this claim of AEC in *Calvert Cliffs'* with the proposed EPA regulation. 47 Fed. Reg. 52,072, 52,092, § 124.85 (1982).

339. 449 F.2d at 1123. Although the EPA's proposed regulation grants res judicata status to actions of the same agency, the principal is the same.

340. 33 U.S.C. § 1371(c)(2)(B) (1982) (current version).

341. See *id.*

342. See Energy Supply and Environmental Coordination Act of 1974, § 7(c)(1) (current version at 15 U.S.C. § 793(c)(1) (1982)).

343. See, e.g., *Anaconda v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973), *after remand*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

D. Conclusion

Despite the judicial trend toward recognizing the concept of functional equivalency and exempting certain EPA actions from NEPA's EIS requirements, no case has held that the EPA is completely exempt from NEPA or even that any one of NEPA's programs is exempt on a functional equivalency basis. Judicial exemption has been on a case-by-case, fact-specific basis. Even under the broad rule of *Maryland v. Train*,³⁴⁴ an individual analysis of the particular decisionmaking process for which exemption is sought must be undertaken.

A determination that NEPA compliance is not required is not, therefore, one that can be made by the EPA acting alone. A major difference exists between an agency's determination of exemption due to functional equivalency and judicial or congressional determination. Because the agency's procedural decisionmaking processes are being evaluated, the agency may not be free from bias³⁴⁵ and, therefore, may be institutionally incompetent to make a determination of functional equivalency. The history of the functional equivalency doctrine and the legislative history of the Clean Water Act indicate that the EPA may not definitively conclude that the issues listed in its regulations³⁴⁶ have already been subjected to procedures that are functionally equivalent to, and therefore not subject to, NEPA. This interpretation is particularly true when, as here, the EPA may be saying that NEPA review may not be applied to those issues even in the new source context when the issues involved would otherwise be subject to NEPA review by virtue of a congressional directive.³⁴⁷

VI. CONCLUSION

In reviewing these recently amended NPDES regulations, the wisdom of the EPA's decision largely to retain its long-standing interpretation of NEPA's impact on new source permitting becomes apparent. Retention of this position allows the EPA to continue to use the NEPA review process to work towards environmentally superior new sources. The consideration of all environmental impacts and the ability to incorporate appropriate conditions into permits is critical to that effort. The plain language of section 511 of the Clean Water Act would make application of NEPA to the new source permitting process meaningless if nonwater quality related conditions could not be imposed, since section 511 forbids imposition of water quality related

344. 415 F. Supp. 116, 122 (D. Md. 1976).

345. As Senator Jackson said with regard to applying NEPA to the EPA:

The real point to be made is why environmental control programs should be exempt from the constraints of environmental laws? Do we exempt civil rights programs from anti-discrimination requirements? Are labor programs exempted from minimum wage and child labor laws? Are law enforcement officers free to disobey criminal laws? In short, the question is, "Who shall police the police?"

SENATE CONSIDERATION, *supra* note 217, at 202.

346. See *supra* notes 278-87 and accompanying text.

347. CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (1982).

conditions as a result of NEPA review. Furthermore, congressional statements clearly point out that a primary reason that Congress made NEPA applicable to new sources was so that nonwater related factors such as siting and other land use impacts would be considered.

In addition to retaining its strong position supporting the imposition of nonwater related permit conditions, the EPA has continued its long-standing assertion of the right to ban construction of new sources until the agency has completed the NEPA-required environmental review. The ability to impose the construction ban is critical in order for the agency to study the environmental impacts of a new source and make a reasonable decision from among all alternatives. Without EPA authority to ban construction, potentially irreversible detrimental environmental effects may limit alternatives to the point that certain significant aspects of the NEPA review would be meaningless. Even if the detrimental environmental effects allowed to occur are not completely irreversible, they may mean a real loss of ability to incorporate NEPA conditions because of the economic and political realities of forcing a discharger to undo what it has already done.

The impact of the hearing regulation is unclear at best. At worst, the regulation would institutionalize functional equivalency for the listed effects at the behest of the EPA rather than as a result of judicial review or congressional action. The result would shield from NEPA review certain environmental considerations even when Congress has specifically acted to subject all the various environmental aspects of an action to the NEPA-EIS process as it has done with new source permitting. The courts have sanctioned the EPA's reliance on functional equivalency in certain specific cases, but only when Congress has not explicitly subjected the environmental action in issue to NEPA. If its new regulation is intended to limit the scope of the EIS, then the EPA is seeking to expand functional equivalency in circumvention of congressionally required NEPA review.

The EPA's positions with regard to inclusion of NEPA conditions in new source permits and the ban on construction of new sources prior to environmental review are positions of reasonable strength and long standing. They seek to implement NEPA's goals as well as the policies and goals set forth by Congress in the Clean Water Act. They are well supported by the CEQ's interpretation of NEPA, by case law, by the history of the Agency's own interpretation of the Clean Water Act, and the legislative history of that Act.