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ANDRUS V. SIERRA CLUB: NO EFFECTIVE ENVIRONMENTAL REVIEW IN THE FEDERAL BUDGET PROCESS

Catherine Finnegan Shortsleeve*

I. INTRODUCTION

Congress enacted the National Environmental Policy Act of 1969 ("NEPA")¹ to ensure that environmental factors would be given adequate consideration in the decision-making processes of federal agencies. To accomplish this purpose the Act requires that an environmental impact statement ("EIS")² accompany "every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the environment."³ In 1974 the Sierra Club, along with other environmental groups, brought suit in a federal district court alleging that the annual budget requests for the National Wildlife Refuge System ("NWRS"), a program in the Interior Department devoted to the conservation of fish and wildlife, are proposals for legislation and major federal ac-

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³ The Council on Environmental Quality ("CEQ") defines an environmental impact statement to mean a "detailed written statement as required by Sec. 102(2)(C) of NEPA." 40 C.F.R. § 1508.11 (1979). For purposes of textual variety, this article will not restrict itself to the phrase "environmental impact statement." The common terms "EIS" and "impact statement" will also be used with no difference in meaning intended.


tions significantly affecting the environment for purposes of NEPA and thus require an EIS. After conflicting decisions had been reached in the district court and the court of appeals, the Supreme Court on June 11, 1979, held unanimously in *Andrus v. Sierra Club* (these three cases are at times generally referred to herein as "the Sierra Club litigation") that NEPA does not require federal agencies to prepare environmental impact statements to accompany their annual appropriation requests.

This article will explore the issues involved in extending NEPA's requirements into the federal budget process. Requiring an EIS to accompany the annual budget requests of all federal agencies which significantly affect the environment admittedly has far-reaching implications for the administration of the federal budget. The federal budget, however, controls the funding of all federal agencies, and action on the budget is a most significant governmental action in terms of effects on the environment. NEPA's environmental review requirements accordingly should, in some manner, be extended into the budget process and thereby into federal resource allocation decisions made at the highest levels so as to effectuate the purposes of the Act.

The problem is basically one of balancing adverse interests: the governmental interest in efficiently producing an annual budget, and the national interest in protecting the environment against federal fiscal decisions which shortcut environmental concerns. The dimensions of the problem are best outlined by considering the overall purposes and goals of NEPA, the manner in which the federal budget process works, and the judicial responses to the problem demonstrated in the *Sierra Club* litigation. After doing so, it will be finally suggested that, despite the Supreme Court's holding to the contrary, NEPA's impact statement requirement can apply to the appropriation process with a minimal amount of administrative burden due to revised regulations simplifying EIS preparation. A method of so effectuating NEPA's policy through the federal budget process is by requiring impact statements to accompany authorization requests, the substantive legislative proposals which must, by law, precede requests for appropriations. The

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authorization process specifically addresses the kind of government­
tal decision making which NEPA was intended to influence, and authorization impact statements would be effective and practical as a means of ensuring adequate consideration of environmental factors in federal budget decision making.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

A. Purposes and Goals

NEPA established a national policy requiring all federal agencies to give full consideration to environmental effects in planning and carrying out their programs. Congress recognized that environmental considerations had traditionally been ignored or omitted by government decisionmakers and that incorporating such considerations into the everyday functioning of the federal government would be a difficult task. To accomplish this, NEPA requires that responsible officials of all federal agencies prepare an EIS detailing the impact of particular actions on the environment. Such a statement is required when an agency proposes a major federal action which will significantly affect the environment or submits a legislative proposal to Congress which may have the same effect.

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* The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and the environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . .


12 Section 102(2)(C) sets out the following procedures:
The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
The EIS itself serves three basic purposes: it requires agencies to analyze environmental factors in their decision making; it provides a record for judicial review if a court must later determine the adequacy of that environmental analysis; and it informs the public of the environmental costs of the proposed agency action. The main thrust of the EIS requirement is to force federal agencies to integrate the NEPA process into their own planning at the earliest possible time so that the policies of NEPA are meaningfully implemented. Otherwise, the EIS becomes an empty exercise in post hoc rationalization for decisions already made. Thus, the regulations prepared by the Council on Environmental Quality ("CEQ"), the body created by NEPA to assist the President in overseeing agency compliance with the Act, indicate that the pri-


18 CEQ regulations state that:
[t]he primary purpose of an environmental impact statement is to serve as an action forcing device to insure that the policies and goals defined in [NEPA] are infused into the on-going programs and actions of the Federal Government. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.


16 "For instance:
(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary. . . ." 40 C.F.R. § 1502.5 (1979).

18 In 42 U.S.C. § 4344(3) (1976), CEQ is charged with the responsibility "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in [the Act] . . . and to make recommendations to the President with respect thereto."

Originally, CEQ was meant to serve as a presidential advisor in matters concerning NEPA. Some of its enumerated duties are: assisting the President in preparing an annual report on the environment, gathering and analyzing environmental information, reviewing and appraising governmental compliance with and furtherance of NEPA's objectives, recommending to the President policies which will encourage improvement of the environment, and submitting an annual report to the President on the condition of the environment. Id. at § 4344. The Office of Management and Budget, however, which was originally intended to coordinate agency compliance with NEPA, has shown little enthusiasm for the Act and has been reluctant to assume an enforcement role with regard to it. See Hearing on S.1075, S.237 & S.1725 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. 116-17 (1969)(remarks of Sen. Jackson and Dr. Lynton Caldwell); 115 CONG. REC. 19,012 (1969) (excerpt from Committee on Interior and Insular Affairs Report on S.1075); F. Anderson, The National Environmental Policy Act, in ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 238, 248-56 (1974). As a result, CEQ has gradually assumed its current position as the "undisputed overseer of agency compliance with NEPA." W. ROGERS, ENVIRONMENTAL LAW 705 (1977). See generally Calvert Cliffs' Coord. Comm. v.

