

# THE NEPA MANDATE AND FEDERAL REGULATION OF THE NATURAL GAS INDUSTRY

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## I. INTRODUCTION

Utility regulators increasingly take responsibility for the “externalities” associated with their decisions, meaning the economic and social costs related to rate decisions or other kinds of authorizations.<sup>1</sup> Yet, when Congress adopted the National Environmental Policy Act of 1969 (“NEPA”),<sup>2</sup> it intervened to ensure protection of the natural environment, not from abuses by the citizenry but from the activities of the federal government itself. Comprised of “action forcing” procedures, NEPA was designed to infuse the decisional processes of federal agencies with a broad awareness of the environmental consequences of their actions. NEPA encourages decisionmakers to counterbalance the organic statutory and political missions of their departments or agencies with a sensitivity to the ecological consequences of their directives and authorizations.

Unlike other environmental laws before and since which mandate protection for specific environmental features or values, NEPA is more procedural than prophylactic. It is characteristic of a major generic approach to regulatory reform, the impact statement approach.<sup>3</sup> Rather than prohibiting or mandating particular agency conduct, Congress chose to set forth a policy and then to establish a mode of analysis “designed to influence the substantive direction of agency policy.”<sup>4</sup> Later replicated by the Carter Administration’s

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1. The public’s environmental concerns, in contrast to the efficiency focus of economic regulation, are historically peripheral in regulatory proceedings because:

. . . the market does not, by definition, recognize external costs springing, for example, from the environment and limitations like the Endangered Species Act and the National Historic Preservation Act. These latter concerns are presumably the sorts of “public goods” that process is good at taking into account but efficiency tends to ignore. These considerations, along with other values that may include consumer protection, historical factors, etc., will often fall by the wayside to the extent that efficiency “wins out” over process.

Honorable Richard D. Cudahy, U.S. Court of Appeals for the Seventh Circuit, Address before the Federal Energy Bar Association, (May 21, 1992) Mimeo at 1-2.

2. 42 U.S.C. §§ 4321-4370 (1988).

3. STEPHEN BREYER, REGULATION AND ITS REFORM, 341-368 (1982).

4. *Id.* at 363. It is useful to recognize at the outset that the impact statement approach to regulatory reform has obvious shortcomings as a means of achieving an objective. “(1) It is difficult to find a single factor . . . (e.g., competition or the environment) that *all* agencies would do better to focus upon . . . (2) The final decision remains with the agency. (3) It is not difficult to write a plausible justification for almost any decision along the lines required by the statute. By now it should be clear that classical regulation, even when far too restrictive and undesirable, is never without plausible justification.” *Id.* at 364.

regulatory impact statements and subsequent reporting requirements under the Regulatory Flexibility Act<sup>5</sup> and the Paperwork Reduction Act,<sup>6</sup> NEPA's method is to force analysis of factors which are "external" to the base regulatory decision and to make agency decisionmaking more thoughtful and responsive to a broad policy agenda without dictating an end result in particular cases.

This paper examines how the requirements of NEPA have fared in the environment of classical public utility regulation at the Federal Energy Regulatory Commission ("FERC" or the "Commission"). Under the Natural Gas Act ("NGA"),<sup>7</sup> the FERC, like its predecessor agency, the Federal Power Commission ("FPC"), regulates entry into and exit from the regulated gas pipeline business and the pricing of pipeline services. Traditionally, no pipeline construction project could be deemed to be required by the public convenience and necessity under the Act unless the Commission found that: (1) current and potential supplies of natural gas existed in proximity to the facilities sufficient to meet demand; (2) the applicant had long-term commitments to utilize the proposed capacity; (3) the facilities would be adequate to provide full and complete service; (4) the applicant possessed adequate financial resources to construct the project; (5) the estimates of costs to construct the project were accurate and reasonable; (6) the proposed rates reflected the estimated costs; and (7) the anticipated fixed costs of operation were reasonable.<sup>8</sup> On the other hand, the Commission's responsibilities under NEPA represent something different. Congress expects the agency to take into account in its energy decisions certain values which appear unrelated to the elements of the public convenience and necessity that govern its natural gas pipeline construction authorizations.

The Commission decided in Order No. 555 to expedite pipeline construction by expressly recognizing that projects that do not meet the *Kansas Pipe Line* criteria can nevertheless be authorized under the NGA, provided that ratepayers are insulated from risks inherent in projects whose viability has not been tested. This complemented its view that section 311 of the Natural Gas Policy Act ("NGPA")<sup>9</sup> contained authority to build certain pipeline facilities entirely without NGA-type authorization.<sup>10</sup> The demand for expedition or, to

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5. 5 U.S.C. § 601 (1988).

6. 44 U.S.C. §§ 101, 3501 (1988).

7. 15 U.S.C. §§ 717-717z (1988).

8. *Kansas Pipe Line & Gas Company*, 2 FPC 29 (1939) (codified at 18 C.F.R. § 157.102(b) by Order No. 555), Order No. 555, *Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities*, III F.E.R.C. Stats. & Regs. ¶ 30,928, at 30,224-228, codified at 18 C.F.R. pts. 2, 154, 157, 284, 375, and 380. [hereinafter Order No. 555], stayed by Order Granting Rehearing for Purposes of Further Consideration and Postponing Effective Date of Order No. 555, 57 F.E.R.C. ¶ 61,195 (1991).

9. 15 U.S.C. §§ 3301-3432 (1982).

10. Order No. 555, *supra* note 8, at 30,224-250. The Commission provided a "menu of options" the pipelines could employ as their needs might dictate to obtain authority to build pipeline capacity to meet market demand for gas transportation service, among which is participation in the "at risk" framework. New facilities not meeting *Kansas Pipe Line* criteria would require incremental cost-based rates, placing the risk of capacity underutilization on the project sponsor, not on current or future customers. At-risk terms and conditions consist primarily of minimum throughput conditions and prohibitions against cost shifting. *Id.* at 30,252-256.

use Judge Cudahy's terms, for efficiency over process, required the FERC to reassess the structure of its environmental reviews and clearances. As the Commission appears to have concluded, regulatory reform of the certificate process succeeds only to the extent that the Commission can integrate prescriptive, non-economic judgments under NEPA.<sup>11</sup>

This task is not unique to the Commission. The sudden ubiquity of NEPA's policies during the 1970s quickly led to lawsuits against federal agencies, then to large environmental documents, and finally to bureaucratic delay.<sup>12</sup> The President consequently called upon his Council on Environmental Quality ("CEQ") in 1978 to formulate a regulatory template for NEPA implementation which would standardize procedures and squeeze out the excesses that had come to characterize federal environmental review. Thereafter, the CEQ's regulations required procedures for "all federal agencies" governing the timing, preparation, and content of environmental documents, as well as methods of interagency cooperation and standards for decisionmakers.<sup>13</sup>

The FERC, preoccupied by the "energy crisis" and Congress' response to it, was slow to recognize that implementation of NEPA in the regulatory context posed novel problems not faced by Executive Branch agencies which initiate and manage their own programs, projects, and activities. Examples of these are offshore mineral leasing, dam or highway construction, genetic research and harvests on federal forest lands. Like other regulatory agencies, the Commission acts primarily in response to private economic initiatives. It therefore conducts environmental review and mitigation proceedings that deal with project proposals formulated outside of its immediate control.

The FERC's approach to NEPA implementation has evolved dramatically during the past decade. In the 1980s, interstate pipelines struggled to find new markets in which to sell surplus gas supplies and sought to build new facilities with which to serve those markets. The Commission felt compelled to reinvigorate its administration of the NGA by employing blanket certificate techniques, pregranted abandonment authorizations, and other market-based regulatory solutions.<sup>14</sup> To foster competition among and against pipeline companies as sellers of "bundled" gas service, the Commission adopted rules designed to transform these companies from merchants of bundled sales and transportation services serving traditional gas distribution markets into carriers of gas supplies on an "open access" basis for often-distant third parties and to establish a competitive national market for gas supplies.<sup>15</sup>

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11. Theorists have customarily recognized a normative and non-economic aspect in utility regulation. 1 ALFRED KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES & INSTITUTIONS* 14-15 (1970).

12. See, e.g., Nicholas Yost, *Streamlining NEPA — An Environmental Success Story*, 9 B.C. ENVTL. AFFAIRS L. REV. 507 (1981).

13. 40 C.F.R. § 1500-1508 (1978).

14. Order No.234, *Interstate Pipeline Certificates for Routine Transactions*, [Regs. Preambles 1982-1985] F.E.R.C. Stats. & Regs. ¶ 30,368 (1982), *codified at* 18 C.F.R. pts. 157, 284, and 375. [hereinafter Order No. 234].

15. Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, [Regs. Preambles 1982-1985] F.E.R.C. Stats. & Regs. ¶ 30,665, *codified at* 18 C.F.R. pts. 2, 157, 250, 284, 375, 381. [hereinafter Order No. 436], *modified by* Order Nos. 436-A, 436-B, 436-D, and 436-E, *vacated and*

The demand for decisional innovation and "light-handed regulation" represented objectives and constituencies different than those associated with NEPA, the procedures mandated by the CEQ, and other environmental statutory requirements. The Commission's effort to reconcile seemingly incongruous administrative regimens is still ongoing.

## II. CEQ, FERC, AND NEPA IMPLEMENTATION

### A. NEPA and Agency Decisionmaking

The FERC is required by statute to protect consumers from the potential abuses, largely economic in nature and purpose, that accompany natural monopolies in the gas and oil pipeline, electric utility, and hydropower development businesses. However, the accumulated financial, economic, and technical expertise at the disposal of the Commissioners does not necessarily help them administer NEPA.<sup>16</sup> The act has injected "environmental concerns into much federal agency decisionmaking in a way related to resource management and by making possible federal litigation challenging federal actions affecting environmental quality, . . . moving concern about environmental problems to a high level of public salience."<sup>17</sup>

NEPA imposed on all federal agency decisionmakers a supervening responsibility to take into account the consequences of their actions for the "human environment."<sup>18</sup> Procedurally, it accomplished its objective by requiring what section 102(C) of the statute calls a "detailed statement," later termed the Environmental Impact Statement ("EIS"). The EIS is prepared by an agency before it undertakes any "major federal action significantly affecting the quality of the human environment." Through this procedural device NEPA's policies wormed themselves into the machinery of federal decisionmaking eventually exacting from federal agencies a measure of meaningful reflection upon the environmental consequences of proposed actions.<sup>19</sup> The willingness of courts to set aside administrative actions for inadequate review and consideration under NEPA, frequently in response to private citi-

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*remanded sub nom.* Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The Commission responded to the court with interim regulations. Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, [1986-1990 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,761. The Commission's transformation of pipeline transportation regulation culminated in Order No. 636, *Pipeline Service Obligations and Revisions To Regulations Governing Self-Implementing Transportation under Part 284 of the Commission's Regulations*, 59 F.E.R.C. ¶ 61,030 (1992).

16. Since 1920, however, the FPC and then FERC were responsible to ensure a comprehensive plan of development (including protection of sensitive environmental features, such as fish, wildlife, water quality, aesthetics and historic resources) when licensing hydroelectric projects under the Federal Power Act, 16 U.S.C. § 803(a) (1988). Environmental review under the Federal Power Act and highly specific environmental laws like the Endangered Species Act was therefore familiar to FPC and FERC Commissioners. Environmental analysis at the Commission before the late 1970s was nevertheless balkanized, most of it occurring in the area of hydropower licensing.

17. F. ANDERSON, D. MANDELKER AND A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 78i (1990).

18. 42 U.S.C. § 4332(2) (1988).

19. S. REP. NO. 296, 91st Cong., 2d Sess. 21 (1969). ANDERSON, *supra* note 17, at 482.

zens seeking to enforce NEPA compliance, was instrumental in achieving this result.

NEPA had self-evident deficiencies. With no ostensible substantive yardstick or objectives, no penalties, and not even a judicial review provision, NEPA seemed a peculiar affront to the spirit of the age. It was a mandate for the federal bureaucracy to generate a paper trail in every instance, sometimes a sizeable one, upon which its decisionmakers might meditate to no prescribed end. Agency heads, awash in other statutory commands and urgent political agendas, might incline toward NEPA's statutory minima, attending first to their agencies' organic missions and their own reputations for productivity and efficient decisionmaking.<sup>20</sup> Reflecting upon 20 years of NEPA implementation, Professor Lynton Caldwell, the person primarily credited for devising the EIS concept and persuading the Senate to include this "action-forcing" mechanism in its version of the bill, imputed to federal decisionmakers the visceral sentiment that "NEPA was . . . a good law to pass and then forget."<sup>21</sup> Because NEPA's real intended benefits were realizable only in the long term, federal officialdom during the 1970s and 1980s scarcely concealed its indifference, if not outright hostility, to NEPA. Effective NEPA enforcement has never translated into Congressional support or appropriations as predictably as a federal hydropower or highway project, for instance. NEPA was viewed as a mere declaration of principles rather than a "real" law, claims Caldwell.<sup>22</sup>

After encountering lackluster early efforts to perform NEPA review, the courts made it clear that however modest its mandate the statute was intended to require more of federal agencies than the mere semblance of compliance:

NEPA mandates a case-by-case balancing judgment on the part of federal agencies . . . . The particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs: alternatives must be considered which would affect the balance of values . . . . In some cases, the benefits will be great enough to justify a certain quantum of environmental costs; in some cases they will not be so great and the proposed action may be abandoned or significantly altered . . . . The point of the individualized balancing analysis is to insure that the optimally beneficial action is finally taken.<sup>23</sup>

NEPA review, the courts soon concluded, was not intended as a decisional sideshow that could be excluded from agency proceedings or diminished in importance. Rather, Congress had required agencies to conduct a balanced, systematic, interdisciplinary analysis that is given serious consideration as they discharge their normal duties. Moreover, any decision subject to NEPA must sustain judicial scrutiny as to the following:

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20. The drafters of NEPA sought a mechanism to counterbalance agency bureaucracies' substantive focus on defined jurisdictional responsibilities. See 91st Cong., 1st Sess., 115 CONG. REC. 29,053 (1969) (Statement of Sen. Muskie); *Hearings on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 1167 (1969). The early skepticism about the ability and willingness of non-environmentally oriented agencies to carry out NEPA proved justified.

21. L. Caldwell, *NEPA at Twenty: A Retrospective Critique*, 5 NATURAL RESOURCES & ENV'T 6 [American Bar Association] (Winter 1991).

22. *Id.*

23. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1137 (D.C. Cir. 1971).

(1) whether the agency took a "hard look" at the environmental problem; (2) whether the agency identified the relevant areas of environmental concern; (3) . . . whether agency made a convincing case that impact was insignificant; and (4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.<sup>24</sup>

On the other hand, the courts understand that NEPA did not represent a limitless federal commitment to the study and protection of the environment. Adequate consideration of environmental consequences does not, for example, necessitate evaluation of problems that are remote and speculative.<sup>25</sup> NEPA does not, therefore, lay claim to indefinite quantities of administrative energy, time, and resources. NEPA entails neither alterations to the primary missions and obligations of federal agencies, nor expansion of their respective jurisdictions.<sup>26</sup> It does not otherwise limit agencies' choices among options for action once consigned to their discretion,<sup>27</sup> nor does NEPA "elevate environmental concerns over other appropriate considerations."<sup>28</sup> NEPA has never been interpreted to prohibit damage to the environment as a result of government activities.<sup>29</sup> In the final analysis, NEPA is subject to a rule of reason. "If this requirement is not rubber, neither is it iron."<sup>30</sup>

The teaching of *Vermont Yankee*<sup>31</sup> and *Strycker's Bay*<sup>32</sup> is that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences,"<sup>33</sup> notwithstanding any judicial preference for other ways to achieve the ameliorative goals of NEPA.<sup>34</sup> Yet, it was once understood that agencies would be called to account for ignoring what *Vermont*

24. *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 339 (D.C. Cir. 1985).

25. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

26. 42 U.S.C. § 4334 (1982). Section 102 requires only that agencies comply "to the fullest extent possible." *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188-89 (3d Cir. 1983).

27. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976).

28. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983) (citing *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)).

29. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-56 (1989).

30. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 519-21 (1974).

31. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

32. *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 228 (1980). See also *Grazing Fields Farms, Inc. v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir.1980) (requiring only "good faith" consideration of environmental issues).

33. *Strycker's Bay*, 444 U.S. at 227.

34. Another factor frequently argues for deference: "Because substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision-making by concentrating our efforts on strengthening administrative procedures." *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976)(Bazelon, C.J. and McGowan, J., concurring).

*Yankee* termed NEPA's "significant substantive goals,"<sup>35</sup> and that judicial review might probe the analysis and justifications offered by an agency and rule on their substantive acceptability. "The language of NEPA, as well as its legislative history, makes it clear that the Act is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking."<sup>36</sup>

Those who subscribe to the view that NEPA is a substantive mandate are now a minority. They will likely find courts following *Vermont Yankee and Strycker's Bay* in treating NEPA as altogether procedural, a lifeless vision "in which conformity to procedure replaces sound environmental planning."<sup>37</sup>

### B. CEQ Guidelines

Regulations that finally set out the metes and bounds of procedural compliance under NEPA were adopted in 1978 by the CEQ<sup>38</sup> in response to a

35. Compare Justice Marshall's dissent in *Strycker's Bay* on this point. 444 U.S. at 228-31. One commentator states that whether NEPA has substantive effect "turns in the words of *Overton Park* [Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)] on whether the statute has enacted 'law to apply.'" Pre-*Vermont Yankee* courts were generally convinced that NEPA was not so general that agencies and courts could not find in it law to apply. ANDERSON, *supra* note 17, at 846.

36. *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289, 297-98 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). One commentator has suggested that the doctrine of "structural due process" formulated by constitutional scholar Lawrence Tribe may resolve for the judiciary and the rest of us the confusion inherent in the separation of NEPA's procedural duties and substantive policies.

"Only through the application of the information and analysis generated by the NEPA process, not their mere collection, can an agency demonstrate its good faith in implementing NEPA's purpose of sound decisionmaking. Accordingly, meaningful judicial review should evaluate the agency's use of environmental data (the agency's decisionmaking process) to determine whether the agency has acted in good faith. This process can vary in intensity." Melanie Fisher, *The CEQ Regulations: New Stage in the Evolution of NEPA*, 3 HARV. ENVTL. L. REV. 347, 378 (1979).