The primary purpose of an EIS is to serve as an "action-forcing" device to ensure that NEPA's policies and goals are infused into the everyday workings of the federal government.\textsuperscript{19}

As a result of the broad purposes to be accomplished, the scope and detail of an EIS may differ depending on its function and on the particular major federal action or legislative proposal under review.\textsuperscript{20} A "programmatic" EIS is a type of statement involving a comprehensive analysis of agency programs which encompass a number of related actions with environmental effects.\textsuperscript{21} Past CEQ guidelines encouraged the use of such programmatic statements and indicated that "individual" statements on specific major actions were to be integrated with them.\textsuperscript{22} An individual statement,
in other words, should be required only if later actions have a significant impact not already adequately evaluated. The advantage of a programmatic EIS is that it allows a broader look at alternatives, permits a reevaluation of project objectives and future directions, and can usually be prepared at an earlier time in the life of a project before the project has built up such momentum as to make objective evaluation difficult. The risk of the programmatic statement, however, is that it can obscure or be used to avoid producing individual statements for specific segments of the project as the project later unfolds. Both the court of appeals and the Supreme Court in the Sierra Club litigation considered the programmatic EIS as a possible way to approach the problem of applying NEPA to the complicated federal budget process.

B. The Council on Environmental Quality

To carry out its overview responsibilities, CEQ during the period from 1970 to date has prepared three increasingly demanding sets of guidelines and a final set of regulations to serve both as guides to agencies preparing environmental impact statements and as interpretive aids to courts in reviewing them. The CEQ guidelines

40 C.F.R. § 1500.6(d) (1979). For instance, the Department of Transportation should arguably consider the long range impacts of building a nation-wide road system, one of which might be a progressive loss of productive farmland. Such an issue is appropriately considered in a program statement, rather than in the specialized impact statement for any given segment of highway. See Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973).

40 C.F.R. § 1500.6(d)(1) (1979).


In Sierra Club v. Andrus, the court of appeals held that when an agency undertook a programmatic review of a program with significant environmental effects and then requested appropriations to fund its new course of action, an EIS must accompany that particular budget request. Sierra Club v. Andrus, 581 F.2d 895, 903 (D.C. Cir. 1978). It held that when an agency expanded or revised a program significantly affecting the environment, a programmatic EIS should accompany the decision itself, and that a second EIS when the agency requested funding would be redundant and unnecessary. Andrus v. Sierra Club, 442 U.S. 347, 363 (1979). Both these positions assumed that agencies do prepare programmatic impact statements when they take a series of actions which will significantly affect the environment. As a matter of practice, however, it could well be that agencies do not prepare such statements if they can avoid it, and the Supreme Court's decision placed agencies on notice of their continuing obligation to prepare programmatic EIS's where such statements are appropriate. See text at notes 146-82 infra.

which were in effect until 1979 adhered consistently to the position that NEPA's impact statement requirement applied to agency appropriation requests. However, in its final regulations which became effective on July 30, 1979, CEQ reversed its position and specifically excluded appropriation requests from NEPA's coverage.

The Supreme Court's decision in the Sierra Club litigation to exclude budget requests from NEPA's compliance requirements is based almost wholly on these 1979 CEQ regulations, thus reinforcing CEQ in its position as the key enforcer of NEPA. Because of CEQ's significant role in the Sierra Club litigation, an understanding of that body's development during the past ten years is essential.

On March 5, 1970, President Nixon directed CEQ to issue guidelines to assist federal agencies in implementing the EIS process. On April 30, 1979, CEQ published interim guidelines which provided that major federal actions requiring impact statements include "recommendations or reports relating to legislation and appropriations." On April 23, 1971, the guidelines were revised to state that major federal actions include "recommendations or favorable reports relating to legislation including that for appropriations." On August 1, 1973, the guidelines were once again revised, this time to the form noted by the court of appeals in the Sierra Club litigation. Major federal actions were now defined to include either "[r]ecommendations or favorable reports relating to legislation including requests for appropriations."

From 1970 to 1978, then, CEQ consistently indicated that impact statement requirements applied to budget requests. During this eight year period the guidelines were simply advisory in nature. Agencies did, however, promulgate regulations pursuant to...
the guidelines to govern their own NEPA compliance, and, based on the CEQ guidelines, two circuit court decisions had held that "proposals for legislation" included appropriation requests.

In 1977, President Carter ordered CEQ to issue binding regulations which would establish uniform procedures for implementing the procedural provisions of NEPA. The new regulations were issued in final form on November 29, 1978, and became effective on July 30, 1979, approximately one month after the Supreme Court rendered its decision in the Sierra Club litigation. These final regulations, while still requiring an EIS for legislative proposals, defined "legislation" to include a bill or legislative proposal to Congress, but not requests for appropriations. CEQ explained this reversal by stating that, in conjunction with the Office of Management and Budget ("OMB"), it had concluded that the intricacies and time constraints inherent in the yearly budget cycle made impractical any meaningful preparation of impact statements within the budget preparation process.

The earlier CEQ guidelines, which included appropriation requests within NEPA's scope, were in effect when the district court and the court of appeals rendered their decisions in the Sierra Club litigation. Both decisions supported and affirmed the guidelines, holding that appropriation requests fell within NEPA's scope.