37. See Marion Miller, *The National Environmental Policy Act and Judicial Review After Robertson v. Methow Valley Citizens Council and Marsh v. Oregon Natural Resources Council*, 18 ECOLOGY L.Q. 223, 253, n. 227 (1991); Opinion on NEPA's usefulness as a tool of substantive agency decisionmaking is by no means unanimous. Agencies conducting environmental review may act defensively rather than creatively, adapting NEPA in ways not threatening to the agencies' established behaviors. NEPA implementation is sometimes regarded as a mere adjunct to agency missions. Bardach and Pugliaresi, *The Environmental Impact Statement versus The Real World*, 49 PUBLIC INTEREST 22 (1977) Conversely, NEPA arguably has enlisted genuine "change agents" within agencies, effectuated new allocations of resources, and mustered clientele groups and judicial support outside agencies who then urged upon them more environmentally-sound policies. Liroff, *NEPA — Where Have We Been and Where Are We Going?*, 46 J. AM. PLANNING ASSOC. 154 (1980); See ANDERSON, *supra* note 17, at 888-90.

38. 40 C.F.R. § 1500-08 (1978). They replaced a succession of guidelines which were widely believed to be ineffectual in achieving meaningful compliance with the statute. For a review of the legislative history of NEPA and early development of NEPA regulation in the Executive Branch, See William Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 205-33 (1989). In response to the initially lackadaisical response of agencies to their consultation obligations under NEPA, both CEQ (under Exec. Order No. 11,514 (3 C.F.R. § 902 (1966-1970)) and the new Environmental Protection Agency (under the Clean Air Act Amendments of 1970) were given wide-ranging responsibility to advocate better implementation of NEPA. *Id.* "EPA is the day-to-day watchdog of NEPA compliance, responsible for reviewing and commenting upon all federal actions which have significant environmental impact . . . CEQ, in turn, is assigned the task of reviewing problem cases which EPA brings to its attention." *Id.* at 231. The 1978 CEQ regulations and their relationship to NEPA and judicial interpretations of NEPA at that time are explained in greater detail in Fisher, *The CEQ*

decade of grudging implementation by some federal agencies and excessive documentation by others. Section 203 of NEPA<sup>39</sup> created the CEQ and placed it within the Executive Office of the President. Congress gave the CEQ the duty to monitor environmental review of federal activities and to apprise the President of important developments.<sup>40</sup> President Carter subsequently directed the CEQ to specify how the EIS process would work in order to bear more meaningfully on agency decisions and to refine the NEPA process to avoid undue burdens and delay.<sup>41</sup> Therefore, it was the CEQ's intent to transform NEPA review from an enormous *pro forma* paperwork burden into the predicate for "excellent action" by all federal agencies.<sup>42</sup>

The CEQ sought to streamline a process that was developing an insatiable appetite for private and public resources and a near-infinite propensity for bureaucratic delay.<sup>43</sup> The changes included limiting the size of EISs, avoiding

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*Regulations, supra* note 36, generally, and in David Lesser, *Putting Bite in NEPA's Bark: New Council on Environmental Quality Regulations for the Preparation of Environmental Impact Statements*, 13 U. MICH. J.L. REFORM 367 (Winter 1980).

39. 42 U.S.C. § 4342 (1988).

40. Section 204 of NEPA, 42 U.S.C. § 4344 (1988), states:

It shall be the duty and function of the Council —

- (1) to assist and advise the President in the preparation of the Environmental Quality Report . . . ;
- (2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective . . . and to compile and submit to the President studies relating to such conditions and trends;
- (3) to review and appraise the various programs and activities of the Federal Government in light of the policy . . . of this chapter . . . and to make recommendations to the President with respect thereto;
- (4) to develop and recommend to the President national policies . . . ;
- (5) to conduct investigations, studies, surveys, research, and analyses . . . ;
- (6) to document and define changes in the natural environment . . . ;
- (7) to report at least once each year to the President on the state and condition of the environment; and
- (8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

41. Exec. Order No. 11,991, 3 C.F.R. 1977 (compl. p. 123). Despite the advisory nature of the Guidelines, courts accorded substantial deference to the CEQ's environmental expertise and thus to its interpretation of the statute. *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 86 (2d Cir. 1975) (according the Guidelines "substantial weight"); *Sierra Club v. Andrus*, 581 F.2d 895, 898 (D.C. Cir. 1978), *cert. granted*, 439 U.S. 1065 (1979), *rev'd*, 442 U.S. 347 (1979) (assigning "considerable weight" to CEQ's interpretations); *Sierra Club v. Morton*, 514 F.2d 856, 873 (D.C. Cir. 1975), *rev'd on other grounds sub nom. Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1178 (6th Cir. 1972); *See Fisher, supra* note 36, at 348, n.11; One commentator worries that, in light of *Vermont Yankee* and its progeny, *supra* note 31, courts should be particularly careful in using the CEQ regulations as a vehicle to intensify substantive review of agency decisions under NEPA. G. Shell, *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, 876-77 (1980).

42. 40 C.F.R. § 1500.1(c) (1991).

43. The CEQ's main innovation was to require agencies to classify their jurisdictional activities into three categories: (1) types of actions that ordinarily are "major federal actions significantly affecting the quality of the human environment" that would routinely require an EIS, 40 C.F.R. § 1508.4 (1991); (2) actions typically studied to ascertain the need for a full EIS and requiring an Environmental Assessment (EA), 40 C.F.R. §§ 1508.9, 1507.3(b)(2) (1991); and (3) either a Finding of No Significant Impact (FONSI), 40 C.F.R. §§ 1501.4(e), 1508.13 (1991) or a Notice of Intent to prepare an EIS, 40 C.F.R. § 1501.4(d)

analysis of insignificant issues (“scoping”), and establishing time limits on the NEPA process. The CEQ also encouraged cooperation and concurrent reviews among government bodies with related jurisdictional responsibilities provided one agency acted as a “lead agency” thereby charged with drafting the NEPA documents. So receptive was the Executive Branch to the CEQ’s efforts that its regulations (and NEPA generally) were untouched by the regulatory reforms of the early Reagan era. Whether attributable to a demonstrable reduction in the burdens of NEPA compliance, the increased strength and visibility of environmental interests, or merely a lack of attention to environmental matters, the lack of a challenge to the CEQ’s guidelines was applauded. The CEQ’s General Counsel stated in 1980 that “there were no legislative amendments to NEPA. NEPA was not targeted in the Heritage Foundation’s Report. Nobody made campaign promises to gut NEPA. NEPA is on nobody’s hit list.”<sup>44</sup>

### C. *New Problems for Regulators*

Some obvious new problems for regulatory agencies were inherent in the CEQ’s systematized NEPA process. Reacting as they must to the applications of private parties for authorizations to construct or abandon projects, provide services, or change rates, regulatory agencies were limited in their ability to command adoption of environmentally preferable activities not contemplated by an applicant. The CEQ, in adopting a process perhaps better suited to Executive Branch agencies whose programs and projects are of their own devising, provided that an EIS must “devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”<sup>45</sup> The analytical responsibilities of agencies such as the FERC were expanded beyond an applicant’s proposal, so as to include at least the study of hypothetically competing proposals.

In addition, the CEQ required agencies to obtain information relevant to adverse impacts if that information, even if not presently known, was going to be essential to a reasoned choice among alternative proposals.<sup>46</sup> Agencies were required to implement mitigation measures identified in an EIS as practicable means of minimizing environmental impacts, rehabilitating affected areas or natural features, or substituting resources for those lost or affected. These mitigation measures included imposing conditions upon authorization of private activities, under jurisdictional statutes, if such conditioning authority was committed to agency discretion.<sup>47</sup> Agencies were required to consider

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(1991); and all actions that do not individually or collectively entail adverse environmental consequences, “categorically exclude” such activities from NEPA review. 40 C.F.R. § 1508.4 (1991).

44. *Streamlining NEPA*, *supra* note 12. No changes to the CEQ regulations were made during the decade following their adoption, except modification of the requirement that agencies undertake a “worst case” analysis in any EIS. 40 C.F.R. § 1502.22(b) (1985); *See generally* Eveleen Henry, *The Council on Environmental Quality’s Research and Worst Case Regulation: The Recent Litigation*, 64 OR. L. REV. 547 (1986).

45. 40 C.F.R. § 1502.14(b) (1991).

46. 40 C.F.R. § 1502.22(a) (1991).

47. 40 C.F.R. § 1505.3 (1991).

the alternative of "no action,"<sup>48</sup> which in the regulatory environment might mean rejection of an application. The CEQ required each agency to explain whether it had adopted all practicable means to avoid or minimize environmental harm.<sup>49</sup> Finally, agencies with quasi-judicial functions were required to incorporate into evidentiary proceedings the environmental determinations of other agencies such as the CEQ, the Army Corps of Engineers, or the Bureau of Land Management, that might not be parties to the hearing process. The new responsibility to seek out and study a range of alternatives based on a comprehensive data base of all reasonable alternatives was at best resource-hungry and at worst a futile exercise in second-guessing the marketplace.

Agencies with highly specialized regulatory functions, such as the FERC, are always under pressure to minimize the time and resources committed to disposing of matters viewed as peripheral to their primary activities. By employing generic mitigation measures such agencies might reasonably conclude that an authorization will not constitute a "major federal action." A Finding of No Significant Impact ("FONSI"), based on the mitigation or prohibition of adverse impacts, is not typically the product of the same level of public review and case-specific study that characterizes formulation of an EIS.

NEPA scholars have inquired whether the mitigation procedure, when employed to avoid environmental review, actually undermines a fundamental objective of NEPA.<sup>50</sup> The CEQ opposes use of mitigation measures as justification for a FONSI even though that strategy has found some favor in the courts.<sup>51</sup> The CEQ reasons that for any major federal action, with potentially significant effects, only the preparation of an EIS will ensure that all factors are considered by the agency. Mitigation measures adopted as part of the EIS process are legally enforceable, unlike the outcome of the less formal EA process.<sup>52</sup>

The CEQ's position on such issues is a matter of constitutional significance as well as practical administrative interest. Contrary to the CEQ's directive that "[a]ll agencies of the federal government shall comply with these regulations",<sup>53</sup> no express grant of authority in NEPA requires or permits the

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48. 40 C.F.R. § 1502.14(d) (1991).

49. 40 C.F.R. § 1505.2(c) (1991).

50. See Albert Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 *ECOLOGY L.Q.* 51, 66-72 (1986).

51. *Id.* CEQ provided wide-ranging informal advice on the meaning and implementation of its 1978 regulations in *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,038 (1981). See Question 40 on this issue.

52. The FERC's attempt to avert an EIS by simply adopting the recommendations of federal and state fish and wildlife agencies in a hydropower project exemption case was rejected by the Ninth Circuit primarily for lack of reasoned decisionmaking. *The Steamboaters v. FERC*, 759 F.2d 1382, 1392-1394 (9th Cir. 1985); For an analysis of current FERC policy in hydropower proceedings, see R. Buckendorf, *FERC Interaction With Fish and Wildlife Agencies in Hydropower Licensing Under the Federal Power Act Section 10(j) Consultation Process*, 27 *TULSA L.J.* 433 (1992).

53. *Cf. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989) ("CEQ guidelines are not binding on [the NRC] to the extent that the agency has not expressly adopted them.") and *Steamboaters*, *supra* note 52. Although scarcely a new issue, the enforceability of the CEQ regulations with respect to independent regulatory bodies has generally escaped judicial scrutiny, save for the occasional scholarly footnote. Executive Order No. 11,991, which directed CEQ to establish a binding regulatory

CEQ to enforce its interpretation of the NEPA process on all agencies of government.<sup>54</sup> While NEPA applies to all federal agencies, its implementation appears committed by Congress to individual agencies. Thus, the President's ability to determine how NEPA is to be implemented by an "independent" agency whose members he is powerless to remove, except for cause, can be seriously questioned.<sup>55</sup>

The CEQ's assertion of authority consequently calls into question the extent to which the FERC may fashion its own NEPA approach. The Commission exhibits the customary indicia of independence from the Executive Branch, notwithstanding section 401 of the Department of Energy Organization Act ("DOE Act"), which establishes "*within* the Department of Energy an *independent regulatory commission* to be known as the Federal Energy Regulatory Commission."<sup>56</sup> Modern case law recognizes the independence of certain entities established "*within*" departments of government that have functions administratively (if not constitutionally) different from those of the department itself.<sup>57</sup> The Commission's failure, until 1987, to conform its regu-

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model under NEPA, was expressly based on the President's supervening constitutional duty to "take care that the laws be faithfully executed . . . ."

54. See U.S. Const. art. II, § 3; 3 U.S.C. § 301 (1982); In its Preamble to the new rules, the CEQ set forth the President's constitutional authority as the basis for enforceability of its regulations. See also *CEQ: National Environmental Policy Act*, 43 Fed. Reg. 55,978 (1978) (noted in Andreen, *In Pursuit of NEPA's Promise*, *supra* note 38, at 210 n. 35).

55. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349, 356 (1958); "*Humphrey's Executor* has shaped the judicial understanding of the independence concept in administrative law. Some insulation from direct control by the President was thought desirable for those agencies that exercised powers labeled 'quasi-judicial' or 'quasi-legislative.'" P. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 781-82 (1986) (footnote omitted); Professor Verkuil describes the controversy over the constitutionality of so-called independent agencies during the Reagan Administration and the efforts of the Executive to exercise control over all agencies of government. *Id.* at 779-88; When a three-judge panel rejected as unconstitutional under the doctrine of separation of powers the efforts of the Congress to vest in an official that it alone could remove (the Comptroller General) certain policymaking powers that are properly exercised by the Executive, *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986), the historic doctrine of independent agencies appeared doomed. *Bowsher* nevertheless "legitimizes the idea of the independent agency" by quoting *Humphrey's Executor* with approval. Verkuil, *supra*, at 792-93; The prospect of a different result that would jeopardize independent agencies concerned many members of the court. B. Schwartz, *An Administrative Law "Might Have Been" — Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221 (1990); Other decisions may further reinvigorate the concept that some agencies performing specialized executive-type functions may be insulated from complete control by the President. See *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990) (limiting the authority of the Office of Management and Budget to review agency rules under the Paperwork Reduction Act of, in this case, the Department of Labor); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding judicial appointment of independent counsel *within* the Executive Branch as not violating the separation of powers); *Mistretta v. U.S.*, 488 U.S. 361 (1989) (approving creation of a Sentencing Commission as "an independent agency within the judicial branch") (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and *Morrison v. Olson*, 487 U.S. 654 (1988)). The Supreme Court has recognized anew that the Congress may establish a limitation on the "President's removal power . . . [that is] specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies." *Mistretta*, 488 U.S. at 411 (citations omitted). *But See id.* at 413-26 (Scalia, J., dissenting).

56. 42 U.S.C. § 7101 (1988) [emphasis added].

57. The holding of *Humphrey's Executor* emanates from the distinction between the quasi-judicial and quasi-legislative functions of the Federal Trade Commission and its executive functions. 295 U.S. at 628.

lations to the CEQ's NEPA procedures as directed<sup>58</sup> probably reflected neither acquiescence in nor total agreement with the Executive Branch directives. However, when it finally adopted complete NEPA procedures in Order No. 486,<sup>59</sup> the Commission explained that "[t]his final rule complies with and supplements the CEQ regulations. Since the Commission is voluntarily complying with CEQ regulations, there is no need to address a number of comments that raise the question whether those regulations are binding on the Commission as a matter of law."<sup>60</sup>

#### D. Early Environmental Review at the FERC

Well before 1987, the Commission was compelled to examine the environmental implications of its decisions.<sup>61</sup> In addressing the concerns raised by the court in *Greene County Planning Board v. FPC*, the FPC refined the environmental review procedures that applied to NGA authorizations. Those procedures were used until 1987.<sup>62</sup> The FPC created baseline informational requirements which applicants were to comply with so as to assist staff analysis of any application.<sup>63</sup> This filing requirement, originally set forth in the

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*See* Verkuil, *supra* note 52, at 783-84; The DOE Act delegates to the FERC almost the same quasi-judicial and quasi-legislative functions performed for half this century by the FPC. In addition, the FERC generally functions without the budgetary and operational support of the department it finds itself "within" and was designated by Congress to review certain DOE rules and to hear appeals from certain final DOE determinations. Department of Energy Organization Act, sections 404, 503 and 504 (42 U.S.C. §§ 7174, 7193, 7194); Moreover, the Federal Power Commission was historically regarded as an arm of the Congress. Burton Wheeler, *The Federal Power Commission As An Agency of Congress*, 14 GEO. WASH. L. REV. 1 (1945).

58. "Not later than eight months after publication of these regulations . . . , or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations." 40 C.F.R. § 1507.3(a) (1990).

59. In its proposed rule, the Commission proposed virtual wholesale incorporation of many of the CEQ's regulations. Notice of Proposed Rulemaking, *Regulations Implementing the National Environmental Policy Act of 1969*, [1982-1987 Proposed Regs.] FERC Stats. & Regs. ¶ 32,442, 52 Fed. Reg. 20314. [hereinafter 1987 NOPR] The CEQ dissuaded the Commission from repeating or paraphrasing the CEQ regulations because, in its view, they apply to all agencies anyway.

60. Order No. 486, *Regulations Implementing the National Environmental Policy Act of 1969*, [1986-1990 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 30,783, at 30,924 (1987) [hereinafter Order No. 486].

61. In 1965, the U.S. Court of Appeals for the Second Circuit had taken the FPC to task for acting as "an umpire blandly calling balls and strikes" rather than giving "active and affirmative protection" when weighing the environmental factors involved in licensing a pumped storage power project under the Federal Power Act. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966); *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

62. In 1972, the FPC was found to have abdicated its responsibilities under NEPA to develop and consider information on the environmental impacts of a project it authorized, because the FPC had merely substituted the environmental statement of an applicant as its own. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420-25 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972)(citing *Calvert Cliffs* for the proposition that NEPA places primary and non-delegable responsibility on the Commission to consider environmental values at each stage of the agency's processes).