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36 The Department of the Interior indicated that actions requiring EIS's included "recommendations or favorable reports to Congress relating to legislation including appropriations." 36 Fed. Reg. 19,343 (1971). The Department of Defense had a regulation which required that for "those budget items which are identified as having a significant effect on the environment, or which are controversial, an environmental impact statement shall be prepared which will accompany the budget request." 32 C.F.R. § 214.6(d)(1)(ii) (1979).


38 Exec. Order No. 11,991, § 1, 3 C.F.R. § 124 (1977 Comp.).


41 See note 28 supra. The Sierra Club suggested that there might have been collusion between OMB and CEQ with respect to CEQ's new wording of the regulations which excluded agency budget requests from NEPA compliance requirements. Brief for Respondents [Sierra Club] at 31-32 n.23, Andrus v. Sierra Club, 442 U.S. 347 (1979).

42 On the basis of "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, . . . the Council in its experience found that preparation of EIS's is ill suited to the budget preparation process." 43 Fed. Reg. 55,989 (1978).


mandate and were subject to the EIS requirement. Between the time of the court of appeal's decision and the time of the Supreme Court's decision, however, the final regulations were proposed; and, as noted, one month after the Supreme Court's decision they went into effect. The Supreme Court's decision supported the revised regulations and reversed the court of appeals, holding that NEPA's impact statement requirement does not extend to requests for appropriations in the federal budget process.

III. ENVIRONMENTAL REVIEW AND THE FEDERAL BUDGET PROCESS

The most significant governmental decision making affecting the environment takes place in the course of agency, OMB and congressional action on the federal budget, for this is the process through which federal programs are financed. At issue in the Sierra Club litigation was whether NEPA's policy of full disclosure, with its resulting environmental review requirements, should be extended into the budget process at an early stage and thereby into federal resource allocation decisions made at the highest levels of government. The problem involves complex and multi-dimensional dynamics between OMB and Congress on two separate levels and suggests no readily definable solution. OMB and Congress have traditionally experienced tension over which body would exert dominant control over the federal budget. Congress over the past decade has also struggled internally to control its own spending power and to coordinate related decisions as to how much will be spent and on what. These struggles are exposed in the Sierra Club litigation. An appreciation of their complexity is essential to a reasoned analysis of the issues involved in introducing environmental review into governmental budget and spending processes.

Of the several phases involved in the federal budget process, two are relevant in examining NEPA's compliance requirements:

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46 395 F. Supp. at 1188; 581 F.2d at 895.
52 See Executive Office of the President, Office of Management and Budget, U.S. Budget
President's annual formulation and transmittal of a proposed budget to Congress; and Congress' annual action to revise and approve the budget which then becomes the financial plan for the operation of federal agencies during the fiscal year.

A. Executive Formulation and Transmittal

The President submits his proposed budget to Congress in January of each year after many months of fiscal planning and coordination among all the federal agencies. Functioning as the President's budget coordinator, OMB stands at the center of the budget process—receiving, correlating, and revising agency budget estimates before proposing them for presidential approval and subsequent transmittal to Congress. OMB's role is crucial, for by reason of its extensive budgetary control, it has come to exert a decisive influence in determining which agencies and programs will prosper and which will not. The implications of subjecting OMB's budgetary decision-making processes to environmental review are accordingly far reaching and require an understanding of OMB's role in the federal budget process as it has developed over the years.

In the nineteenth century, budgeting had been a fragmented process in which agencies and bureau heads in the executive branch, and House and Senate committees in the legislative branch, all struggled for power over governmental funds in order to advance their own particular interests. In the early twentieth century, Congress, dissatisfied with this fragmentation and the re-

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in Brief, 1980-65-68 [hereinafter the U.S. Budget in Brief].
82 "The President shall transmit to Congress during the first fifteen days of each regular session, the Budget . . . ." 31 U.S.C. § 11(a) (1976).
84 See note 52 supra.
85 There is in the Executive Office of the President an Office of Management and Budget . . . . The Office, under such rules and regulations as the President may prescribe, shall prepare the Budget . . . . and to this end shall have authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the several departments or establishments.
86 The Office of Management and Budget stands at the center of Federal policy-making with life and death decisions about programs and procedures. The budget is the great judgment book for Federal Agencies and Activities, recording which shall live and which shall die, which shall prosper and which shall wane.
H.R. REP. No. 697, supra note 8, 1974 U.S. CODE at 2784. "Next to the President, the Director [of OMB] is the most powerful person in the Executive Branch." Id. at 2783.
87 See generally L. Fisher, supra note 49, at 1-35.
sulting lack of control over expenditures, enacted the Budget and Accounting Act of 1921. Under the Act the President was to prepare and transmit an annual budget to Congress pursuant to regulations which he himself prescribed; and he was to be assisted in this task by the newly created Bureau of the Budget which was to be part of the Treasury Department, and which thereafter continued as part of the Treasury Department until 1939. Prior to 1921, individual agencies had submitted their budget requests directly to Congress, often to their favored legislative committees. The Act changed this practice by directing that federal agencies submit their department budget requests to the Bureau of the Budget, which then had the authority to revise, reduce, or increase those requests before recommending them to the President for transmittal to Congress.

According to the policy of the Budget and Accounting Act, the presidential budget was intended to be a recommendation to Congress. It would remain Congress’ role to set expenditure policy. But while Congress established an entire bureau to assist the President with his budget responsibility, it made no similar attempt to reorganize its own procedures to accommodate the vast growth of governmental programs and federal spending. As a result, there developed an incongruity between executive and legislative resources devoted to the formulation of the budget. The Bureau of the Budget’s large and powerful staff afforded the President an ad-

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Note: The text includes footnotes with references to statutes and reports.
vantage which Congress did not have, and the President, benefit-
ing from his superior resources, gradually took over much of the
congressional role of program and financial policy making.

In 1970, President Nixon centralized budget power even more
directly in the executive branch by transferring all budget func-
tions from the Bureau of the Budget to the President and then
delegating these functions to the newly created OMB. OMB’s di-
rector was to be appointed by the President and would, therefore,
be accountable only to him. Congress viewed with concern this
centralization of power in the executive branch and the extensive
power wielded by the director of OMB in the budget process, and
in an attempt to curb the President’s budget power and to make
the director more accountable to Congress, Congress amended the
Budget and Accounting Act in 1974 to require that OMB’s direc-
tor and deputy director be appointed by the President, but by and
with the advice and consent of the Senate. Despite this tradi-
tional struggle for power over the budget, however, Congress has
continually chosen over the years to delegate to the President the
responsibility for producing an annual recommended budget for
Congress, and in doing so to be guided only by his own regula-
tions. This is a significant fact to be recognized in considering the
possibilities for environmental review in the executive-OMB
budget formulation process, for a very probable effect of requiring
environmental impact statements in that process would be to upset
the carefully structured balance of budgetary power established by
Congress and the President.
Timing is crucial in OMB's procedure for formulating the annual budget which the President submits to Congress each January. An example of the strict time schedule adhered to by OMB in producing this budget is the Interior Department's 1975 fiscal year budget request for NWRS\textsuperscript{76} which was involved in the Sierra Club litigation.\textsuperscript{76}

The 1975 fiscal year budget request which was sent to Congress in January, 1974,\textsuperscript{77} was initiated in February, 1973, when OMB suggested a maximum appropriation level for the Department, and the Department\textsuperscript{78} then allocated OMB's figure into suggested appropriation levels for each agency and division within the Department.\textsuperscript{79} In mid-May, 1973, each agency and program head reported to the Secretary of the Department how each intended to remain within the suggested appropriation levels,\textsuperscript{80} and until late August each had the continuing opportunity to seek budget revisions from the Secretary.\textsuperscript{81} In late September, 1973, the Department's draft statement was sent to OMB and, after review, OMB informed the Department in late November of the level of appropriation that OMB would recommend for presidential approval.\textsuperscript{82} The Department then had a final opportunity to request revision of the budget allowance directly from the President before the President sent the budget request to Congress in January, 1974.\textsuperscript{83} The subsequent transmittal to Congress in January was accordingly the first
public announcement of budget requests for NWRS and all other federal programs. 84

Although confidentiality is not mentioned in the Act which created OMB, 85 OMB has developed and aggressively maintains a strong tradition of confidentiality in the budget process. 86 According to agency practice, all budget estimates are privileged communications and remain privileged until the President's budget request is transmitted to Congress. 87 Even then, the supplemental materials remain confidential unless formally requested by members of Congress in connection with formal appropriation hearings. 88 It is accordingly apparent that requiring preparation of environmental impact statements during this process would seriously reduce OMB's flexibility. While the disclosure of the hidden environmental costs of its budget decisions would expose OMB to outside pressure which could force it to consider environmental factors in making those decisions, it would also significantly burden OMB administratively by interfering with OMB's streamlined and pressured process of producing the annual presidential budget.

B. Congressional Action

In January of each year, Congress begins its formal consideration of the President's recommended budget. 89 Traditionally, however, there has been no unified congressional process comparable to OMB's concentrated and finely tuned procedure for producing the President's recommended budget. 90 As previously noted, congressional budgeting began as a fragmented process, marked by a

86 See Budget Circular No. 352, December 26, 1939; Budget Circular No. A-10, August 1, 1943 (formerly No. 352); Budget Circular No. A-10 (revised Jan. 18, 1964) (all emphasize the confidentiality of the budget process).
87 "All budget estimates and supporting materials submitted to the Bureau of the Budget are privileged communications. Their confidential nature must be maintained, since they are the basic data and worksheets in the process by which the President resolves budget problems . . . . " Budget Circular No. A-10, ¶ 3 (revised Jan. 18, 1964). "The decisions of the President as to his budget recommendations and estimates are administratively confidential until made public by the President." Id. at ¶ 4.
88 "The Head of each agency is responsible for preventing disclosure of information contained in such estimates and materials except on request in formal appropriation hearings and when requested by Members of the Congress in connection with their consideration of the budget after its transmittal." Id. at ¶ 3.
90 See text at notes 77-88 supra.
dispersion of responsibility among various House and Senate committees acting upon budgetary matters independently of one another. As the national budget experienced a sharp expansion in the 1930's and 1940's, an expansion which has continued to the present day, Congress gradually found itself unable to deal effectively with its two budgetary functions of managing the economy and establishing public priorities in allocating federal resources. In order to reestablish control over spending and spending policy, Congress, in addition to amending the Budget and Accounting Act, which was previously noted, enacted the Congressional Budget Act of 1974 which established a legislative budget process to harness, and thereby improve, congressional control over spending.

Fiscal year 1980 may be used as an example of the congressional budget process. Congress began its formal consideration of the President's budget in January, 1979. According to congressional practice established before the Congressional Budget Act and reinforced by it, Congress initially enacted legislation to authorize agency programs and overall funding levels before considering appropriation requests for specific programs. Legislation setting

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82 Id. at 3468.