63. By 1972, the FPC had adopted new regulations implementing NEPA, which required staff to prepare an environmental statement *unless* the application was contested, in which case such statement was to be submitted with the final decision. 18 C.F.R. §§ 2.81(e)(f), 2.82(e)(f). Order No. 415, 44 FPC 1531 (1970), *modified by* Order No. 415-A, 45 FPC 563 (1971), Order No. 415-B, 46 FPC 1240 (1971), and Order No. 415-C, 48 FPC 1442 (1972). Order No. 415 created Exhibit F-IV to 18 C.F.R. § 157.14 which

Appendices to Part 2 of the Commission's Regulations, was labeled the Environmental Report ("ER").<sup>64</sup> ERs became instrumental in enabling the FPC and the FERC to adapt their regulatory processes to the analytic demands of NEPA and to carry out jurisdictional duties with reasonable dispatch.<sup>65</sup>

By 1987, when the Commission finally adopted the CEQ-type regulations, the agency had been subject to NEPA for nearly a generation without standardizing its implementation. Although environmental interests had worked tirelessly before the Commission to protect riverine biota from the adverse effects of hydropower development, those groups were far less active in pipeline construction-related proceedings. Consequently, projects continued to be built under such procedures as the "budget-type" certificate program. This called for construction of facilities within pre-set dollar ceilings and physical limitations were undertaken without any case-specific pre-construction review. All this transpired with the aid of the federal power of eminent domain.<sup>66</sup> Under the budget-type certificate regulations, companies notified the Commission of project construction only after the fact. Thus, from the standpoint of environmental review and accountability, the Commission's NEPA compliance during the 1970s in the natural gas pipeline area can be characterized as minimal for this group of sometimes-significant projects. This practice might have ceased, but did not, as early as 1979 when the Commission proposed but failed to adopt CEQ-type regulations.<sup>67</sup>

In Order No. 486, the Commission adopted a Final Rule which was a

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outlined the major informational requirements that NEPA imposed on applicants for a certificate of public convenience and necessity to construct facilities pursuant to section 7 of the Natural Gas Act. As 18 C.F.R. § 157.14(a)(6-d), Exhibit F-IV has remained applicable to certain certificate applications, although it will be replaced by more elaborate reporting provisions under a pending rulemaking. See *infra* note 172 and accompanying text. This series of orders promulgated § 2.80, which stated Commission adherence to NEPA's policies and established general procedures for applying those policies to hydropower licensing (§ 2.81) and gas pipeline construction (§ 2.82). In 1987, these sections were subsumed into new Part 380.

64. Appendix B to Part 2 of the Commission's Regulations was established by Order No. 485, *Implementation of the National Environmental Policy Act of 1969*, 49 FPC 1280 (1973). Appendix B set forth in great detail the data that an applicant for construction of pipeline facilities could be called upon to submit, "commensurate with the complexity of the possible environmental impact of the proposed action." *Id.* at 1295. The provisions were nevertheless precatory.

At the time of NEPA's enactment, the FPC was in the process of formulating guidelines instructing natural gas companies a set of guidelines how to protect scenic, historic, wildlife and recreational values when planning, locating, clearing, maintaining rights-of-way or otherwise building aboveground facilities. 18 C.F.R. § 2.69. These guidelines, which would be deleted by Order No. 555, incorporate both NEPA directives and the environmental public interest policies inherent in section 7(e) of the Natural Gas Act; See also Order No. 407, 44 F.P.C. 47, 48-49 (1970) (citing a line of cases that include among the public interest factors national defense, conservation of gas, air pollution, antitrust considerations, and the effect of "pipeline location" on its environs).

65. The Environment Report guidelines applicable to applications under NGA section 7(c) were retained by Order No. 486 almost unchanged as a separate Appendix to Part 380, the Commission's NEPA regulations. The Commission has incorporated the hydropower EA requirements into its specific licensing rules. See, e.g., 18 C.F.R. § 4.41(f).

66. This program was replaced in 1984 by Order No. 234 which adopted similar authorizations but with a measure of consultation and environmental review before the fact. See *infra* note 93 and accompanying text.

67. The Commission first attempted to adopt the CEQ-type regulations in 1979 in Docket No. RM79-69. Notice of Proposed Rulemaking, *Regulations Implementing the National Environmental Policy Act of*

faithful adaptation of the essential CEQ process, which it had used as its template. In addition, it reevaluated its 1979 proposals in light of regulatory innovations "such as the advent of blanket certificate applications in the gas area".<sup>68</sup> Like the CEQ guidelines, Order No. 486 categorized natural gas-related activities into those requiring an EIS (section 380.6),<sup>69</sup> those categorically excluded from NEPA review except under specific circumstances (section 380.4),<sup>70</sup> and those which require an EA to ascertain the levels of

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1969, [1977-1981 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,034, 44 Fed. Reg. 50052 (1979). [hereinafter 1979 NOPR].

68. 1987 NOPR, *supra* note 59, at 33,439, 33,441.

69. Natural gas projects or actions listed under § 380.6(a) as requiring an EIS are:

(1) Authorization under sections 3 or 7 of the Natural Gas Act and DOE Delegation Order No. 0204-112 for the siting, construction, and operation of jurisdictional liquefied natural gas import/export facilities used wholly or in part to liquefy, store, or regasify liquefied natural gas transported by water;

(2) Certificate applications under section 7 of the Natural Gas Act to develop an underground natural gas storage facility except where depleted oil or natural gas producing fields are used;

(3) Major pipeline construction projects under section 7 of the Natural Gas Act using right-of-way in which there is no existing natural gas pipeline; . . .

70. Natural gas projects or actions listed under § 380.4(a) as not requiring an EA or EIS are:

. . . (21) Approvals of blanket certificate applications and prior notice filings under § 157.204 and §§ 157.209 through 157.218 of this chapter;

(22) Approvals of blanket certificate applications under §§ 284.221 through 284.224 of this chapter;

(23) Producers' applications for the sale of gas filed under §§ 157.23 through 157.29 of this chapter;

(24) Approval under section 7 of the Natural Gas Act of taps, meters, and regulating facilities located completely within an existing natural gas pipeline right-of-way or compressor station if company records show the land use of the vicinity has not changed since the original facilities were installed, and no significant nonjurisdictional facilities would be constructed in association with construction of the interconnection facilities;

(25) Review of natural gas rate filings, including any curtailment plans other than those specified in § 380.5(b)(5), and establishment of rates for transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act and sections 311 and 401 through 404 of the Natural Gas Policy Act of 1978; . . .

(27) Sale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that requires no construction of facilities;

(28) Abandonment in place of a minor natural gas pipeline (short segments of buried pipe of 6-inch inside diameter or less), or abandonment by removal of minor surface facilities such as metering stations, valves, and tops under section 7 of the Natural Gas Act so long as appropriate erosion control and site restoration takes place;

(29) Abandonment of service under any gas supply contract pursuant to section 7 of the Natural Gas Act;

(30) Approval of filing made in compliance with the requirements of a certificate for natural gas project under section 7 of the Natural Gas Act . . . ;

*See* Order No. 486, *supra* note 60, at 30,924-30. The Commission excluded any activity the impact of which was solely socio-economic. *Id.* at 30,927, n. 19.

The categorical exclusion from NEPA review of gas and electric rate filings, which constitute a major portion of the FERC caseload was not addressed by the public or the Commission during the rulemaking. Although changes in rates no doubt affect the business decisions of utility companies, including whether to build facilities or utilize particular kinds of fuels, the causal link between rates and their environmental consequences may be too "remote and speculative" to implicate NEPA, particularly in cases where rates are

probable impacts and the need for an EIS (section 380.5).<sup>71</sup> In each instance, the Commission afforded an opportunity for more or less review as each case might warrant.

Order No. 486 also confronted the FERC's most troublesome decision-making issues. First, the Commission had been urged by commentators to defer in environmental matters to the judgment of other agencies with greater expertise, to allow third party contractors to prepare environmental documents, and to refer environmental disputes to the CEQ for resolution.<sup>72</sup> It nevertheless concluded that its ability to do any of these things was limited by its obligation to take responsibility for implementing NEPA<sup>73</sup> and to exercise independent judgment about the acceptability of proposals. The Commission also had a non-delegable responsibility in pipeline certificate cases to administer the Endangered Species Act ("ESA"),<sup>74</sup> the National Historic Preservation

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based on historical costs and do not contain incentives or market-based mechanisms. See *Natural Resources Defense Council v. Morton*, 458 F.2d at 837-38.

Moreover, the application of NEPA review to individually-litigated rate cases poses baffling problems because rates approved by the Commission, after a lengthy process, often vary from those proposed. However, precedent exists for NEPA review in rate-setting proceedings. See *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327 (1985) (vacating on other grounds FERC Order No. 298, which allowed [in rate base] a portion of costs associated with construction work in progress, but rejecting a challenge to the EA), *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) (standing granted to an environmental group raising a challenge to a railroad rate increase approved by the Interstate Commerce Commission); Under its pending proposed NEPA regulations, the DOE would continue its practice of requiring EAs for certain rate increases for products or services marketed by DOE and certain rate increases for electric power and transmission services provided by power marketing administrations. 55 Fed. Reg. at 46,463. Abandonments of service under section 7(b) of the NGA, 15 U.S.C. §§ 717f(b) (1988), present similar questions of potential environmental impacts such as, for example, fuel-switching by industrial gas consumers could be involved. The Commission categorically excludes such authorizations.

71. Natural gas projects or actions listed under § 380.5(a) as requiring an EA are:

(1) Except as identified in §§ 380.4, 380.6 and 2.55 of this chapter, authorization for the state of new gas import/export facilities under DOE Delegation No. 0204-112 and authorization under section 7 of the Natural Gas Act for the construction, replacement, or abandonment of compression, processing, or interconnecting facilities, onshore and offshore pipelines, metering facilities, LNG peak-shaving facilities, or other facilities necessary for the sale, exchange, storage, or transportation of natural gas;

(2) Prior notice filings under § 157.208 of this chapter for the rearrangement of any facility specified in §§ 157.202(b)(3) and (6) of this chapter or the acquisition, construction, or operation of any eligible facility as specified in §§ 157.202(b)(2) and (3) of this chapter;

(3) Abandonment or reduction of natural gas service under section 7 of the Natural Gas Act unless excluded under § 380.4(a)(21), (28) or (29);

(4) Except as identified in § 380.6, conversion of existing depleted oil or natural gas fields to underground storage fields under section 7 of the Natural Gas Act.

(5) New natural gas curtailment plans, or any amendment to an existing curtailment plan under section 4 of the Natural Gas Act and sections 401 through 404 of the Natural Gas Policy Act of 1978 that has a major effect on an entire pipeline system . . . .

See Order No. 486, *supra* note 60, at 30,931; "If the EA indicates a project will not have significant environmental impact, including instances where mitigation measures are responsible for the lack of adverse impact, the Commission will make a Finding of No Significant Impact." 1987 NOPR, *supra* note 59, at 33,450.

72. Order No. 486, *supra* note 60, at 30,932.

73. See *Steamboaters*, 759 F.2d at 1389; Order No. 486, *supra* note 60, at 30,931-932.

74. 16 U.S.C. §§ 1531-1544 (1988). The Endangered Species Act requires each Federal agency to consult with the Secretary of Commerce (National Marine Fisheries Service) and Secretary of the Interior

Act ("NHPA"),<sup>75</sup> the Coastal Zone Management Act ("CZMA"),<sup>76</sup> and other similar laws that protect particular environmental features.<sup>77</sup> In the Commission's view, these requirements had to be addressed by the Commission itself, even if the subject activity was otherwise categorically excluded pursuant to NEPA.<sup>78</sup>

Second, the Commission recognized that its "adjudicatory responsibilities" to provide a fair hearing would make highly problematic any referral of cases to the CEQ for resolution, or any reliance on expertise and documentation not properly submitted for the record in any proceeding. Consequently, the Commission reserved the right not to participate in the CEQ referral process.<sup>79</sup> Just as the 1979 NOPR had insisted that all issues be resolved on the record within the bounds of the FERC's own proceedings and by parties only,<sup>80</sup> Order No. 486 codified this policy by requiring that facts and opinions relating to any environmental issue set for formal hearing would be subject to customary evidentiary requirements.<sup>81</sup> The Commission enunciated its modified adherence to section 1505.2 of the CEQ regulations by explaining that its "Record of Decision" in any case involving an EIS would consist of the final Commission order in which environmental factors and alternatives would be balanced.<sup>82</sup>

Third, the Commission made clear it would employ the EA process to avoid an EIS where possible. By encouraging the applicant to mitigate adverse impacts, the agency planned to enter a FONSI and summarily conclude its NEPA responsibilities. Even if inspired by the FERC's aversion to paperwork and complaints about delay, this variant of the CEQ's categorization was capable of yielding substantial environmental benefits. As the Com-

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(U.S. Fish and Wildlife Service) regarding any action that might jeopardize any species listed or proposed to be listed as endangered or threatened and to ensure such species are not jeopardized or their habitats destroyed or adversely modified.

75. 16 U.S.C. §§ 470f-470w (1988). The National Historic Preservation Act requires Federal agency heads to take into account the effect of any undertaking over which it has direct or indirect jurisdiction on any site, structure or object included in or eligible for inclusion in the National Register of Historic Places, and to allow the Advisory Council on Historic Preservation an opportunity to comment on such undertakings.

76. 16 U.S.C. §§ 1451-1464 (1988). The Coastal Zone Management Act requires applicants for federal licenses or permits in the coastal zone to submit to the federal agency issuing a permit or license a determination by the state that the proposed project is consistent with the requirements of the state's coastal zone plan.

77. *E.g.*, Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1982) as amended by Pub. L. No. 101-549; Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988).

78. 1987 NOPR, *supra* note 59, at 33,442.

79. Order No. 486, *supra* note 60, at 30,937.

80. 1979 NOPR, *supra* note 67, at 32,385.

81. 18 C.F.R. § 380.10(a)(ii)(9); *See* 1987 NOPR, *supra* note 59, at 33,442-443. The disagreement between the FERC and the CEQ over the integration of environmental review and administrative adjudication continues today. Although FERC was not wedded to CEQ's advice, it nevertheless consulted CEQ in formulating its Final Rule. However, "[c]ommunications with FERC during much of the 1980s may be characterized as infrequent." *FERC's Natural Gas Pipeline Certification Process: Hearings Before the Subcommittee on Environment, Energy and Natural Resources*, 102 Cong., 1st Sess. 3 (1991) (Testimony of Dinah Bear). [hereinafter Synar Hearing]

82. 1987 NOPR, *supra* note 59, at 33,443.

mission emphasized, “[m]itigation measures must provide concrete solutions to negate potential environmental impacts” if the process is to succeed.<sup>83</sup>

Fourth, the Commission recognized its environmental responsibilities relating to matters not necessarily within its regulatory jurisdiction. The consequences of a proposed project or action might be the construction or operation of facilities, which although outside the Commission’s regulatory reach, nevertheless form an integral part of, or are directly related to, the project or action. In such cases, courts refuse to delimit an agency’s NEPA responsibilities at the jurisdictional boundary.<sup>84</sup> In addition, the Commission was required to examine all alternatives in the “Purpose and Need Statement” of any related EIS, including the possibility of taking no action and any reasonable alternatives not considered by the applicant or any alternatives outside Commission jurisdiction.<sup>85</sup>

Finally, the Commission pledged to evaluate the “cumulative impacts” of its actions which, according to the CEQ, might arise from the collective incremental effects of all “past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.”<sup>86</sup> The Commission’s expressed willingness to undertake an environmental review of such breadth belied certain misgivings about the potential delays inherent in it.<sup>87</sup>

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83. Order No. 486, *supra* note 60, at 30,932.

84. *Silentman v. FPC*, 566 F.2d 237 (D.C. Cir. 1977); *Henry v. FPC*, 513 F.2d 395, 406 (D.C. Cir. 1975); The purpose of NEPA “is not to be frustrated by an approach that would defeat a comprehensive and integrated consideration by reason of the fact that particular officers and agencies have particular occasions for and limits on their exercise of jurisdiction.” (citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (1972)); The responsibility imposed on agencies by NEPA to examine the environmental impact of their actions does not stop abruptly at legal limits of regulatory jurisdiction. Both case law and the CEQ make clear that non-jurisdictional activities resulting from or related to a Commission authorization may also be subject to NEPA review. In an attempt to avoid an unreasonable expansion of an agency’s analytic responsibilities in this regard, the CEQ identified such interrelated actions for purposes of defining the scope of an EIS as those which:

- (i) Automatically trigger other actions which may require environmental impact statements;
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously;
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. § 1508.25(a) (applied in *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 836 F.2d 760, 763 (2d Cir. 1988)); Order No. 486, *supra* note 60, at 30,932; *Cf. infra* note 206 and accompanying text.

85. Order No. 486, *supra* note 60, at 30,934.

86. 40 C.F.R. § 1508.7. Order No. 486, *supra* note 60, at 30,933.

87. Whatever the Commission’s problems implementing NEPA, the size of the agency has made solutions relatively achievable. The sprawling bureaucracy of the Department of Energy had, on the other hand, been implementing NEPA during the 1980s in “a decentralized, non-uniform and self-defeating manner,” admitted the Office of the Secretary. Department of Energy, Notice, SEN-15-90, issued February 5, 1990. The department had relied heavily on ad hoc categorical exclusions written in the form of Memoranda-to-File or MTFs pursuant to a “catch-all exclusion” in the regulations. The MTFs were withdrawn by the Secretary in 1990, pending reformulation of new “NEPA guidelines” by rulemaking. 55 Fed. Reg. 46,444 (1990) (to be *codified at* 10 C.F.R. pt. 1021)(proposed Nov.2, 1990).

### III. NEPA IMPLEMENTATION IN THE ERA OF REGULATORY DECONTROL

#### A. *Environmental Protection and Self-Implementing Transactions*

##### 1. Blanket Certificates for Pipeline Construction

Traditional forms of state and federal regulatory intervention in the natural gas marketplace came increasingly under attack in the 1980s as "pervasive, complicated, expensive, distortive and largely ineffective."<sup>88</sup> The contemporaneous growth in the early 1980s of a natural gas surplus and sustained high gas prices, both arising in part from Congress' directives in the Natural Gas Policy Act of 1978, encouraged regulated companies and the Commission to devise new ways to eliminate direct or indirect contractual or regulatory protections from price competition,<sup>89</sup> to increase gas transportation services and the marketing of excess supplies to fuel-switchable consumers,<sup>90</sup> and otherwise to facilitate entry into and exit from gas markets and transactions.<sup>91</sup> These

88. Richard Pierce, *Reconstituting the Natural Gas Industry From Wellhead to Burnertip*, 9 ENERGY L.J. 1, 52 (1988). Professor Pierce surveys a body of economic and legal scholarship which argues that conventional forms of price regulation and government intervention in gas markets have exacted enormous costs from society. *Id.* at 22-57. "Regulation is so much less effective than competition as a means of inducing companies to minimize costs, and regulation has such great potential to distort the operation of the market, that its scope should be limited to that essential to respond to an imperfection." *Id.* at 9.

89. Order No. 380, *Elimination of Variable Costs from Certain Gas Pipeline Minimum Commodity Bill Provisions*, [1982-1985 Regs. Preambles] F.E.R.C. Stats. and Regs. 30,571, *codified at* 18 C.F.R. pt. 154 (1992).