The size of the budget is a leading indicator of the changes that have occurred [in American government]. During the first 100 years, Federal expenditures crossed the billion dollar mark only once—in 1865 when Civil War costs were at a peak. This level was not reached again until 1917 when the United States entered the World War. That War—like all others in which the United States has been involved—had a pronounced effect on the budget. Wartime spending zoomed to $18 billion, and although it dropped after the War, it never dipped below $3 billion.

With the expansion of domestic and international commitments in the 1930's and 1940's, the budget climbed at an unprecedented pace, and except for postwar dips, the escalation has continued uninterrupted for the past 25 years. Nowadays, the year-to-year spiral is a familiar part of the budget scene. Annual increases are in the $15-20 billion dollar range, more than was spent in the first century of American government.

Id. at 3466.

One indicator of the increasing loss of congressional control over spending was a fiscal year 1978 statistic recorded by OMB. In that year approximately 75 percent of the budget was beyond the effective control of Congress. See House Committee on the Budget, Congressional Control of Expenditures 1 (Comm. Print 1977) [hereinafter cited as Congressional Control of Expenditures]. In other words, even if Congress took no action whatever on that portion of the budget, the money would be spent anyway. See also H.R. Rep. No. 658, supra note 50, 1974 U.S. Code at 3469.
85 See Clause 2 of Rule XXI of the House of Representatives provides that "no appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto for any expenditure not previously authorized by law. . . ." Paragraph 2 of Senate Rule
overall funding levels for authorized programs is defined as authorizing legislation, a process separate from and taking place prior to the actual appropriation of funds for the programs. Such authorizations fall into three categories depending upon their duration. Permanent authorizations remain in effect until Congress alters them; multi-year authorizations have terms of approximately two to five years; and annual authorizations expire each year and must be renewed annually for the program to continue. Depend-


The Congressional Budget Act of 1974 directs that the Comptroller General of the United States, “in cooperation with the Secretary of the Treasury, the Director of the Office of Management and Budget, and the Director of the Congressional Budget Office, shall develop, establish, maintain and publish standard terminology, definitions, classifications and codes for Federal fiscal, budgetary and program-related data and information.” 31 U.S.C. § 1152(a)(1) (1976). In accordance with this statutory authority, the Comptroller General has published definitions distinguishing “authorizing legislation” from “appropriation”. Authorizing legislation is defined as:

Basic substantive legislation enacted by Congress which sets up or continues the legal operation of a Federal program or agency either indefinitely or for a specific period of time or sanctions a particular type of obligation or expenditure within a program. Such legislation is normally a prerequisite for subsequent appropriations or other kinds of budget authority to be contained in appropriation acts. It may limit the amount of budget authority to be provided subsequently or may authorize the appropriation of such sums as may be necessary.


Appropriation is defined as:

An authorization by an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes. An appropriation usually follows enactment of authorizing legislation.

Id. at 3.

Over one-half of the budget is permanently authorized. These permanent activities are regularly considered only by congressional appropriations committees. There is no periodic review by the substantive committees of Congress, as Congress has set up the program and authorized it to continue until further notice. Examples include Social Security, interest on the public debt, and the operations of most cabinet departments. Congressional Control of Expenditures, supra note 92, at 19.

Multi-year programs must be renewed when their two- to five-year authorizations run out. Programs which require such reauthorization in a given year account for approximately 10 percent of the federal budget. The multi-year programs scheduled for termination during 1976 included revenue sharing, economic development assistance, water pollution control, higher education, and various health programs. Most, but not all, of the expiring programs were reauthorized. Id. at 21 (emphasis added).

Annual authorizations, which require an agency or program to go through both the legislative and appropriations committees each year account for approximately 15 percent of the budget. Examples are: education; health; nuclear energy; certain programs of the De-
ing upon the duration of the authorizing legislation, then, funds may become available to a program annually after appropriations review only; funds may become available periodically as a multi-year program comes up for re-authorization; or budget authority may become available each year only as authorized by Congress.

After Congress had completed action on authorizations for the 1980 fiscal year, a process which by statute is required to be completed by May 15, Congress considered specific agency budget requests. Congress had completed action on all such specific requests by early September and the measures were then transmitted to the President for his approval. On October 1 the fiscal year began.

IV. THE SIERRA CLUB LITIGATION

The central legal issue in the Sierra Club litigation was whether and under what circumstances NEPA requires a federal agency to prepare impact statements to accompany its annual budget requests for programs having significant environmental

fense Department; and the State Department. The State Department is the only Cabinet department subject to annual authorization for its entire appropriation. Id. at 22; U.S. BUDGET IN BRIEF, supra note 51, at 66.


101 The appropriations and authorizations processes are happening concurrently throughout this congressional ritual of completing action on the budget. Theoretically, authorizing legislation must be enacted before appropriations are approved. In practice, however, this is often not the case. If the authorizations process does not move efficiently enough to have the authorizing legislation in place at the time an appropriations committee is ready to approve funding, the appropriations committee will often approve funding without authorizing legislation, knowing that authorization will come later. Telephone conversation with an Administrative Assistant, United States Senate, Committee on the Judiciary, November, 1979.

102 Id.

103 UNITED STATES BUDGET IN BRIEF, supra note 51, at 67.

104 31 U.S.C. § 1321 (1976). Environmentalists in the Sierra Club litigation were seeking to have the EIS requirements of NEPA attach to the appropriation phase of this process. Andrus v. Sierra Club, 442 U.S. 347-49 (1979). There is, however, an inconsistency involved in that approach. Effective environmental review in the budget process involves an analysis of the policies which underlie agency programs. The purpose of attaching an EIS to the budget process is to force Congress to question agencies as to why they are requesting money to fund actions which have an impact on the environment and whether there is an alternative to the proposed agency action which would less adversely affect the environment. According to congressional practice, this kind of inquiry into agency goals and policies occurs in the authorization process, rather than in the appropriation process. See text at notes 95-96 supra. Introducing an EIS into the appropriation process could arguably alter the roles which Congress has assigned to its various budget committees in its attempt to control congressional spending.

consequences. The action was commenced in the District Court for the District of Columbia in 1974 by members of the Sierra Club and two other conservation groups who were concerned by threatened cutbacks within NWRS. They contended that both the existing CEQ guidelines and the spirit of NEPA required that budget requests for programs significantly affecting the environment be considered to constitute "proposals for legislation and major Federal actions," characterizations that require an EIS under NEPA. The objective of the action was accordingly to extend NEPA's scope to the kinds of changes that occur within agency programs and have significant environmental effects but

106 Id. at 348-49.
107 Sierra Club v Morton, 395 F. Supp. 1187 (D.D.C. 1975). The suit was brought against the Secretary of the Interior and the Director of OMB. The Sierra Club alleged that OMB had "significantly reduced the Interior Department's request for appropriations for the operation of National Wildlife Refuge System during fiscal year 1974 and during other years without preparing or considering the environmental impact statement required by NEPA." Complaint at ¶ 25, Sierra Club v. Morton, 395 F. Supp. 1187 (D.D.C. 1975). This issue was dropped in the subsequent litigation. The Sierra Club alleged, as well, that Section 102(2)(C) of NEPA, supra note 12, required OMB to develop procedures to assure consideration of environmental factors in the budget process. Complaint at ¶ 26, Sierra Club v. Morton, supra.
108 The National Parks and Conservation Association and the Natural Resources Defense Council, Inc. joined the Sierra Club in bringing the action.

The National Wildlife Refuge System, administered by the U.S. Fish and Wildlife Service, consists of over 390 refuges containing more than 30 million acres in 49 states. See U.S. DEPT. OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT, OPERATION OF THE NATIONAL WILDLIFE REFUGE SYSTEM, November 1-3 to 1-6 (1976) [hereinafter FINAL ENVIRONMENTAL STATEMENT]. The primary purposes of NWRS are to preserve endangered species and to sustain populations of migratory birds by maintaining, intact, an extended network of their natural habitats. A second purpose of NWRS is to provide for the System's educational and recreational use by the public. Id.
110 The guidelines in effect at the time of the district court case defined major federal actions to include "[r]ecommendations or favorable reports relating to legislation including requests for appropriations." 40 C.F.R. § 1500.5(a)(1) (1978); 38 Fed. Reg. 20,551 (1973). See text at note 34 supra.
111 "The thrust of § 102(2)(C) [see text at notes 11-12 supra] is that environmental concerns be integrated into the very process of agency decision making." Andrus v. Sierra Club, 442 U.S. 347-50 (1979). To support and advance this objective, CEQ regulations require federal agencies to "integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values. . . ." 40 C.F.R. § 1501.2 (1979).
113 See text at note 12 supra.
which never take shape as distinct major federal actions because they never come into focus outside the budget process.\textsuperscript{114} It was contended that decisions within a program such as NWRS relating to the operational, maintenance and staffing areas, among others, are often made in response to funding level increases and decreases made by OMB and the Interior Department, and although these decisions may significantly affect the environment by decreasing or terminating services which were previously available, NEPA could not reach them without reaching the budget process itself. To accomplish their objective, the plaintiffs sought a declaration that environmental review should be integrated into the budget process for NWRS through early preparation of an EIS by the agencies and departments involved. This would require the agencies and departments to consider environmental factors and alternatives in making budgetary decisions on how to allocate or reallocate agency resources; would provide a record for judicial review of the adequacy of consideration of such factors; and would inform the public of the environmental costs of the proposed budget allocations.

\textbf{A. The District Court Decision}

The district court agreed with the contention that NEPA required federal agencies to prepare an EIS to accompany each annual budget request for those programs which significantly affected the environment.\textsuperscript{116} It held that such requests were "proposals for legislation"\textsuperscript{116} within the meaning of NEPA and were also "major Federal actions"\textsuperscript{117} which clearly had a significant effect on the environment.\textsuperscript{118} The court accordingly ordered the Interior Department to prepare statements for the annual budget requests of NWRS,\textsuperscript{119} and it also ordered OMB to take an active role in seeing that all federal agencies complied with NEPA in the budget process.\textsuperscript{120}

Although annual budget requests had not before been at issue in

\textsuperscript{114} The Sierra Club claimed that "[d]efendants have made major policy decisions and taken actions to cut back significantly the operations, maintenance, and staffing of units within the System." Complaint at ¶ 17, Sierra Club v. Morton, 395 F. Supp. 1187 (D.D.C. 1975).


\textsuperscript{118} Id.

\textsuperscript{119} 395 F. Supp. at 1189.