90. Special marketing programs or SMPs were instituted by pipelines seeking to market excess gas to new incremental customers at prices lower than those paid by captive customers. *See, e.g.*, Transcontinental Gas Pipeline Corp., 23 F.E.R.C. ¶ 61,400 (1983), 23 F.E.R.C. ¶ 61,221, 23 F.E.R.C. ¶ 61,199; Tenneco Oil Co., 25 F.E.R.C. ¶ 61,234 (1983); Columbia Gas Transmission Corp., 26 F.E.R.C. ¶ 61,031 (1984), 25 F.E.R.C. ¶ 61,220 (1983); Tennessee Gas Pipeline Co., 26 F.E.R.C. ¶ 63,054 (1984), 26 F.E.R.C. ¶ 61,398, 26 F.E.R.C. ¶ 61,381, 25 F.E.R.C. ¶ 61,398 (1983). Columbia's SMP was invalidated as discriminatory in *Maryland Peoples Council v. FERC*, 761 F.2d 768 (D.C. Cir. 1984) [MPC I], which signaled the beginning of the end for all SMPs.

Selective or limited transportation programs were begun by the Commission in 1983 to afford any end user to obtain transportation of third party supplies. Order No. 234-B, *Interstate Pipeline Blanket Certificates for Routine Transactions and Sales and Transportation by Interstate Pipelines and Distributors*, [1982-1985 Regs. Preambles] F.E.R.C. Stats. and Regs. *codified at* 18 C.F.R. pt. 157, vacated sub. nom. *Maryland Peoples Council v. FERC*, 761 F.2d 780 (D.C. Cir. 1985), [hereinafter MPC II]; Notice of Proposed Rulemaking, *Sales and Transportation by Interstate Pipelines and Distributors*, F.E.R.C. Stats. & Regs. ¶ 32,132, 46 Fed. Reg. 24,585 (1981) (expanding the variety of transportation services available under the Order No. 234-B blanket certificate). The court found that the Commission's rules did not require transportation to be offered to anyone requesting it.

For further description of how these programs contributed to structural changes in the gas industry, *See* John Griggs, *Restructuring The Natural Gas Industry: Order No. 436 and Other Regulatory Initiatives*, 7 ENERGY L.J. 71 (1986); Means and Angyal, *The Regulation and Future Role of Direct Producer Sales*, 5 ENERGY L.J. 1 (1984); P. Marston, *Pipeline Restructuring: The Future of Open-Access Transportation*, 12 ENERGY L.J. 53, 57-60 (1991).

91. 23 F.E.R.C. ¶ 61,140 (1983) (allowing pipelines to market excess system supplies to other pipelines and distribution companies under circumstances also designed to protect traditional customers). The Commission also began liberalizing its abandonment policy under section 7(b) of the Natural Gas Act. It authorized limited term abandonments, whereby pipelines could sell gas previously committed to interstate sales for resale into the spot market. *E.g.*, Columbia Gas Transmission Corp., 33 FERC ¶ 61,233 (1985); Opinion No. 245, *Felmont Oil Corp. and Essex Offshore Inc.*, 33 F.E.R.C. ¶ 61,333 (1985). Pre-

initiatives formed the predicate for a program of non-discriminatory open-access transportation by interstate pipelines and a truly national market for natural gas, for which the Commission ultimately provided the regulatory framework in Order No. 436.<sup>92</sup> The Commission recognized as early as 1983, however, that new services, market access, and flexibility were meaningless without expeditious authorizations for the construction, expansion, and rearrangement of certain pipeline facilities.<sup>93</sup>

NEPA review represents a peculiar obstacle in the path of reform of construction-related authorization. Although NEPA directs agencies to examine the cultural, aesthetic, social, and economic effects of their actions, the Commission was looking for ways to delegate public interest determinations to the actions of contestable markets for commodities and services. The issue confronting the Commission was how to reconcile its developing role of light-handed regulation of the gas industry with the searching environmental scrutiny required by NEPA. The Commission began devising solutions to this dilemma as early as 1982. Order No. 234 allowed any blanket certificate holder to construct or abandon specified kinds of pipeline facilities without seeking separate authorization or giving prior notice if the cost and type of facility met specific requirements. New section 157.208, for example, allowed construction and operation of minor facilities such as small diameter lateral pipelines, field compression, or other facilities not constituting or affecting main line capacity, provided no single project would cost in excess of \$4.2 million.<sup>94</sup> Moreover, projects costing up to \$12 million could be constructed subject to the notice and protest procedures of section 157.205, which gave persons adversely affected (in theory, even competitors) an opportunity to delay and even prevent the expedited authorization (section 157.205(f),(g)). The Commission established similar differentiations between automatic and prior notice authorizations for gas transportation services to qualified end-users, local distribution companies, and intrastate or interstate pipelines. Changes were also made in construction of sales taps (section 157.211), changes of delivery points, storage services, increases in storage capacity, underground storage testing and development, abandonment of facilities, and changes in customer name.

From an environmental standpoint, Order No. 234 made two important

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granted abandonment of certain services was permitted pursuant to blanket certificates under Order Nos. 234-B and 319; 18 C.F.R. § 157.208 (1985); Griggs, *supra* note 90, at 86-90.

92. See Order No. 436, *supra* note 15.

93. In Order No. 234, *supra* note 14, the Commission created its "blanket certificate" program under which pipelines could obtain generic determinations of public convenience and necessity for routine activities such as the construction and operation of facilities, transportation services, construction and operation of sales tapes, storage services, underground storage testing and development activity, and abandonments of facilities. In conjunction with new gas transportation policies later adopted in Order No. 319, Order No. 234 was expected to save companies significant time and effort preparing individual requests for authorization under NGA section 7 for routine transactions, estimated at the time to be 25,000 workhours per year. *Id.* at 30,200.

94. 18 C.F.R. § 157.208(d) (1992) specifies adjusted annual dollar ceilings on project construction under automatic authorization and on all other facilities constructed under the certificate. For 1991, a certificate holder is authorized to construct an eligible facility costing up to \$6 million without prior notice. The limit for all other construction under the blanket certificate is \$16.7 million.

changes in the Commission's certificate process. First, the Commission began phasing out its "budget-type" certificate program under former section 157.7(b)-(g). This program had allowed pipeline companies to undertake construction and routine operations (gas supply facilities, miscellaneous rearrangements of facilities, up to three years of underground storage testing and development, abandonment of direct sales measuring stations, and field gas compression facilities) under certain cost limits, subject to a general application requirement and post-construction reports only. A company seeking a budget-type certificate had been required to supply an Exhibit F (location of facilities), Exhibit F-I (factors considered in use of joint rights-of-way), Exhibit F-II (factors used in locating projects in scenic, historic, recreational, or wildlife areas), Exhibit F-III (statement of adoption of construction guidelines), and Exhibit F-IV (statement of adherence to the requirements of NEPA).<sup>95</sup> However, because the applicant had only projected what construction of facilities might occur, the Commission was not apprised of specific projects actually built until weeks or months after completion. In its EA on Order No. 234 and in Order No. 319, the FERC therefore concluded:

Because of the nature of a budget-type application, the environmental information submitted usually does not specify the location and types of facilities to be constructed because the applicant does not know this at the time of filing. Thus, the environmental impact resulting from the approval of such applications cannot be specifically determined in advance . . . .

There is no question that environmental safeguards in the proposed rule are stronger than those currently in effect for budget-type certification.<sup>96</sup>

Notwithstanding these defects, the new blanket certificate program employed a method of authorization similar to the budget-type certificate. The Commission increased the project-specific and annual dollar limitations for automatic construction authorization under new section 157.208, acknowledging in its EA that, "because the proposed rule would expand the transactions allowed and enable larger projects to proceed absent case-by-case environmental review, there would be a potential for increased impact."<sup>97</sup> The means selected by the Commission to address this issue was its second major innovation.

Among the conditions imposed on blanket certificate holders under section 157.206 was compliance with NEPA's policies and with twelve other environmental statutes, including the NHPA, CZMA, and ESA, as well as related Executive Orders. In effect, no activity otherwise permitted under the blanket certificate would be authorized or could be lawfully undertaken unless the certificate holder observed the requirements of the listed statutes. The Commission grafted onto the consultative requirements of the NHPA, CZMA, and ESA specific procedures whereby any pipeline company applicant was obligated effectively to discharge the Commission's responsibilities.

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95. 18 C.F.R. § 157.14(a)(6) (1992); *See supra* note 63.

96. Environmental Assessment, *Blanket Certification of Gas Pipeline Transactions*, issued July 11, 1981 at 15-16 [hereinafter Order 234 EA]; Acceptance of a blanket certificate (like any section 7 certificate) required surrender by the applicant of any budget-type certificate authority. 18 C.F.R. § 157.206(e).

97. *Id.* at 16.

These measures ensure that endangered species and their critical habitats are protected,<sup>98</sup> that the appropriate agency in each affected state either determines that the project complies with the state's coastal zone management plan or waives its review,<sup>99</sup> and that there is no effect on historic properties included in, or eligible for inclusion in, the National Register of Historic Places.<sup>100</sup> In addition, the Commission withheld by rule its authorization for any transactions that would significantly or adversely affect a "sensitive environmental area",<sup>101</sup> entail an unacceptable noise impact from compression facilities,<sup>102</sup> or be situated within a specific distance from a nuclear power plant.<sup>103</sup>

These conditions and the delegation of environmental responsibility to the applicant comprised the core of the Commission's protective and mitigative regimen with respect to actions and projects authorized under the blanket certificate.<sup>104</sup> Not only did the Commission conclude that its rulemaking did "not [constitute a] major federal action significantly affecting the quality of the human environment . . .",<sup>105</sup> it established in Order No. 234 a template for treatment of issues under the NEPA and the other major environmental statutes that it would later employ more widely for project authorizations.

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98. 18 C.F.R. § 157.206(d)(3)(i) (1992) and Appendix I to Part 157, Subpart F.

99. 18 C.F.R. § 157.206(d)(3)(iii) (1992). Coastal zone management plans have recently figured prominently in review of major recent pipeline expansions; *See, e.g. infra* note 136.

100. 18 C.F.R. § 157.206(d)(3)(ii) (1992) and Appendix II to Part 157, Subpart F. A company is deemed in compliance with § 157.206(d) only if it adheres to the procedures of Appendix II, which provides for data gathering, evaluation, and mitigation in consultation with the appropriate State Historic Preservation Officer ("SHPO").

101. 18 C.F.R. § 157.206(d)(4) (1992). "Sensitive environmental area" is defined by 18 C.F.R. § 157.202(b)(11) (1990) as:

- (i) The habitats of species which have been identified as endangered or threatened under the Endangered Species Act (Pub. L. 93-205, as amended);
- (ii) National or State Forests or Parks;
- (iii) Properties listed on, or eligible for inclusion in, the National Register of Historic Places, or the National Register of Natural Landmarks;
- (iv) Floodplains and wetlands;
- (v) Designated or proposed wilderness areas, national or state wild and scenic rivers, wildlife refuges and management areas and sanctuaries;
- (vi) Prime agricultural lands, designated by the Department of Agriculture; or
- (vii) Sites which are subject to use by American Indians and other Native Americans for religious purposes.

102. 18 C.F.R. § 157.206(d)(5) (1992).

103. 18 C.F.R. § 157.206(d)(6) (1992).

104. A protest may be filed under 18 C.F.R. § 157.205 (1990) with respect to environmental problems raised by a project. While environmental protests are possible in theory, the Commission's notice under the requirements of 18 C.F.R. § 157.205(b)(5) and (6) (1992) is not likely to raise environmental issues on its face for public consideration. However, the Commission has consistently required preparation of an EA for any project authorized pursuant to the prior notice procedure under § 157.208(b). *See* Order No. 486, *supra* note 60, at 33,456.

105. Order No. 234, *supra* note 14, at 30,213. The Commission adopted several staff recommendations set forth in the Order 234 EA, including ambient noise limitations from compression facilities installed under a blanket certificate. *See* Order 234 EA, *supra* note 96, at 47-50.

## 2. NGPA Section 311 Construction

Blanket certificates complemented Congress' limited authorization under section 311(a) of the NGPA<sup>106</sup> for gas transmission services not subject to section 7 of the NGA.<sup>107</sup> Without the need to obtain a certificate to provide section 311 transportation services, pipelines were at liberty, without Commission supervision, to develop new arrangements and offer services to attach new supplies and serve new markets, provided the statutory "on behalf test" was met.<sup>108</sup> Order No. 46, which originally implemented section 311, also concluded that

the NGPA is silent on the jurisdictional consequences of participating in the construction and operation of the facilities necessary to effectuate transportation under section 311(a). It is our view that a facility is not subject to NGA jurisdiction if it is used exclusively for transportation authorized under section 311(a); thus, no certificate is required by section 7 of the NGA.<sup>109</sup>

By ratifying the non-jurisdictional status of section 311 facilities in Order No. 436, the Commission sought to integrate further intrastate and interstate systems into a national pipeline network, just as it had done by imposing uniformity on all transportation services not receiving case-specific NGA authorization.<sup>110</sup> Order No. 46 and Order No. 234 had yielded modest increases in pipeline construction. Order No. 436 represented a far more ambitious scheme. It eliminated the two-year and system-supply limitations on section 311 service. The EA of Order No. 436 acknowledged, however, that there was a "question of what might be constructed by transporters or shippers under the proposed section 311(a) program."<sup>111</sup> The Commission nevertheless con-

106. 15 U.S.C. § 3371(a) (1988).

107. Devised to integrate the intrastate and interstate gas pipeline markets, section 311 granted to the FERC power to authorize by rule or order "any interstate pipeline to transport natural gas on behalf of (i) any intrastate pipeline; and (ii) any local distribution company." Furthermore, NGPA section 601(a)(2), 15 U.S.C. § 3431(a)(2), made clear that the Commission's NGA jurisdiction "shall not apply" to transportation under section 311(a).

108. The interpretation and reinterpretation of this test has had a protracted history. Until pipeline companies began accepting blanket certificates under Order No. 436, open-access transportation occurred almost entirely under section 311. To remove regulatory restrictions on section 311 transportation, the Commission determined in 1988 that such service was authorized by statute if "some economic benefit" accrued to an LDC, interstate or intrastate pipeline on whose behalf the transportation occurred. *Hadson Gas Sys. Inc.*, 44 F.E.R.C. ¶ 61,082 (1988); In the case of *Associated Gas Distrib. v. FERC*, 899 F.2d 1250 (D.C. Cir. 1990), this broad application of the statute was reversed and remanded because of "its potential wholly to undermine the regime created by § 7 of the NGA" and its tendency to serve other than the limited purpose "to integrate the interstate and intrastate gas markets . . ." *Id.* at 1261-62; In reexamining how to implement section 311's directives, the Commission determined that the best reading of the statute requires the "on behalf of" entity to have title or custody of the gas transported under section 311. Order No. 537, *Revisions to Regulations Governing Transportation Under section 311 of the Natural Gas Policy Act of 1978 and Blanket Transportation Certificates*, III F.E.R.C. Stats. and Regs. ¶ 30,927 (1991).

109. Order No. 46, *Sales and Transportation of Natural Gas*, [1977-1981 Regs. Preambles] F.E.R.C. Stats. and Regs. 30,081 at 30,535 (1979), codified at 18 C.F.R. § 284.3 (1990).

110. "By encouraging pipelines to transport for others, the existing exemption [from FERC jurisdiction under § 284.3 promotes access to the commodity market by otherwise 'captive' customers that may be able to acquire access to alternative transporters as well as merchants." Order No. 436, *supra* note 15, at 31,552.

111. Environmental Assessment, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol* (Docket No. RM85-1-000)(October 1985). [hereinafter Order 436 EA].

cluded that, insofar as Order No. 436 might impact levels of construction activity, there would be no significant environmental impact.<sup>112</sup> That conclusion went unchallenged.<sup>113</sup>

The Commission's FONSI in Order No. 436 was arrived at in large part because the Commission decided "to impose environmental conditions under new section 284.11 on any Part 284 service authorized under section 311 that involves construction or abandonment of facilities. That condition applies to existing section 157.206(d), which provides for compliance with a variety of environmental laws . . . ."<sup>114</sup> This was the NEPA compliance strategy of Order No. 234 and an approach already approved by the courts: "[M]easures designed to mitigate the environmental consequences of a project may justify an agency's decision not to prepare an EIS."<sup>115</sup> The FERC's application of section 157.206(d) to section 311 construction through the general open-access condition of section 284.11 was, therefore, considered "a satisfactory protection from adverse impacts from facilities that could be constructed by interstate or intrastate pipelines on a self-implementing basis . . . ."<sup>116</sup> Such self-

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112. Finding Of No Significant Impact, Order No. 436, *supra* note 15, at 31,586-587.

113. The Commission's analysis scarcely constituted a "hard look" at the expanded section 311 program, however. Order 436 EA cursorily discussed seven section 311 alternatives, for example, including its preferred section 311 approach: (1) limiting section 311 service to existing projects; (2) imposing conditions on transportation; (3) requiring separate applications for all facilities construction; (4) limiting the size of projects automatically authorized; (5) retaining the system supply test and two-year limitation; (6) promulgating the rule without environmental review; and (7) obtaining a legislative exemption from NEPA review.

NEPA is violated if an agency decides not to prepare an EIS without adequately addressing environmental concerns, even if the EA is for a whole program of relatively indeterminate activities. *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 153-54 (D.C. Cir. 1985); *See also* *Foundation on Economic Trends v. Weinberger*, 610 F.Supp. 829, 841 (D.D.C. 1985); Environmental review of a program entailing multiple future activities does not necessarily require the same level of detail as review of one project or activity, but neither can that be an excuse for non-compliance with NEPA. *Scientists' Inst. for Pub. Info. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

114. Order No. 436, *supra* note 15, at 31,586. Although the facilities used for section 311 transportation are not themselves subject to NGA certificate requirements, Order No. 436 was a Federal "action" because the Commission was required by statute to prescribe the terms of the related transportation service. This NGPA conditioning authority resembles the authority the Commission exercises under the NGA. *See* *Associated Gas Distrib. v. FERC*, 824 F.2d 981, 1003 (D.C. Cir. 1987); Because the Commission cannot impose conditions directly on construction of non-jurisdictional section 311 facilities for lack of jurisdiction (unlike its authority to authorize transportation in interstate commerce through such facilities), an interesting question arises as to its ability to condition section 311 construction indirectly with compliance with § 157.206(d). *See* *Northern Cal. Power Agency v. FPC*, 514 F.2d 184 (D.C. Cir. 1975).