\textsuperscript{120} Id. at 2.
a suit to enforce NEPA, the district court had substantial support for its decision. The CEQ guidelines at the time held that appropriation requests were proposals for legislation, and the Interior Department's own regulations followed those guidelines by providing that statements be prepared in connection with appropriation requests. The term "major Federal actions," moreover, had been broadly interpreted to include as many actions as possible within NEPA's mandate, and there was a body of case law requiring that an EIS accompany requests for appropriations to construct or initiate specific projects. The decision, however, left unanswered major questions peculiar to the practical problem of integrating NEPA within the budget process. Final budget decisions are made in the executive branch in the short time period from September to December. It would be a difficult task for agencies to prepare meaningful statements and for OMB to consider them carefully during this short period. The district court minimized this difficulty by suggesting that a budget EIS can and should be prepared early in the budget process rather than during the period from September to December when time pressure on

124 In Environmental Defense Fund v. Tenn. Valley Auth., 468 F.2d 1164 (6th Cir. 1972) (Tellico Dam), the court held that "as long as appropriations are necessary for the continued construction of a project, impact statements should be filed." Id. at 1182. And in Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973) (development of the liquid metal fast breeder reactor), the court came to a similar conclusion:

The program comes before Congress as a proposal for legislation each year, in the form of appropriations requests by the Commission. And as the Council on Environmental Quality has noted in its NEPA Guidelines, the statutory phrase "recommendation or report on proposals for legislation" includes "[r]ecommendations or favorable reports relating to legislation including that for appropriations." Id. at 1088 (emphasis in original) (citing 36 Fed. Reg. 7,724 (1971)). Accord, Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977) (congressional committees' approval of construction of a federal building); Atchison, Topeka and Sante Fe Ry. v. Callaway, 431 F. Supp. 722 (D.D.C. 1977) (construction of dam and locks).

OMB and the agencies is the greatest.\textsuperscript{127} Realistically, however, this is not practical for the reason that the kind of vital decision making at which NEPA is directed occurs late in the budget process.

There are, in fact, two possibilities for the timing of an EIS in the budget process as previously outlined.\textsuperscript{128} The first would be for the Fish and Wildlife Service ("FWS"), the agency within the Department which administers NWRS, to prepare an EIS to accompany its preliminary budget request to the Department in mid-May. The Department, however, could well ask FWS to revise this request to bring it in line with OMB's appropriation levels for the particular fiscal year, and such a preliminary request would arguably be predecisional and not yet a definite "proposal for legislation" requiring NEPA compliance. The second possibility would be for the Department to prepare an EIS when it submits its draft budget request to OMB in late September. By virtue of the statement, OMB would have an opportunity to consider environmental factors in finalizing the Department's budget for recommendation to the President, and at this point the Department's request would be considered a proposal which would involve no further significant changes in the NWRS budget allocation.\textsuperscript{129}

Late September, then, would seem to be the appropriate time for an EIS within the budget process. But the period from late September through December is the most pressured time in the budget cycle for both OMB and the agencies. An issue further complicating the problem is that a large number of statements would probably have to be prepared by many federal agencies, tending to overwhelm OMB and render it less able to carry out its budgetary responsibilities. The district court recognized and dismissed this issue by noting that NEPA required impact statements to be prepared only on those legislative proposals significantly affecting the environment.\textsuperscript{130} As the court itself declared elsewhere in its opinion, however, the term "major Federal actions" has been broadly interpreted,\textsuperscript{131} and an EIS would conceivably have to accompany every budget request of any agency whose activities

\textsuperscript{128} See text at notes 77-84 supra.
\textsuperscript{131} See note 124 supra.
might have a significant environmental impact.\textsuperscript{182}

There was another issue which arguably was the most significant and troublesome one raised by the litigation and which the district court did not expressly recognize: balance of power between Congress and OMB as to the budget, with each body trying to exert dominant budgetary control.\textsuperscript{183} Statements attached to each annual budget request, or to any budget request, would expose much of the negotiation which occurs behind closed doors at OMB and could, therefore, weaken OMB's substantial control over the budget.\textsuperscript{184} If the balance of power between these two branches of government were to be upset, it might well be that Congress, rather than the courts, should effect the change.

**B. The Court of Appeals Decision**

The Court of Appeals for the District of Columbia reversed the district court in part. It interpreted NEPA's "proposal for legislation" provision to include only non-routine budget requests and held that statements were not required for the annual budget requests of all ongoing federal programs but only for those which envisioned a significant change affecting the environment.\textsuperscript{185} In fashioning this remedy, the court of appeals noted with concern that preparation of a potentially large number of annual statements would "trivialize NEPA"\textsuperscript{186} by fostering shallow and hurried preparation and consideration of impact statements.\textsuperscript{187} An EIS should accordingly accompany an agency's budget request only in those instances when the request sought to initiate a new course of action which had been preceded by a comprehensive review or evaluation constituting a major federal action within the agency.\textsuperscript{188}

\textsuperscript{182} This would include, for example, budget requests from the ICC, see Aberdeen & Rockfish R.R. Co. v. SCRAP [SCRAP II], 422 U.S. 289, 320-21, 322-27 (1975), and the SEC, Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689, 697-700 (D.D.C. 1974).

\textsuperscript{183} See text at notes 57-74 supra.


\textsuperscript{185} Sierra Club v. Andrus, 581 F.2d 895, 903 (D.C. Cir. 1978).

\textsuperscript{186} Id. at 904.

\textsuperscript{187} Id.