115. *Steamboaters*, 759 F.2d at 1394, (citing *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982)); *See also* *City and County of San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980); The Commission overlooked what is perhaps the critical difference between the success of mitigating conditions as applied to actions under an Order No. 234 blanket certificate and as applied to actions taken under section 311. Under the blanket certificate regulations, projects that are not minor or "well understood" to be routine are reviewed on a case-specific basis.

116. Order No. 436, *supra* note 15, at 31,586. However, the Commission required case-specific environmental review of any construction of facilities or abandonment with removal of facilities related to its new optional expedited certificate procedures under Part 157, Subpart E. These NGA section 7 procedures provide for the expeditious grant of certificates by allowing pipelines to compete head-to-head for the same routes. They also pregrant abandonment authority and put pipeline companies at risk to

implementing compliance with all applicable environmental laws was presumed to "mitigate" any potential environmental harm and thereby obviate an EIS, not only for individual section 311 and blanket certificate projects but also for the transportation program as a whole.<sup>117</sup> The Commission expected that "the services that necessitate construction will generally involve taps, metering, and interconnecting facilities" and that section 311 transporters of natural gas "will rely largely on existing facilities."<sup>118</sup>

Promulgation of section 284.3(c) signaled the Commission's intention not to require NGA authorization for facilities used solely to conduct section 311 transportation.<sup>119</sup> In the face of arguments that uneconomic construction would result from expanded section 311 transportation under the open-access rules and that Congress' interest in protecting consumers required NGA-type authorization for all pipeline facilities, the U.S. Court of Appeals for the D.C. Circuit held implicitly that facilities used in furtherance of section 311 transportation deserved the same self-implementation accorded the underlying service. It stated that ". . .in the NGPA [the Congress] declined to require a system of certification akin to that of section 7. Congress clearly recognized that consumer protection purposes can be achieved without control over entry."<sup>120</sup> The court thus supplied the FERC with a non-NEPA defense of its use of the section 157.206(d) environmental conditions; that is insofar as non-jurisdictional service was concerned, Congress' diminution of regulatory control over transportation and facilities also seemed to diminish agency environmental review responsibilities.

The Commission's open-access transportation program swiftly changed how most pipeline companies did business. Pipelines reduced their commitment to selling their own gas supplies at the citygate subject to long-term contracts. More and more companies responded to the new blanket certificate program of Order No. 436 and the increasing pressures of competition by becoming primarily transporters of gas for others. Pipelines and shippers thus began participating in geographically distant gas markets. The demand for new pipeline capacity began to increase.<sup>121</sup> Before the end of the 1980s, pipelines were planning major expansion projects, many of which were constructed without NGA authorization under section 311. Due to the fact that

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recover their costs through a volumetric rate structure. *Id.* at 31,579-580. An applicant under Subpart E must file an Environmental Report under what is now Appendix A to Part 380.

117. The CEQ has been traditionally hostile to justifying any FONSI on the basis of mitigation measures. *See supra* note 51 and accompanying text.

118. Order No. 436, *supra* note 15, at 31,587. *See* Order 436 EA which dealt most extensively with construction under the optional expedited certificate process.

119. North Penn Gas Co., 41 F.E.R.C. ¶ 61,307, at 61,802 (1987).

120. *Associated Gas Distrib.*, 824 F.2d at 1040.

121. By 1990, NGPA section 311 accounted for substantially greater amounts of open access transportation service than service under NGA section 7 blanket certificates. "Sixty-six (66) percent, 13 percent firm and 53 percent interruptible, of the carriage for market in 1989 occurred under NGPA Section 311 authority, slightly lower than the 1988 level of 70 percent. Carriage under Part 284 blanket certificates increased from 19 percent of carriage for market in 1988 to 29 percent in 1989. Gas moving under Section 7(c) certificates accounted for another four percent and pipeline to pipeline carriage made up the remaining percentage of carriage for market." Interstate Natural Gas Association of America, *Issue Analysis: Carriage Through 1989*, Report No. 90-2 at 4-5 (April 1990).

those plans sometimes turned out to be more extensive than Order No. 436 had contemplated, the Commission's construction authorization processes suddenly became subject to reexamination.

In 1990, the U.S. Court of Appeals for the District of Columbia tested the Commission's decision not to certificate construction of facilities destined solely to provide section 311 service. A petition for review and a Writ of Mandamus were filed to compel the Commission to prevent construction by ANR Pipeline Company of a 92-mile, 36-inch pipeline in Ohio called the "Lebanon Extension" under section 311.<sup>122</sup> Petitioners alleged that the FERC had erred in not requiring a certificate of public convenience and necessity for so significant a project and that it had also failed to comply with the requirements of NEPA and the NHPA.

The Commission responded that under section 157.206(d), it would effectively withhold construction authority, even under section 311, from any company failing to comply with the consultative and mitigative processes in the regulations. Placing its actions in the full context of economic regulatory developments, it further stated that "the Commission's regulations implementing section 311 take into account the market oriented purpose of the NGPA and the particular aim of section 311, and they then balance those interests with the Commission's further responsibilities to see that environmental purposes are adequately served."<sup>123</sup> The Commission and the company then recited the consultation efforts that had occurred between ANR and various state and federal agencies. The court denied the requests for a stay and expedited consideration *per curiam*.<sup>124</sup> The Commission apparently had demonstrated to the court's satisfaction that, at least in this instance, it had reserved sufficient capability to enforce environmental requirements on projects it authorized only in the most general way under section 284.3(c).

### 3. FERC's Mobile Bay Pipeline Problem

ANR's Lebanon Extension was one of several large section 311-only projects under construction in 1990.<sup>125</sup> The Commission's confidence that it

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122. Emergency Motion to Expedite Consideration of the Mandamus Relating to Respondent Federal Energy Regulatory Commission, *City of Germantown v. FERC*, No. 90-1194 (D.C. Cir. 1990). Although the project was constructed pursuant to section 311, the company also applied for authorization to operate it under NGA section 7. See *ANR Pipeline Co.*, 54 F.E.R.C. ¶ 61,032 (1991).

123. Response of the Federal Energy Regulation Commission In Opposition To The Emergency Motion to Expedite Consideration of the Mandamus Relating To Respondent Federal Energy Regulation Commission, *City of Germantown v. FERC*, No. 90-1194, at 16 (D.C. Cir. 1990). Self-implementing environmental review did not have the total support of the Commissioners, however. Commissioner Moler's contrary view was stated in the pleading. Commissioner Moler takes exception to this observation [i.e., that § 157.206(d) is an adequate response to environmental concerns]. She does not believe that Congress intended section 311 of the NGPA to provide an exemption from the requirements under section 7(c) of the NGA and section 102 of NEPA for the Commission to conduct a case-specific pre-construction review of the Project. *Id.* note 14, at 16.

124. In a response to inquiries by Senator Howard Metzenbaum at the height of the debate over the Lebanon Extension, the FERC Chairman pointed out that Commission staff was making field investigations even of section 311 projects. Letter, Martin L. Allday to Honorable Howard M. Metzenbaum, January 5, 1990, at 3-4.

125. Pipeline companies that build projects under section 311 authority may use those facilities only to

could police the environmental impacts of these projects had to do in part with its enforcement powers under the NGA and NGPA. The Chairman made clear in his January 5, 1990 letter to Senator Metzenbaum that the FERC possessed broad authority under section 501(a) of the NGPA<sup>126</sup> to take whatever action may be necessary or appropriate to carry out its statutory functions. NGPA section 504<sup>127</sup> allowed the Commission to initiate civil enforcement action in a federal district court or assess civil penalties for knowing violations of the NGPA, including any environmental requirements established thereunder. As it happened, the Chairman was able to direct the Senator's attention to a dramatic example of pipeline construction activity run amok.

In order to attach new gas supplies in the Mobile Bay region of Alabama, Transcontinental Gas Pipe Line Corporation ("Transco") constructed in 1987 two major pipeline facilities under section 311. Notwithstanding the applicable terms and conditions of section 157.206(d), which included compliance with the NHPA of 1966, Transco commenced this activity prior to the completion of consultation with Alabama's SHPO.<sup>128</sup> As a result, Transco's Mobile Bay projects were completed without regard to 77 archaeological sites that had been discovered to be partially or entirely within the projects rights-of-way. However, not only had the SHPO not completed the tasks specified in the highly-specific Appendix II to the blanket certificate regulations but Transco's clearing, grading, trenching, and pipe-laying activities had also damaged or destroyed 22 sites eligible for inclusion in the National Register of Historic Places.

On July 26, 1989, Transco was given notice of \$37 million in NGPA civil penalties.<sup>129</sup> By Stipulation and Consent Agreement with the Commission

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transport natural gas under section 311. If any certificated service is provided pursuant to the NGA, the pipeline company must obtain certificates of public convenience and necessity for both the service and the facility. In reality, companies began filing for NGA section 7 authority even as their section 311 projects were nearing completion. North Penn Gas Co., 41 F.E.R.C. ¶ 61,307 (1987)(Declaratory Order); Arkla Energy Resources, a division of Arkla, Inc. 54 F.E.R.C. ¶ 61,033 (1991)(225-mile line from the Arkoma Basin to Eastern Arkansas); ANR Pipeline Co. 54 F.E.R.C. ¶ 61,032 (1991)(96-mile Lebanon Extension); Trunkline Gas Co. 54 F.E.R.C. ¶ 61,032, at 61,101 (1991)(54 miles of Lebanon Extension).

126. 15 U.S.C. § 3411(a) (1988)

127. 15 U.S.C. § 3414 (1988).

128. Appendix II to Subpart F, Part 157 of the Commission's Regulations (which Order No. 555 would replace) withholds Commission authorization unless (1) the pipeline company has gathered data on any protected properties located in the area of the project's potential impact, if required by a SHPO, (2) such survey is deemed adequate by the SHPO, and (3) a determination is made whether eligible properties exist in the area of the project, pursuant to the Criteria of Evaluation established by the Advisory Council on Historic Preservation; *See supra* notes 72,97.

129. Transcontinental Gas Pipe Line Corp., Notice of Proposed Civil Penalty, 48 F.E.R.C. ¶ 61,189 (1989). Without NGPA section 311(a) authorization, Transco's construction activity and operation of its Mobile Bay facilities required NGA section 7 authorization. 48 F.E.R.C. ¶ 61,133 (1989). The Commission therefore ordered Transco to show cause why it was not in violation of both statutes. The Commission's willingness to establish a believable level of deterrence by use of its enforcement powers has virtually no significance for NEPA compliance if no Record of Decision exists, even though enforcement practices may have great significance for the viability of any scheme of self-implementation; Many agencies lack organic power to require mitigation or to fine non-federal parties for environmental violations. Lesser, *supra* note 35, at 392.

Enforcement Staff, approved on May 29, 1991 by the Commission, Transco agreed to pay \$25.5 million in civil penalties and restitution, in addition to financial support for remediation measures and to seek NGA authorization for the facilities. The agreement terminated litigation over Transco's alleged violations of section 157.206(d).<sup>130</sup>

The *Transco* case illustrates the limits of the Commission's ability to ensure the integrity of affected environmental features against violations of its regulations. Although self-implementing section 311 transportation signaled the Congress' intention to depart from traditional utility-type regulation, the extension of self-implementation into the area of major pipeline construction raised a question whether Congress also intended to loosen reins on matters having environmental impacts.

The *Transco* case also demonstrates the importance of timely review of construction plans and the need for oversight that is preventative, not merely punitive or remedial, in nature. The proper timing of decisions is a critical feature of environmental review, as NEPA and the CEQ regulations emphasize. Environmental review, if it occurs during the formulation of private proposals and before an agency grants authorization, affords the agency a timely perspective on the upcoming activity and an opportunity to order mitigation of any adverse effects.<sup>131</sup> *Transco* dramatized how fallible the Commission's efforts could be in individual cases in balancing its NEPA obligations against the competitive pressures on companies and regulators for expedition in evaluating and authorizing proposed pipeline facilities.

#### B. *Phasing Optional Certificate Authorizations*

The new means of obtaining authorization had inherent limitations. Only projects of a certain type and cost were eligible for automatic authorization under the blanket certificates program. The usefulness of section 311 was likewise diminished by: (1) the FERC's unwillingness to allow even operational facilities to be rolled into a pipeline's system-wide rates under NGA section 4;<sup>132</sup> (2) the uncertainty that accompanied changes to the "on behalf of" test;<sup>133</sup> and (3) questions about the legal sufficiency of the section 157.206(d) for large section 311 projects. Applicants therefore continued to seek authorizations under NGA section 7(c) for projects of significant scope, subject to the Commission's case-specific environmental scrutiny in an EA or EIS.<sup>134</sup>

In 1985, regional demands for additional gas supplies and thus for greater deliverability began to accelerate, most notably in the Northeast,<sup>135</sup> the Gulf

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130. Transcontinental Gas Pipe Line Corp., 55 F.E.R.C. ¶ 61,318 (1991).

131. See 40 C.F.R. §§ 1501.1, 1501.2, 1505. See also *supra* note 33 and accompanying text; *Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978), *vacated in part*, *Western Oil and Gas Assoc. v. Alaska*, 439 U.S. 922 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390 at 409; *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974); *Scientists' Inst. for Pub. Info. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

132. Transcontinental Gas Pipe Line Corp., 44 F.E.R.C. ¶ 61,400 (1988).

133. See *supra* notes 108,125.

134. 18 C.F.R. § 380.5(b)(1-3) (1992); 18 C.F.R. § 380.6(a)(1-3) (1992).

135. In 1987, the Commission conducted an "open-season" to attract pipeline applications to serve the Northeast. *Northeast U.S. Pipeline Projects*, 40 F.E.R.C. ¶ 61,087 (1987); Long after beginning an initial

Coast,<sup>136</sup> and the Enhanced Oil Recovery ("EOR") market of Southern California.<sup>137</sup> The Commission was confronted by the need to sort out competing applications according to the traditional principle of mutual exclusivity, which requires comparative hearings to determine which of several proposals best serves the public interest in terms of market demand, supply of gas, financing, and other factors.

The optional certificate procedure developed in Order No. 436 afforded one solution to this problem.<sup>138</sup> To the extent an applicant was willing to offer open access transportation and to agree to volumetric rates that guarantee no level of revenue, the Commission was willing to authorize the proposed project notwithstanding direct competition from other project applicants, all things being equal.<sup>139</sup> The economic appeal of this optional procedure was ease of entry and exit. In the Commission's view, it eliminated the need to

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31 distinct projects, 21 of which were competitive or arguably mutually exclusive, the Commission in 1990 granted certificates to the so-called Iroquois/Tennessee projects serving various markets with both U.S. and Canadian gas supplies. Opinion No. 357, Iroquois Gas Transmission System, L.P., 53 F.E.R.C. ¶ 61,194 (1990). A summary of the proceedings is set forth at 61,671-680. Environmental issues raised by the EIS and intervenors are analyzed by the Commission at 61,758-779; See also 52 F.E.R.C. ¶ 61,091 at 61,400-405, and Appendices M(1), M(2), and N.

136. In addition to the Transco Mobile Bay project, See *supra* note 115 and accompanying text, 15 applications for onshore and offshore facilities were filed before August 30, 1988, mostly pursuant to an open season procedure. Mobile Bay Pipeline Projects: Deadline for 1988-1989 Certification of Mobile Bay Construction Applications, 53 Fed. Reg. 29,519 (1988). On June 4, 1991, the Commission approved an Onshore Settlement among 6 pipeline companies and an Offshore Settlement among 5 companies thereby resolving mutual exclusivity impediments to competing projects. Mobile Bay Pipeline Projects, 55 F.E.R.C. ¶ 61,358 (1991). The Commission conditioned its certificate approvals on compliance with 30 mitigative measures set forth in Appendix G to the Order, developed as a result of a Comprehensive Environmental Assessment, which in the Commission's opinion supported a FONSI. *Id.* at 62,079-86.

137. In 1985, applications for traditional NGA section 7(c) certificate authorization were filed by Mojave Pipeline Company (Docket No. CP85-437-000), Kern River Gas Transmission Company (Docket No. CP85-552-000), and El Paso Natural Gas Co. (CP86-197-000). The comparative hearing for the resulting *Mojave/Kern River* proceeding was divided into phases, with environmental consideration in Phase II. An Initial Decision on Environmental Issues was issued by the ALJ on October 25, 1988. 45 F.E.R.C. ¶ 63,005 (1988). Before conclusion of this proceeding, Mojave and Kern River filed optional certificate applications for the same facilities in Docket Nos. CP89-1-000 and CP89-2047-000, respectively, to compete with Wyoming-California Pipeline Company's (WyCal) 1988 application for an optional certificate for a 1000-mile pipeline to serve the EOR market (Docket Nos. CP87-479-003 and CP87-480-001). The Mojave/Kern River proponents were unsuccessful in persuading the Commission that it must consider WyCal in the context of a comparative hearing; See, e.g., Wyoming-California Pipeline Co., 45 F.E.R.C. ¶ 61,234 (1988); Optional certificates were issued to both Kern River and Mojave. 50 F.E.R.C. ¶ 61,069 (1990).

By certificating more than one pipeline to serve the EOR market, the Commission limited when it would apply the principle of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) that comparative review or a hearing is required when an agency is presented with similarly situated, mutually exclusive proposals. Consistent with its approach in Order No. 436, the Commission recently held that the *Ashbacker* principle does not apply if one of the competitors accepts the economic risks of its proposal by operating without rolling the project's costs into its overall system rates. Questar Pipeline Co., 59 F.E.R.C. ¶ 61,307 (1992) and 59 F.E.R.C. ¶ 61,363 (1992).

138. See EOR cases, *supra* note 134.

139. Among other things, this theoretical lack of mutual exclusivity allowed the Commission to avoid consolidating similar certificate proposals for consideration in a comparative hearing, as required by *Ashbacker*, 326 U.S. 327 (1945). See Wyoming-California Pipeline Co., 45 F.E.R.C. ¶ 61,234, at 61,675-76 (1988).

examine the traditional NGA certificate considerations, which acted as a time-consuming barrier to effective competition.

To enhance the attractiveness and speed of the optional procedure, the Commission segregated the associated environmental review. It employed phased environmental and non-environmental decisionmaking to grant an optional expedited certificate to the Wyoming-California Pipeline Company ("WyCal"). WyCal had proposed to build a pipeline from Lincoln County, Wyoming to Bakersfield, California<sup>140</sup> to serve the EOR market in direct competition with other long-line systems previously proposed to the Commission. The Commission first made a preliminary determination that the project was required by the public convenience and necessity under NGA section 7. However, the Commission maintained that issuance of a determination on non-environmental issues was merely a conditional certificate to become effective upon completion of environmental review.<sup>141</sup> Its objective in addressing environmental and non-environmental issues in phases was to "provide a measure of stability to the project . . . by facilitating financing arrangements and contract negotiations . . . [and therefore to give] natural gas companies greater opportunity to compete effectively in the marketplace."<sup>142</sup>

In the opinion of the CEQ, the Commission's phasing of project-related decisions was contrary to the spirit of NEPA. The CEQ maintained that environmental review should accompany, not follow, any decision that might effectively short-circuit objective review or eliminate any alternative courses of action.<sup>143</sup> This called into question whether the Commission's preliminary determinations are effectively decisions on the merits and therefore irretrievable steps toward project authorization. Competitors that had intervened in the *WyCal* proceeding likewise contended that the Commission was prohib-

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140. Wyoming-California Pipeline Co., 50 F.E.R.C. ¶ 61,070 (1990), 46 F.E.R.C. ¶ 61,029 (1989), vacated in part, 44 F.E.R.C. ¶ 61,210 (1988), 45 F.E.R.C. ¶ 61,353 (1988), 44 F.E.R.C. ¶ 61,001 (1988).

141. Because the Commission required that the environmental impacts of the WyCal project be subject to the EIS and comparative hearing process in progress in *Mojave/Kern River*, it waived the requirements of § 157.206(d), which is otherwise applicable to all optional certificate proceedings under § 157.103(i) of the Commission's regulations. 44 F.E.R.C. ¶ 61,001, at 61,013; 45 F.E.R.C. ¶ 61,234, at 61,691, n.13.

142. Delta Pipeline Co., 52 F.E.R.C. ¶ 61,004, at 61,042-43 (1990). The Commission had used similar phasing procedures to consider separately certain services or facilities, while deferring review of other aspects of an application. *Id.* at 61,042, n.1.

143. "The purposes of NEPA — to anticipate environmental problems at an early stage and to find alternatives that would avoid them — cannot be achieved by adding environmental review requirements onto agency decisions that have already been made and choices among alternative courses of action that have been effectively eliminated." Letter to Lois D. Cashell, Secretary, FERC, from Dinah Bear, General Counsel, CEQ, October 29, 1990, at 4, filed as an initial comment to revise the FERC's certificate process [hereinafter Initial Comments of CEQ]; See also Notice of Proposed Rulemaking, *Revisions To Regulations Governing Certificates for Construction*, IV F.E.R.C. Stats. & Regs. ¶ 32,477 (1990). [hereinafter Construction NOPR]; See 40 C.F.R. Parts 1500.1(b), 1500.2(c), 1506.1 (1991). Under both NEPA and the CEQ regulations, the requirement that agencies concurrently examine the merits of the proposed action and its environmental impacts, including alternatives and any irreversible and irretrievable commitment of resources, applies primarily to actions determined to be major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1988); In some instances, protracted review of NGA issues is not completed by the Commission until after a Final EIS is completed, notwithstanding the Commission's use of "preliminary determinations." Iroquois Gas Transmission System, L.P., 52 F.E.R.C. ¶ 61,091, at 61,400-406 (1990).

ited by the CEQ regulations from taking any action that would limit its choice of alternatives, contrary to the intent of NEPA.<sup>144</sup> The Commission denied rehearing. After assuring these intervenors that phasing would not deter the Commission from making "environmental review an integral part of the decision making process," it promised not to issue a certificate if the adverse impacts of the project could not be mitigated or if WyCal's application was determined not to conform to the Commission's requirements.<sup>145</sup> On review, such challenges to the phasing procedure failed to persuade the court.<sup>146</sup>

Petitioners contended that the Commission had failed to balance the adverse environmental effects of the project against the need for, and viability of, the project because no particularized inquiry was made into the project's benefits.<sup>147</sup> The Court of Appeals concluded that the Commission had employed its optional certificate process under Order No. 436 to weigh the public interest in authorizing construction of such facilities against the "relatively insubstantial environmental harm which will result from a properly mitigated WyCal pipeline."<sup>148</sup> In the court's view, NEPA does not command a more particularized inquiry. Insisting on this analysis "would disable any number of efforts at streamlining the resolution of regulatory issues that have nothing to do with the environment. An agency's primary duty under the NEPA is to "take a hard look at environmental consequences." "<sup>149</sup>

Similarly, the court dispatched objections to phasing based on the CEQ principle set forth at 40 C.F.R. section 1500.1(b) that environmental data must be available to decisionmakers and the public *before* any action in furtherance of an activity are taken. The court held that the Commission's Phase I non-environmental final decision under the NGA to certificate the WyCal project was defensible under the CEQ regulations because it would not be effective until after a Phase II hearing on environmental matters.<sup>150</sup> Finally,

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144. 45 F.E.R.C. ¶ 61,234, at 61,676 (1988) (citing 40 C.F.R. §§ 1506.1(a)(2), 1501.1, 1501.2).

145. *Id.* In response to the Commission's assurances that no authorizations under the NGA were effective until after completion of NEPA review, industry commentators advocated insulating any non-environmental preliminary determinations from subsequent challenge or revision at the environmental stage. *E.g.*, Initial Comments of the CEQ, *supra* note 143; Initial comments of Interstate Natural Gas Assoc. of America, at 7-12; ANR Pipeline Co./Colorado Interstate Gas Co. at 41.

146. *Public Util. Comm'n of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990) [hereinafter *CPUC*].

147. Under *Kansas Pipe Line & Gas Co.*, 2 FPC 29, 35 (1939), the traditional certificate of public convenience and necessity for gas pipeline facilities, which amounted to an exclusive franchise, is based on evaluation of the availability of supplies needed to satisfy anticipated demand, the presence of adequate customer demand "in the territory proposed to be served," the adequacy of proposed facilities and the reasonableness of rates and charges; *See* 18 C.F.R. Part 157, Subpart A. Optional expedited certificates are issued without evaluation of many of these factors because the pipeline company bears the financial risk of its success. This approach is codified by Order No. 555, *supra* note 8.

148. *CPUC v. FERC*, 900 F.2d at 282 (citing *Mojave Pipeline Co.*, 46 F.E.R.C. ¶ 61,029, at 61,168 (1989)).

149. *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 21). The court nevertheless acknowledged that under the optional procedures a project the environmental features of which were a "significant net negative" might be improperly certificated. However, such a possibility would not justify "burying the Commission in red tape."

150. *Id.* relying on *Illinois Comm. Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), in which the court approved the ICC's generic exemption pursuant to the Staggers Rail Act of a railroad abandonment of unused lines granted before assessment of environmental information and the effective date of the

the court found no merit to arguments that the Commission should have analyzed together the cumulative impacts of the WyCal project and its competitor pipelines, observing that it was widely assumed that economic reality would accommodate only one pipeline. The court's decision in *California Public Utility Commission ("CPUC") v. FERC*<sup>151</sup> effectively allowed the Commission to employ phasing in all cases where the traditional merits under the NGA might weigh more lightly because of the applicants' assumption of risks ordinarily shared by ratepayers,<sup>152</sup> or where the environmental statutes that complement NEPA allow the Commission to defer, until after a final Commission order, any final environmental or cultural resource solutions.<sup>153</sup>

Under *CPUC*, it appears that the Commission can meet its NEPA obligations if it can demonstrate that environmental and non-environmental reviews coincide with one another at the conclusion of a proceeding. This conception of the NEPA process differs from the approach that the CEQ appears to favor under which jurisdictional agency decisions and environmental review are not procedurally compartmentalized, especially if the regulated activity is deemed to require an EIS. The *CPUC* decision is the first recognition that, where agencies are being pushed to reform regulation by abbreviating or eliminating procedures that have traditionally involved them in complex non-environmental analysis, the "essentially procedural" requirements of NEPA can be applied with a significant degree of flexibility. For critics who fear evisceration of NEPA's substantive goals, the matter may not end there, however.

*CPUC* is not a robust analysis of NEPA's requirements. The proposition that an agency is not prevented from making final decisions on the merits before assessing environmental data, provided such data are considered before the decision becomes effective,<sup>154</sup> is not consonant with the CEQ's more rigorous reading of NEPA. Moreover, the decision draws upon *Illinois Commerce Commission v. I.C.C.*, which involved the Interstate Commerce Commission's second attempt to explain on remand how its notice procedures to exempt certain rail abandonments from regulation afforded adequate consideration of the environmental consequences of such action. In that case, the D.C. Circuit held that the I.C.C.'s failure to prepare at least an EA on its generic regulations was mere procedural error not warranting another remand,<sup>155</sup> particularly in light of its promise to the court to provide for environmental review and mitigation between the time of any notice of an abandonment and the

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decision. In the NEPA context, the court found "eminently reasonable" the Commission's practice in the underlying proceeding of establishing specific mitigation measures at the commencement of construction; The Commission had also relied on *Illinois Commerce Comm'n* in Opinion No. 357 to rebut challenges to its "position that a certificate can be issued prior to the completion of the cultural resource work" involving historic places under the NHPA. 53 F.E.R.C. ¶ 61,194, at 61,763-64 (emphasis added); Post-certification environmental review and mitigation, usually required by certificate conditions, is cited by the FERC as a "longstanding practice of the Commission." *Id.*; See also *Texas Eastern Transmission Corp.* 47 F.E.R.C. ¶ 61,341 (1989); *Tennessee Gas Pipeline Co.*, 51 F.E.R.C. ¶ 61,113 (1990); *Columbia Gas Transmission Corp.*, 48 F.E.R.C. ¶ 61,050 (1989).

151. *CPUC v. FERC*, 900 F.2d at 277, n.6.

152. See, e.g., *Delta Pipeline Co.*, 52 F.E.R.C. ¶ 61,004 (1990).

153. See *supra* note 150.

154. 900 F.2d at 282 (citing *Illinois Comm. Comm'n*, 848 F.2d at 1259).

155. 848 F.2d at 1259.

effective date under the regulations, which, absent protests and further agency action, would occur 30 days later.<sup>156</sup> The *Illinois Commerce Commission* court stated that publication of the notice "is not itself the final decision" because it does not entail formal review and disposition of any staff and intervenor arguments that may be filed.<sup>157</sup> Primarily, "the notice serves to alert interested parties about the abandonment and provides information . . ."<sup>158</sup>

By equating the I.C.C.'s notice procedure with the Commission's preliminary but conclusive determination on whether the public convenience and necessity requires a project on non-environmental grounds, the court in *CPUC* chose to ignore the possibility that the FERC's Phase I decisions would impel both the Commission and private parties toward implementation of the pending proposal. Notwithstanding the Commission's resolve to fairly examine environmental factors during Phase II and to halt full authorization, if necessary, preliminary determinations would be virtually meaningless unless they would significantly increase the likelihood of certification and hasten financial commitments to the proposed project or activity.<sup>159</sup>

In the final analysis, it is inescapable that changes in the Commission's mode of authorizing pipeline construction resulted in new prominence for the examination of environmental concerns, even if the Commission's motives or techniques might sometimes be suspect. Under both the Commission's phasing technique and the notice and protest procedure of section 157.206(d) the Commission focuses on actively mitigating or prohibiting adverse environmental impacts in the interest of administrative efficiency, rather than merely identifying such impacts and balancing these against the non-environmental justifications for the project. In that sense, regulatory reform has potentially benefitted environmental review over and above anything anticipated by NEPA's authors.

#### IV. NEPA AND CONTINUED REGULATORY REFORM

##### A. *Order No. 555: Cure or Relapse?*

Its administrative reforms notwithstanding, the Commission's efforts to address the capacity constraints on the gas transmission network lagged behind the demands of the industry. During the late 1980s, pressure was

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156. Under severe time constraints, these procedures arguably yield only *pro forma* NEPA compliance rather than thoughtful evaluation of the data gathered. See Montange, "NEPA In An Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission," VA. ENVTL. L. J. 1, 38-39 (the author also lost that same argument before the D.C. Circuit. *Illinois Commerce Commission*, 848 F.2d at 1260).

157. 848 F.2d at 1259.

158. *Id.*

159. See, e.g., *Delta Pipeline Co.*, 52 F.E.R.C. ¶ 61,004 at 61,043 (stating that, although preliminary determinations "in no way diminish the importance of environmental review," they may provide stability by "facilitating financing arrangements and contract negotiations."); Criticism that phasing short-cuts, the selection of alternatives by the Commission and private project sponsors, contrary to the CEQ regulations, was levied by the CEQ and the U.S. Fish and Wildlife Service in response to the *Construction NOPR*, *supra* note 143. Initial Comments of the CEQ, at 4-5; Comments of the Department of the Interior, U.S. Fish and Wildlife Service, at 2-3; The American Gas Assoc. and others found the criticism unjustifiable, from a practical standpoint. Reply Comments of AGA, at 4-6, *Id.*

exerted on the Commission to find even swifter means of discharging NGA and NEPA responsibilities by pipelines competing for open-access transportation business, gas producers seeking dissipation of the gas bubble and access to markets for major new sources of supply, and unregulated marketers wanting capacity under conditions of maximum flexibility to facilitate customer access to spot markets. The objective of end-users and distributors was to maximize their purchasing options so as to replicate the reliability they had as purchasers of pipeline system supply. Impatience with the FERC procedures persisted under these demands.

On June 27, 1991, the GAO reported to an oversight committee the quantitative dimensions of the problem:

Overall, FERC and pipeline industry officials told us that the length of time FERC takes to approve pipeline construction is a problem. The median time for the 125 certificates or approved applications we reviewed was 331 days. Fifty-five, or more than 40 percent, took longer than 1 year, with 10 taking 2 or more years. In addition, as of March 4, 1991, of the 72 pending construction applications, 37 had been in process for over 1 year — many of these for over 2 years. Factors affecting the length of time it takes to process applications include: intervention, a legal form of participation in the process by competitors or other parties; projects involving multiple applicants seeking to build related pipelines or facilities; unresolved policy issues; incomplete applications; and environmental reviews.

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. . . FERC's median time to complete its environmental reviews was 568 days for environmental impact statements, 242 days for formal environmental assessments, and 229 days for informal environmental assessments. FERC took a median of 250 days to determine eligibility for exclusion in five cases.

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FERC maintains that a major cause of delay in approving pipelines is that other agencies do not review environmental documents in a timely manner and that these proposals, along with the authority to proceed without input from other agencies, would speed approvals. . . . Thus, we continue to believe that reaching formal agreements with other agencies would help FERC to resolve coordination issues in reviewing environmental documents.<sup>160</sup>

Commission decisionmakers frankly acknowledged the difficulties inherent in satisfying the FERC's various constituencies and fulfilling its diverse statutory obligations, particularly when pipeline companies submitted incomplete applications or the NEPA process was used by intervenors for competitive advantage. The FERC's General Counsel summarized the frustration:

There clearly is a prevalent view, I think incorrect, that the commission's certificate process is too cumbersome. It's always ironic to me when people say that. I defy anybody to name a major pipeline certificate case, and I guarantee I can go to the record in that case and find one party saying the commission is acting too fast, I can find another party saying the commission's process is too slow, I can find another party saying the commission's process violates NEPA, and I can find another party saying the commission is requiring too much environmental review.<sup>161</sup>

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160. Testimony of Victor S. Rezendes, U.S. General Accounting Office (GAO/T-RCED-91-73), Synar Hearing, *supra* note 81, at 1, 7, 16.

161. *Under Fire, FERC Seeks to Speed Pipeline Permitting*, OIL & GAS J. (November 5, 1990), at 14.

The Commission nevertheless tried to satisfy requests for greater administrative efficiency. The changing economics of the gas business, increasing competitiveness, a sense of urgency within the industry, and more demanding Congressional oversight made clear that the procedures for authorizing pipeline construction had to be seriously reexamined. At first, an internal Commission task force under Commissioner Moler's leadership focused upon the virtual disuse of the optional certificate process. That inquiry swiftly expanded to include all NGA construction-related authorizations. On August 2, 1990 the Commission issued its long-anticipated Notice of Proposed Rulemaking to streamline its authorizations of pipeline projects.<sup>162</sup> It proposed to "reduce the number of projects that will require the filing of an application by substantially increasing the dollar ceilings on projects which may be done under our blanket certificate regulations,"<sup>163</sup> add an accelerated project approval process which would be available for many types of facilities including mainline construction costing up to \$50 million,<sup>164</sup> clarify filing requirements with respect to environmental data submitted by pipeline applicants,<sup>165</sup> and codify optional and other certificate procedures, including phasing, that had evolved on a case-by-case basis.<sup>166</sup>

Naturally, the greatest obstacle to the proposal's adoption and success was whether the Commission could effectively reconcile the NEPA process and the agency's desire to accelerate construction authorizations. The Commission proposed not to diminish the breadth and depth of environmental review per se, but wished to require applicants to alter their proposed activities and adhere to generic preconditions so as to mitigate adverse impacts. As had been its practice, where feasible, the Commission proposed to circumnavigate the entanglements of the EIS or EA processes, as well as to achieve an additional measure of responsiveness, by preventing or reducing to acceptable levels the potential adverse impacts of proposed projects. Faced with the FERC's ponderous procedural alternatives, applicants were in effect encouraged to seek benign construction options. The Construction NOPR also proposed case-specific environmental review where there had been none, however.

First, the FERC proposed elimination of section 157.103(i) from the optional certificate rules thereby replacing the section 157.206(d) condition which had been waived in the WyCal proceeding,<sup>167</sup> with individualized environmental review.<sup>168</sup> Similarly, the Commission proposed to end the exemp-

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162. Construction NOPR, *supra* note 143.

163. *Id.* at 32,457, 474-477.

164. *Id.* at 32,472-474.

165. *Id.* at 32,479-484.

166. *Id.* at 32,467-471, 32,484-487; In their comments, CEQ and the Fish and Wildlife Service severely criticized many of the Commission's procedural innovations, claiming that phasing circumvents NEPA review, and that "automatic authorization" of section 311 construction should be rescinded. Initial Comments of the CEQ (Letter of D. Bear to L. Cashell, *supra* note 143), at 4-5; Comments of Department of the Interior, Fish and Wildlife Service, at 2-4. See Reply Comments of American Gas Association, for review of these criticisms. *Id.*

167. See *supra* note 141.

168. Construction NOPR, *supra* note 143, at 32,469-70.

tion, for the replacement of pipeline facilities, regarding notice and review (section 2.55(b)), because "it is easily conceivable that replacement of a pipeline may seriously disturb certain endangered species or delicate wildlife."<sup>169</sup> Proposed section 157.219 would provide automatic authorizations if certain criteria, including substantially increased cost ceilings, were met. However, no automatic authorization would be available under the new regulations for any facility "regardless of size or cost which involves the removal of existing facilities (which could, for example, contain PCBs or other toxic substances) or construction of facilities in urban or residential areas."<sup>170</sup>

The Construction NOPR addressed the environmental consequences of the Commission's decision to allow construction of non-jurisdictional pipeline facilities under NGPA section 311 without NGA-type review. That authority had been employed to construct extensive pipeline facilities in the 1980s even though the scope of the Commission's duty to regulate such construction had been in doubt. The prevailing view had been that NGPA section 311 permitted construction of non-jurisdictional facilities conditioned only upon compliance with section 157.206(d).<sup>171</sup> The Commission nevertheless expressed a willingness to exercise greater oversight: "The threshold question to be determined is whether our current procedures are, in fact, adequate for expansive pipeline projects."<sup>172</sup> Commissioner Moler dissented from the majority's affirmative answer to that question, pointing to the erroneous conclusions drawn in the EA performed for Order No. 436 with regard to the type of projects that would be built pursuant to section 311. She stated further:

The approach taken in section 157.206(d) is to require those who undertake section 311 construction to certify that they will comply with a wide variety of statutes. That approach must fail. This Commission cannot delegate its responsibilities to insure that the NEPA is complied with. Rather, NEPA requires this Commission to evaluate independently the environmental impact of section 311 construction, and alternatives to that construction, before the construction occurs.

The Commission has been instructed in very clear language that it, and it alone, bears that responsibility.<sup>173</sup>

Proponents of the majority's approach argued in their comments that imposing section 7(c) style procedures on section 311 construction would vio-

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169. *Id.* at 32,471. In recognition of the need to replace promptly any obsolete or damaged pipeline, however, the Commission imposed on an interim basis only a requirement that companies provide 30 days notice of such activity. See *Interim Revisions to Regulations Governing Construction of Facilities Pursuant to section 311 and Replacement of NGPA Facilities*, [Regs. Preambles 1986-1990] F.E.R.C. Stats. and Regs. ¶ 30,895 (1990).

170. Construction NOPR, *supra* note 143, at 32,471.

171. Thirty-seven major pipelines were built pursuant to section 311, notwithstanding the Commission's expectation that these non-jurisdictional projects would be minor. See Testimony of Victor S. Rezendes, *supra* note 160, at 4. Congress now proposes to codify the Commission's approach to construction under section 311; See *infra* note 205 and accompanying text.

172. Construction NOPR, *supra* note 143, at 32,478. The Commission set forth various options that, implicitly at least, would enable it to perform some environmental review.

173. *Id.* at 32,524. Commissioner Moler also avers that the Commission's policy on section 311 construction violates the "logic" of *AGD v. FERC* by undermining the review associated with the traditional certificate process under NGA section 7(c).

late Congress' intent in adopting section 311, which otherwise permits certain activities to occur without traditional regulatory constraints.<sup>174</sup> The CEQ fundamentally agreed with Commissioner Moler. It asserted that the Commission had, in effect, established a fourth category under the NEPA regulations known as the "mitigated categorical exclusion." The CEQ emphasized that no such class of actions is recognized by the CEQ's rules implementing NEPA.<sup>175</sup>

While acknowledging that "[t]he federal environmental process is complicated somewhat by applicant-sponsored proposals,"<sup>176</sup> the CEQ remained clear that the Commission's procedural innovations went beyond the flexibility of application embodied in the CEQ regulations. However, the Commission was proposing to engage in sweeping mitigation of unspecific adverse impacts without open-minded and timely environmental review. The solution offered by the CEQ to the Commission's administrative dilemma was the same one the CEQ articulated a decade ago: "early and active involvement of federal agencies in applicant-sponsored projects."<sup>177</sup>

This dispute brought to the fore two issues which remain unresolved. First, it implicitly raised questions about the CEQ's ability to have the last word in NEPA implementation as well as the Commission's authority to review the effects of individual section 311 projects that are arguably beyond its power to authorize or reject individually. Second, the success of the Order No. 234 approach calls into question whether the Commission's method of protecting environmental features, by generically precluding initiation of any facilities or activities that have not received clearances from agencies specified in its regulations or that might otherwise adversely affect sensitive environmental areas, is not more effective than systematic study of the potential impacts and the reasonable alternatives alone.

Commissioner Moler's dissent reflects substantial skepticism about the workability of the Commission's mitigation approach. The Commission's mitigation approach appeared to delegate environmental compliance to non-federal representatives, namely to regulated entities whose economic interests may not coincide with the values represented by NEPA and other environmental laws. If the Commission had actually ascertained, based on an environmental record developed under its auspices, that proposed projects likely to be authorized with the assistance of section 157.206(d) were unlikely to adversely affect the environment and were thus excludable from the review

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174. See, e.g., Initial Comments of ANR Pipeline Co./Colorado Interstate Gas Co. at 5-6, United Gas Pipeline Co. at 5-8, Enron Interstate Pipelines at 32-34, American Gas Assoc. at 15-16, filed in response to the Construction NOPR, *supra* note 143.

175. See Initial Comments of the CEQ, *supra* note 143, at 5-6; See also Initial comments of the National Trust for Historic Preservation, at 5-7, Tennessee Gas Pipeline Co., at 5-14, *Id.*

176. Synar Hearing, *supra* note 81, at 6.

177. Initial Comments to the CEQ, *supra* note 143 (citing *Forty Most Asked Questions*, *supra* note 51), at 6. The CEQ recommends that regulatory agencies charged with reviewing applicant-sponsored projects consult early with applicants and agencies, assist in the identification of relevant data, and delegate to applicants preparation of EAs, provided they are independently reviewed. In the Construction NOPR proceeding, other Federal agencies criticized the Commission's lack of pre-filing consultation and advice; See, e.g., *infra* note 208-211; See also Order No. 486, *supra* note 60, at 33,450-51.

process, the strength of Commissioner Moler's argument would be diminished. However, the defects in the programmatic EA underlying the adoption of section 157.206(d) in Order No. 436 meant that the requisite "hard look" had not been taken and the exclusions and requirements of section 157.206(d) therefore had a faulty predicate.<sup>178</sup>

The so-called "mitigated categorical exclusion" under section 157.206(d)<sup>179</sup> arguably contravened the CEQ's procedures because it eliminated pre-construction oversight of environmental compliance. The CEQ was not prepared to entertain the idea that NEPA's principal goals could be effectively served by generic restrictions that actively mitigate or outlaw activities likely to have adverse impacts, even if motivated by an agency's desire to avoid paperwork and reduce regulatory delay. The CEQ argued, without recognizable support in the statute, that mitigation may be the product of case-specific environmental documentation and review, as opposed to the generic preclusion of certain foreseeable impacts which might also diminish the major paperwork burdens imposed by statute.<sup>180</sup> The basis for the CEQ's resistance to the Commission's approach was articulated by Commissioner Moler when she pointed out that decisionmakers who simply employ conditioning authority to bar all detriments to the environment, as the Commission did under section 157.206(d), can never be certain without a case-specific EA that those conditions are effective in specific cases.

Finally, the Commission proposed in its Construction NOPR to streamline its existing environmental regulations by adding to the categorical exclusions under NEPA (section 380.4) several natural gas-related activities, including certain types of services, permitted abandonments of service, and presidential permits to operate gas import facilities at the national border, where no facilities construction or removal is involved.<sup>181</sup> The Commission also set forth numerous additional measures intended to

refine our existing regulations, and to summarize the existing informal practices, to subject them to public scrutiny through this notice and comment rulemaking, to expedite and improve the environmental review processes where possible, and to codify them so that they will be applied in a consistent, predictable fashion.<sup>182</sup>

Although the Commission's Final Rule, Order No. 555, issued on September 20, 1991,<sup>183</sup> contained new menus of construction and rate options, it made no essential changes in the proposals of the NOPR to employ heightened levels of environmental review in several areas, to impose an increased

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178. "The agency must supply a convincing statement of reasons why potential effects are insignificant." *Steamboaters*, 759 F.2d at 1393. Assurances by the Commission are arguably less than convincing when they reflect an absence of specific information and thus only minimal understanding of the projects being reviewed.

179. 18 C.F.R. 157.206(d) (1992).

180. Mitigation of environmental impacts pursuant to NEPA review is typically part of the EIS process or the basis of a FONSI. Lesser, *supra* note 38, at 397-99; Miller, *supra* note 37, at 241-43. But cf. Herson, *Project Mitigation Revisited*, *supra* note 47.

181. Construction NOPR, *supra* note 143, at 32,479, 32,501; *adopted by* Order No. 555, *supra* note 8, at 30,249.

182. Construction NOPR, *supra* note 143, at 32,479. See also Order No. 555, *supra* note 8, at 30,249.

183. See *supra* note 8.

data gathering and reporting burden on regulated entities, and to dedicate greater staff resources to analysis of (and advocacy for) a discrete range of issues.<sup>184</sup> Most importantly, the Commission revised and adopted, as section 157.103, the self-implementing procedures of section 157.206(d). The primary refinements to the environmental review process proposed by the Commission and adopted in Order No. 555, included:

(1) A requirement that an applicant give notice of construction activity to landowners and interested parties by filing with the state Governor and Attorney General and by publication once in a daily or weekly newspaper of general circulation in each county in which the project would be located or construction would occur;<sup>185</sup>

(2) Elimination of Exhibits F-I through F-IV, which were replaced with a Compliance Report and Exhibit F-II, the Environmental Report (section 157.14(a)(6-b)) for any certificate application which is comprised of several resource reports specified in the NEPA regulations (section 380.12);<sup>186</sup>

(3) Removal of Appendix A to Part 380 and adoption of section 380.12, which requires a variety of specific information according to the size of the project, the identity of nonjurisdictional facilities "inextricably related to and completely dependent on" the facility to be certificated,<sup>187</sup> and, for the recommissioning of existing LNG facilities, data on engineering and design material.<sup>188</sup>

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184. In the author's view, one of the most interesting aspects of FERC Staff's role in discharging the Commission's duties under the NGA is the transformation of the Commission during the past decade from a professional organization that understood its mission primarily in terms of law and engineering to an organization imprinted more heavily with the perspectives of more activist professions such as free-market economists and emerging environmentalist groups such as biologists, ecologists, and environmental engineers; For useful comparisons in organizational psychology, See WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT at 65, 90-110 (1989).

185. Section 157.103(c)(15); Construction NOPR, *supra* note 143, at 32,479; Order No. 555, *supra* note 8, at 30,243.

186. Construction NOPR, *supra* note 143, at 32,480; Order No. 555, *supra* note 8, at 30,249-251.

187. Construction NOPR, *supra* note 143, at 32,481; Order No. 555, *supra* note 8, at 30,239. This test, which seeks to define and limit the Commission's acknowledged obligation to include related non-jurisdictional facilities or activities in its NEPA review, is set forth in *East Tenn. Natural Gas Co.*, 39 F.E.R.C. ¶ 61,275, 61,911 (1987). In the Final Rule (§ 157.103(b)), the Commission set forth the individual factors that will determine its responsibility to review nonjurisdictional private activity which is caused or affected by its decisions, such as the construction of downstream gas-fired cogeneration facilities or expansion of LDC pipeline facilities that are connected to the installation of, say, a sales tap. Those factors, derived in the *East Tennessee* case, are: (1) whether the regulated activity comprises merely a link in a corridor-type project, thereby militating against review; (2) the proximity of nonjurisdictional activities to the project; (3) the relative proportion of jurisdictional to nonjurisdictional facilities; and (4) the overall extent of Federal control and responsibility. Order No. 555, *supra* note 8, at 30,234-240. These criteria for delimiting NEPA review would be codified by section 11103(d) of S. 2166, *infra*, note 206. In granting a certificate for the construction of a lateral pipeline, the Commission reviewed the impact of a state-regulated power plant served by the facility that "would not be constructed were it not for the Commission's action . . . ." The interstate pipeline was required to furnish proof that a mitigative compensation plan for property value losses, noise and other impacts of the plant had been implemented by the power plant owners. *Tennessee Gas Pipeline Co.*, 45 F.E.R.C. ¶ 61,010, at 61,046-050 (1988); *Cf.* *North Country Gas Pipeline Corp.*, 53 F.E.R.C. ¶ 61,321 (1990)(EA to consider impact of cogeneration plants that buy gas from North Country shipper).

188. Construction NOPR, *supra* note 143, at 32,480-481 and 32,501-520; Order No. 555, *supra* note 8,

(4) A requirement for project-specific and periodic consultation with the U.S. Fish and Wildlife Service, rather than reliance on the blanket clearances developed in the 1980s, which may not account for additional endangered species;<sup>189</sup>

(5) A clarification that companies cannot construct facilities that have effects on cultural resource sites "eligible" for the National Register, even if there is no effect on the aspect of a resource site that made it eligible, and that mandates consultations between FERC staff, the company, the appropriate State Historic Preservation Officer and the Advisory Council on Historic Preservation to ensure compliance;<sup>190</sup>

(6) Modification of the self-implementing environmental review to add residential areas in close proximity to construction activities to the list of sensitive environmental areas for purposes of the blanket construction certificate program and to include compliance with the Toxic Substance Control Act to the list of statutes with which compliance is required to prevent PCB contamination;<sup>191</sup>

(7) New generic procedures for erosion control, revegetation and maintenance (section 380.13) and stream and wetland construction and mitigation procedures (section 380.14) to assist in expediting project applications;<sup>192</sup> and

(8) Adoption of phased authorization for all applications for section 7 certificates in non-environmental and environmental stages, "[w]here appropriate".<sup>193</sup>

Under the Final Rule, any proposed construction satisfying the require-

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at 30,249. The new and more extensive reporting requirements are modeled on the Commission's experience in fashioning guidelines to improve on Appendix A in the Northeast Pipeline Projects Proceeding, 44 F.E.R.C. ¶ 61,149 (1988). Most importantly, the ER would contain "resource reports" which, under proposed § 380.12(a)(2), "must be addressed or their omission must be justified." Each of the 13 proposed reports focuses on specific environmental features, such as water use and quality, vegetation and wildlife, and so forth.

189. Construction NOPR, *supra* note 143, at 32,481-482; Order No. 555, *supra* note 8, at 30,246-247. The procedures for compliance with the Endangered Species Act would move from Appendix I, Subpart F of Part 157, to new § 157.103(f)(4).

190. Construction NOPR, *supra* note 143, at 32,482; Order No. 555, *supra* note 8, at 30,247-248. Appendix II to Part 157, Subpart F, the procedures for compliance with the National Historic Preservation Act, would be moved to new § 157.103(g)(5).

191. 18 C.F.R. § 157.103(c)(9) (1992). Construction NOPR, *supra* note 143, at 32,482; Order No. 555, *supra* note 8, at 30,242-30,243.

192. Construction NOPR, *supra* note 143, at 32,482-484 and 32,513-520; Order No. 555, *supra* note 8, at 30,248-249.

193. Construction NOPR, *supra* note 143, at 32,484-487; Order No. 555, *supra* note 8, at 30,233-234. In the NOPR, the Commission stated:

By subjecting preliminary findings on nonenvironmental issues to a final certificate order based upon complete evaluation of all relevant factors, the Commission is analyzing environmental factors fully at a meaningful time in the review process before actually authorizing pipeline construction. Therefore, the integrity, procedural safeguards and thoroughness of the review process are preserved and the Commission's obligations under its own regulations and NEPA are fulfilled.

Construction NOPR at 32,484. The Final Rule also emphasized the Commission's increased willingness to discuss incomplete applications and frivolous or unsubstantiated protests which would delay processing or applications. Order No. 555, *supra* note 8, at 30,231-234.

ments of new section 157.103 are categorically excluded from NEPA review pursuant to section 380.4(a)(37) of the regulations. However, the failure to conform fully to the requirements of section 157.103 does not always necessitate case-specific authorization. The Final Rule offers a project sponsor whose proposal "satisfies most, but not all, of the conditions of section 157.103" an opportunity to obtain from the Director of the FERC's Office of Pipeline and Producer Regulation clearance to proceed through the "reconciliation process."<sup>194</sup>

Reconciliation may be sought under new section 157.103(e) at the time the project sponsor files its compliance report pursuant to section 157.103(d) in response to protests, upon a complaint where an NGPA section 311 project is involved, or upon the Director's finding of noncompliance. Once a request for reconciliation is filed, the Director may meet with the applicant or other parties, consult with other agencies, or convene a technical conference to address the environmental problem. Upon resolving the dispute, the Director will issue a compliance letter indicating how the applicant will comply with the Commission's environmental requirements. The Director will have 180 days to determine whether the application can comply with the self-implementing application procedures. If the Director determines that the applicant cannot meet the environmental criteria, a case-specific application procedure would replace the self-implementing authorization.

In the final analysis, the Commission's effort to inject flexibility and greater self-implementation into the pipeline approval process proved to be stillborn. On the one hand, Order No. 555 established many new requirements added a bewildering array of options and tests to the regulations as well as new rate conditions that seek to apportion the risks of project construction costs in novel ways. At least two Commissioners found in the Final Rule much less in terms of greater expedition than they did regulatory burden.

"Self-implementing environmental compliance procedures set forth in new section 157.103 are designed to expedite the process. However, the scope of the compliance report that a pipeline is required to file with prior notice projects under subpart F and 311 projects merely increases pipeline time spent prior to the filing of an application. In effect, under the new rule, the clock starts ticking later than sooner, giving the appearance that the process has been expedited once an application is through the Commission's door."<sup>195</sup>

"In the end, Congress in the Final Rule attempted to strike a delicate and, for me, quite tenuous balance between stronger environmental regulations and increased Commission staff control, on one hand, and increased expedition and flexibility on the other. Perhaps there is no better demonstration of that result than the fact that there no longer is a truly self-implementing environmental review process, as has been available for any construction project under section 311 of the Natural Gas Policy Act, and as implemented by the regulations promulgated by Order No. 436 in 1985. Despite the generally acknowledged success of those section 311 self-implementing procedures for many large and small pipeline projects constructed since 1985, the Final Rule requires affirmative Commission staff participation, review and prior approval for almost any new project of any significance . . . Additionally, the Final Rule also requires the

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194. Order No. 555, *supra* note 8, at 30,244-246.

195. Order No. 555, *supra* note 8, at 30,316.

active participation, review and prior approval of federal and state agencies for various types of public lands and under various circumstances. Consequently, there is no doubt that self-implementing environmental review, as such, is a dead letter . . . .<sup>196</sup>

For quite opposite reasons, preservationists and federal agencies with NEPA-related and other environmental review responsibilities also took a dim view of the Final Rule. The National Trust for Historic Preservation filed a petition for rehearing on several grounds. First, it said that the new section 157.103 constituted an impermissible delegation to pipeline applicants of the FERC's NEPA responsibilities. The National Trust also argued that the Commission had violated NEPA in its categorical exclusions of projects in compliance with section 157.103. In addition, the rehearing petition claimed that the rule's treatment of replacement activities, phasing, and the standards employed for determining the need to review nonjurisdictional facilities were unacceptable because they would undermine consultative procedures under the NHPA.<sup>197</sup> In its plea for greater case-specific environmental review, the CEQ expressed a measured concern "that in its zeal to improve the environmental process the FERC has abandoned some essential safeguards in regard to the openness of that process and placed pipeline companies at risk of incurring burdens by not involving itself actively in determining the scope of review for proposed pipeline projects."<sup>198</sup> The CEQ's main disagreement with Order No. 555 involved what it called the FERC's efforts to cede "a large measure of control over compliance"<sup>199</sup> with various laws to private applicants, to the detriment of the public's right to adequate notice and opportunity to comment.

It is unclear which set of observations about the effect of the revised environmental review process contributed most directly to the Commission's decision to suspend the effective date of Order No. 555. The Commission's new regulations were stayed on the basis of their "broad and potentially significant impact on the natural gas industry."<sup>200</sup> In a show of resolve to address the criticisms of Order No. 555, the Commission quickly convened a technical conference on November 12, 1991. In addition, it requested additional comment with respect to twenty-one implementational questions arising from the conference.<sup>201</sup> The nature of the questions reflects the Commission's sensitivity to allegations that the Final Rule contained duplicative, expensive, time-consuming, counterproductive, or overly stringent requirements or procedures that belied the Commission's claims to have eased the burden imposed by its

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196. *Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities*, 57 F.E.R.C. ¶ 61,337, at 62,088 (1991) (emphasis in original).

197. Request for Rehearing of National Trust for Historic Preservation in the United States and Miami Valley Council For Native Americans, filed October 21, 1991, Docket No. RM90-1-001.

198. Letter, Dinah Bear, General Counsel (CEQ) to Lois D. Cashell, Secretary (FERC), dated October 22, 1991 (Docket No. RM90-1-000). CEQ did not request rehearing, however.

199. *Id.* at 1.

200. *Order Granting Rehearing for Further Consideration and Postponing Effective Date of Order No. 555*, III FERC Stats. & Regs. ¶ 30,928A at 30,317 (1991).

201. *Questions Arising From Technical Conference and Request for Comments*, 57 F.E.R.C. ¶ 61,337 (1991).

traditional ways of authorizing pipeline construction. Notwithstanding the FERC Chairman's April 1992 commitment to the White House to "revamp" Order No. 555 in the "near term,"<sup>202</sup> the rule's future is at present unclear. No revised regulations have been issued illustrating the extreme difficulty of the agency's task in resolving conflicting statutory and policy mandates. In the meantime, the Commission continues to perform NEPA environmental review of pipeline projects under section 157.206(d) in a manner substantially similar to what would otherwise occur under new section 157.103 of the stayed rules.

### B. "National Energy Strategy" Legislation

The Commission's difficulties in administering NEPA are widely recognized. Therefore, when the Bush Administration and Congress began reassessing the nation's energy policy, they also reexamined the interrelationship between NEPA, the NGA certificate process, and interagency coordination of environmental review, particularly with respect to natural gas-related activities. The Administration's *National Energy Strategy*, published February 20, 1991,<sup>203</sup> advocates reform of the NEPA process by making the FERC the "lead agency" for all federal environmental review and encouraging the use of third-party contractors to prepare environmental documents pursuant to NEPA, at applicants' expense.

The Administration supports legislation making FERC the sole agency responsible for preparing an EIS for natural gas pipeline construction. FERC would continue to be required to consult with other agencies and consider their views, but the possibility of multiple agencies doing independent NEPA documents would be eliminated.

The Administration also supports legislation allowing FERC to charge the applicant directly for an EIS and other environmental documents prepared by a private-sector firm, without the reimbursed cost counting against FERC's budget appropriation. This will enable FERC to leverage its staff resources and process new facility applications more quickly, without jeopardizing environmental protection.<sup>204</sup>

The Administration's proposals to revise certain aspects of the NEPA process, only as it applies to the gas pipeline authorization, were included in bills having similar broad goals of promoting the use of natural gas. S. 1220,

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202. Letter, Martin L. Allday, Chairman, to the President, April 28, 1992 (regarding the 90-day review of the cost and benefits of existing federal agency regulations).

203. U.S. Department of Energy, *National Energy Strategy: Powerful Ideas for America*, GPO, 1991. The NES is generally embodied in S. 570 and H.R. 1301, 102d Cong., 1st Sess., 137 CONG. REC., S. 2775 (Mar. 6, 1991). Neither bill will emerge from Committee during the 102d Congress, although most proposals therein are incorporated in other bills that passed.

204. *Id.* at 93. See also regarding Order No. 555, DOE, *National Energy Strategy: Powerful Ideas for America — One Year Later*, February 1992, at 25-26:

FERC has delayed implementation of the final rule to review concerns raised in petitions for rehearing. . . and is expected to issue a final rule by the spring of 1992. In addition, some of the Administration's responses to the impact of the Persian Gulf War on energy markets, FERC expedited its process for approval of pending applications to construct new natural gas pipeline capacity. Since the fall of 1990, FERC has approved 31 pipeline projects, with a capacity to deliver 10 billion to 12 billion cubic feet per day.

which emerged from committee as S. 2166, and H.R. 776, representing the work of the House Energy and Commerce Committee and several other committees with jurisdiction over aspects of the bill, have been passed and head for conference containing substantially identical changes to FERC's environmental review process as it applies to pipelines.<sup>205</sup> Both House (section 205) and Senate (section 11103) versions would streamline FERC's procedures under NEPA and the NGA by allowing companies to select a third party contractor or consultant (from a list of approved candidates, according to H.R. 776) to prepare documents under Commission guidance and by making clear that the Commission can allow applicants to submit a prepared EA as part of an application. Under section 205(a)(3)(D), the funds paid a consultant for NEPA document preparation will not be treated as an appropriation to the Commission, unless so provided elsewhere. S. 2166 requires the FERC and all relevant agencies to enter into a memoranda of understanding, under which environmental review of natural gas facilities can be conducted on a consolidated basis. Moreover, the Senate bill sets forth four specific criteria for determining "whether sufficient control and responsibility by the Commission exists" to merit review of nonjurisdictional facilities.<sup>206</sup> No equivalent provision is found in the H.R. 776.

In light of the general agreement of the House and Senate bills, the Natural Gas Act will likely be amended to facilitate the FERC's NEPA review.<sup>207</sup> However, its certificate proceedings will be expedited only marginally by NEPA reform. Greater time savings may be derived from other procedural changes. For example, both bills would codify the phasing of non-environmental and environmental pipeline certificate decisions<sup>208</sup> and would provide for automatic approval of unopposed certificate applications.

## V. CONCLUSION

"In nature there are neither rewards nor punishments; there are only consequences," stated lawyer-environmentalist Robert Ingersoll. Without a battery of incentives and sanctions, NEPA has nonetheless compelled significant changes in the decisional styles of agencies like the FERC with respect to environmental "externalities". To a remarkable degree, even the Commission has "internalized" the NEPA process, as anticipated by NEPA's drafters.

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205. S. 2166, 102d Cong., 2nd Sess., 138 CONG. REC. S. 607 (1992), passed the Senate on February 19, 1992, 138 CONG. REC. S. 1627-98 (1992); See also S. Rep. 72, 102d Cong. 1st Sess. (1991), regarding S. 1220, the predecessor to S. 2166 which is identical to S. 2166 on NEPA compliance matters.

H.R. 776 was adopted in amended form on May 27, 1992, 102d Cong., 2nd Sess., 138 CONG. REC. H. 3747 (1992). Sections 205 and 209 of H.R. 776, which amend NGA section 7 to address NEPA compliance, originated in the Committee on Energy and Commerce. H.R. Rep. No. 474, 102d Cong., 2nd Sess., Pt. 1, 45, 47 (1992).

206. Section 11103(d) conforms to the approach adopted by FERC Order No. 555, not the criteria recommended by the National Trust for Historic Preservation in its rehearing application. Request for Rehearing of NTHP, *supra* note 197, at 7-8.

207. At the time of this writing (July 24, 1992), the conferees have not met to reconcile H.R. 776 and S. 2166. Final legislation is expected to be presented to the President before adjournment in October, however.

208. See section 11109(e) of S. 2166; See also section 210(a) of H.R. 776.

The role of environmental review of pipeline projects has been systematized and enlarged in Commission proceedings during a period in which countervailing pressures were growing to substitute the demands of the marketplace for traditional forms of command-and-control regulation of the natural gas industry.

According to the Commission's Chairman, the Commission's program of NEPA review has, for the most part, become standardized and therefore highly predictable for project applicants. For example, from October 1, 1987 to February 28, 1991, during which time the Commission issued 222 certificates for 122 major projects, the Commission also issued only 19 notices of intent to prepare an environmental document. Six were for EISs and thirteen were for EAs.<sup>209</sup> This does not, of course, reflect total EAs or EISs or the large number of projects authorized on a self-implementing basis under blanket certificates or pursuant to NGPA section 311. It does demonstrate, however, that in only a few instances did the Commission consider it necessary to raise the level of environmental scrutiny (from EA to EIS) or to issue invitations for public participation (comment on EAs is typically not solicited) owing to controversy or the potential impacts that it could not have foreseen when it categorized its activities under Order No. 486. Moreover, it demonstrates the Commission's confidence that it can make a FONSI with respect to most projects, sight unseen, with a high degree of predictability, based on the use of conditions and generic prohibitions. The terms and conditions of pipeline authorizations are designed to eliminate or seriously reduce adverse impacts in individual cases and therefore to avoid additional review and evaluation of the alternatives which, practically speaking, may be of little interest to a private applicant.

However, present levels of efficiency may not be enough. From the standpoint of various constituent parts of the natural gas industry, NEPA is yet another set of legislatively imposed duties that must be more efficiently administered because it stretches the Commission's resources and expertise to the limits of its capacity to effectively regulate under the NGA.

Despite their laudable goals, statutes such as NEPA, the Administrative Procedure Act, and the Sunshine Act often impose multiple requirements that can cause considerable administrative delay in order to achieve high levels of input to controversial topics. As a consequence, timeliness and efficiency are often compromised in assuring that diverse interests are given an opportunity to be heard

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209. Testimony of Chairman Allday, Synar Hearing, *supra* note 81, at 2, 30. This represented the outcome of 277 pipeline construction dockets, the remainder having been withdrawn or rejected. In a February 1992 Report, the U.S. General Accounting Office reported Commission approval of "171 applications to construct natural gas pipelines and related facilities between October 1, 1987 and February 28, 1991. The median processing time was about one year. However, 78 applications, or 46 percent, took longer than one year, with 13 taking two years or more to complete." *Factors Affecting Approval Times for Construction of Natural Gas Pipelines*, GAO/RCED-92-00, at 1; Environmental review is identified by GAO as one of five factors contributing significantly to delays in certificate proceedings. "FERC's median time to complete its environmental reviews for the period of our review was 568 days for environmental impact statements, 384 days for formal environmental assessments, and 220 days for informal environmental assessments." *Id.* at 33. These figures do not include medial time for staff determination of individual categorical exclusions (93 days) or for authorization under the prior notice, 18 C.F.R. § 157.206(d) (1992), procedure (30 days).

and participate.<sup>210</sup>

It is not yet clear whether the courts will follow *CPUC* in crediting the Commission's creativity in finding reasonable ways to minimize the procedural costs of NEPA review. But, the tendency to enforce a more exacting standard of environmental review may be, as one court has stated:

the product of a time when environmental impact statements were less formidable than they have grown to be, when federal agencies were less sensitive than they mostly are today to environmental concern, and perhaps, most important, when environmental assessments involved a less elaborate procedure for determining whether there was so significant an environmental impact as to warrant preparation of an environmental impact statement.<sup>211</sup>

Other agencies have told the Commission that its enforcement of NEPA and related procedures must still be improved. One federal agency with a statutory right to be consulted on gas pipeline proposals claims that participation in the FERC certificate process has been "frustrating and disappointing" and a "continuing struggle" to get the FERC to take historic places into account at appropriate points in its processes.<sup>212</sup> Another states that "we often find that the project has been essentially planned" before the beginning of the scoping process associated with an EIS.<sup>213</sup> Yet another finds that the FERC relegates environmental procedures to "meaningless afterthoughts," citing the damage inflicted on archaeological sites by Transco's Mobile Bay Pipeline project as an example of trust betrayed by both the company and the Commission.<sup>214</sup>

In the CEQ's estimation, the deficiencies in the Commission's NEPA process "are generally associated with the management of the process, not a reluctance to consider environmental concerns."<sup>215</sup> The CEQ is primarily troubled by the FERC's trial-type procedures, under which environmental issues of material fact become no less subject to evidentiary requirements than other fact questions,<sup>216</sup> because adjudications "appear to encourage segmentation and fragmentation as opposed to integration; formality instead of casual communication. . . . We believe the underlying rationale of the adjudicative process may be inconsistent with the underlying rationale of the efficient

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210. Natural Gas Supply Association, quoted in *OIL & GAS J.* (November 5, 1990) at 15; *See also* Construction NOPR, Initial and reply comments, *supra* note 143.

211. *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445, 450 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) (*citing* Judge Friendly's dislike of his colleagues' "stepping up the requirements" for EAs, dissenting in *Hanly v. Kleindienst*, 471 F.2d 823, at 837-39 (2d Cir. 1972)). Just as Judge Friendly recognized the definitional flexibility inherent in NEPA (*e.g.*, "significant" may mean "more than trivial" or "momentous"), the D.C. Circuit is today willing to accommodate variants of the CEQ's NEPA procedures which do not otherwise offend NEPA's policies. *CPUC v. FERC*, *supra* note 146.

212. Statement of Robert D. Bush, Executive Director, Advisory Council on Historic Preservation, Synar Hearing, *supra* note 81, at 3.

213. *Id.* at 3. Testimony of Dr. Jonathan P. Deason, Director, Office of Environmental Affairs, U.S. Dept. of the Interior.

214. *Id.* at 6-8. Statement of J. Jackson Walter, President, National Trust for Historic Preservation.

215. *Id.* at 2. Testimony of Dinah Bear, General Counsel, President's Council on Environmental Quality.

216. *Id.* at 2-3.

NEPA process."<sup>217</sup> Having said that, the CEQ offers no apparent solution to what it views as a critical concern with the FERC's adjudicative function. The CEQ's apparent frustration is explainable in part by the fact that the rigors of administrative litigation (in those cases where environmental issues are set for hearing) will diminish the deference on environmental matters that would otherwise be given to the CEQ and other coordinating agencies.

Commission proceedings do not evidence any widely held opinion that economic regulation of the gas industry, or indeed the interests behind its deregulation, are hostile to the NEPA process.<sup>218</sup> Once the FERC as an institution and the parties in its cases began to realize that environmental review would continue to be a factor in approvals under the NGA, there was general interest in dealing with the issues systematically and swiftly. The Commission may be able to untangle its regulatory mechanisms in the interest of market-driven gas prices and light-handed controls on construction of facilities. It has forthrightly addressed the importance that environmental issues have in its deliberations. In that regard, the Commission's NEPA activity has yielded more than mere procedural compliance; it has begun to effectuate substantive changes in project construction and operation through often-elaborate mitigation measures,<sup>219</sup> which have the administrative advantage of avoiding paperwork burdens, procedural obligations, and delays. The Commission has not been equally as forthright in acknowledging that any increase in its efficiency will generally be purchased at the expense of the applicant, who must shoulder a much greater burden of environmental documentation and pre-application analysis and consultation in exchange for streamlined the FERC procedures.

The Commission's implementation of NEPA from an essentially defensive posture was predictable given the purely economic nature of its normal regulatory duties. That it would refine and elaborate upon its environmental review procedures at the very time it was also pursuing decontrol strategies for gas rate and certificate cases was not similarly foreseeable. The time will probably never come when FERC's defenders and detractors will conclude that the Commission has largely satisfied both its NEPA obligations and the clamor for greater regulatory efficiency. These conflicting demands may in fact represent the political unrealism that often surrounds the business of administrative agencies. As one recent critic has stated, our public bureaucracies:

are almost always given huge, even utopian, goals and are then saddled with a large number of constraints that prevent them from achieving these goals efficiently — if at all. We tell EPA, for example, to protect the public health [sic] with an adequate margin of safety, but advise it not to spend too much money or put anyone out of work. We tell them to use the best scientific evidence, but

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217. *Id.* at 3.

218. *Cf.* Montange, *NEPA In An Era of Economic Deregulation*, *supra* note 156, at 9-12 and generally.

219. The Commission's practice of including in its Phase II orders on major facility proposals a broad array of conditions is illustrated by the following: Pacific Gas Transmission Co., 56 F.E.R.C. ¶ 61,192 at 61,686-698 and Appendix C (1991); El Paso Natural Gas Co., 56 F.E.R.C. ¶ 61,198 at 61,766-770 and Appendix A (1991), (FONSI with 30 conditions); Altamont Gas Transmission Co., 56 F.E.R.C. ¶ 61,199 at 61,782-800 and Appendix A, (43 conditions); Gateway Pipeline Co., 56 F.E.R.C. ¶ 61,109, Appendix A (1991).

refuse to let them pay enough to recruit top-flight scientists, and then tell them, "By the way, do it within 90 days." We expect bureaucrats to account for every penny of public money, to record every conversation with a member of an interest group, to show that they have treated everyone equally, and to consider all the relevant information and alternatives — but to stop producing all that red tape and being so damn slow.<sup>220</sup>

Serious questions persist with respect to the efficacy of self-implementing environmental compliance first developed under section 157.206(d), the past and potential future environmental effects of major NGPA section 311 construction, the defensibility of bifurcated environmental and non-environmental decisionmaking, and persistently slipshod interagency cooperation. Among these issues lies a significant opportunity for the CEQ to contribute meaningfully to the development of procedures that take account of the peculiar needs of, and demands on, independent regulatory agencies. Within the four corners of NEPA's "essentially procedural" mandate, the Commission has demonstrated that a significant level of adaptability can be achieved conducting environmental reviews when confronted by the realities of economic regulation. Whether the Commission has in all instances served the underlying substantive policies of NEPA is as yet an unanswered question and one that neither the Commission, the CEQ, nor the courts seem inclined to ask.

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220. Melnick, *Administrative Law & Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257-58 (1992).