\textsuperscript{188} "In our view, section 102(2)(C) contemplates a 'proposal' for taking new action which significantly changes the status quo, not for a routine request for budget approval and appropriations for continuance and management of an ongoing program." Id. at 903. The court suggests that a significant change in the status quo may give rise to a programmatic review within the agency. This programmatic review would involve a comprehensive reconsideration or reevaluation of agency goals and policies with respect to the particular 'change'.
The Interior Department had, in response to the district court action, voluntarily undertaken and completed such a programmatic review and had issued an EIS for NWRS\textsuperscript{138} which included an analysis of the environmental effects of proposed and alternative funding levels for the System.\textsuperscript{140} In view of this, the court of appeals concluded that the Department had met its current NEPA obligations.\textsuperscript{141}

The court of appeals affirmed that part of the district court's decision requiring OMB to become actively involved in the enforcement of NEPA.\textsuperscript{142} In doing so, it implicitly recognized as significant the tension between Congress and OMB as to which would exert dominant control over the budget.\textsuperscript{143} The court was also sensitive to OMB's position with regard to confidentiality in the budget process, suggesting that OMB integrate into its budget process impact statements submitted by agencies in such a way as to permit environmental analysis without betraying genuine budgetary confidences;\textsuperscript{144} but the court offered no suggestion as to how this could effectively be done.

The decision of the court of appeals was based on reasonableness rather than upon statutory provisions, legislative history, or case law; but it offered no guidelines for courts to use in determining when an agency's budget request involved changes which were significant enough to require an EIS. In addition, it left unanswered the question whether an agency ever has a judicially enforceable

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\textsuperscript{140} \textit{FINAL ENVIRONMENTAL STATEMENT, supra} note 108, at Table 26 (see following page).

\textsuperscript{141} Sierra Club v. Andrus, 581 F.2d 895, 906 (D.C. Cir. 1978).

\textsuperscript{142} \textit{Id.} at 904.

\textsuperscript{143} \textit{Id.} at 903-06.

\textsuperscript{144} The matter may be capable of resolution in a manner that presents program proposals in terms that permit an environmental analysis, without disclosure of dollar projections or other betrayal of genuine budget confidence. . . . [S]ince proposals for major program reviews and changes can probably be disclosed in general outline, sufficient for impact statement purposes, without undercutting the objective underlying budget-type secrecy, OMB can fairly be called on to develop a proposal that serves and harmonizes both NEPA and the budget processes.

\textit{Id.} at 905-06.
Table 26

FUNDING AND MANPOWER ALLOCATION FOR THE NATIONAL WILDLIFE REFUGE SYSTEM UNDER CURRENT LEVEL

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<td>254.1 17.2</td>
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<td>254.1 17.2</td>
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1/ The projected cost to implement refuge programs is based on 1974 dollars and does not include expansion for inflationary trends or money/manpower to operate new areas acquired after July 1, 1974.
2/ Manpower figures include only the man-years of permanent full time personnel, not temporary or other appointments, associated with the Resource Management Appropriation. These figures are not related to personnel ceilings.
3/ Resource Management Appropriation: contains operating and maintenance/rehabilitation and restoration monies. Approximately 80% of the Operational Maintenance monies are spent on salaries with the remainder for equipment and supplies. Rehabilitation and restoration of facilities are accomplished by a revolving fund within the Resource Management Appropriation in the $2,500 to $60,000 range (known as "minor rehab").
4/ Construction projects rehabilitation projects over $60,000 (known as "major rehab") are contained within the Construction and Anadromous Fish Appropriations.
duty to undertake a general review of an entire program extending beyond any particular significant changes in that program.\textsuperscript{146}

C. The Supreme Court Decision

In an opinion written by Mr. Justice Brennan, the Supreme Court unanimously held that budget requests were neither "proposals for legislation" nor "major Federal actions" for purposes of NEPA.\textsuperscript{146} Environmental impact statements, therefore, were not required in connection with any agency budget requests to OMB or to Congress.

1. Budget Requests as "Proposals for Legislation"

In holding that budget requests do not constitute proposals for legislation, the Court adopted the district court's all-or-nothing approach\textsuperscript{147} and held that no budget request is a proposal for legislation.\textsuperscript{148} The Court rejected as unsupported by the explicit language of NEPA the distinction drawn by the court of appeals between routine and non-routine budget requests.\textsuperscript{149} The court of appeals had focused on budgetary control and the administrative implications of impact statements for OMB.\textsuperscript{150} The Supreme Court, how-

\textsuperscript{146} We have no occasion at this time to consider whether, or in what instances, a "new look" may be required because of vastly changed circumstances, either by NEPA or perhaps by some other provision of federal law. Nor need we now consider whether a court may mandate any such duty to take a new look.

\textit{Id.} at 904.


\textsuperscript{148} "Either all appropriation requests constitute 'proposals for legislation' or none does."

\textit{Id.} at 356.

\textsuperscript{149} \textit{Id.} at 361.

\textsuperscript{150} \textit{Id.} at 356.

\textsuperscript{151} Sierra Club v. Andrus, 581 F.2d 895, 904-06 (D.C. Cir. 1978).
ever, focused upon the implications of impact statements for Congress. In holding that NEPA does not apply to appropriation requests, the Court implicitly recognized the continuing struggle within Congress to control its own spending and supported this effort by confirming the congressionally established distinction between appropriations and authorizations.

Authorizing legislation, as has been noted, is basic substantive legislation which must be enacted before appropriations are approved for an agency program. It is the function of authorizing legislation to examine agency goals and policies and establish a fiscal policy for the particular agency or program pursuant to Congress' role as fiscal policy maker. After an agency has received the required authorization, that agency's appropriation requests are then considered and approved. The Supreme Court noted that impact statements attached to such appropriation requests would "flood" the House and Senate appropriations committees with statements focused on policy issues, when such policy issues should have been dealt with in the preceding authorization process. The Court emphasized that the appropriations committees were limited to providing funds for authorized programs and that the distinction between authorizations and appropriations was maintained to ensure that policy matters and financial matters were considered independently of one another. The Court further noted that this division of responsibility was intended to enable the appropriations committees to concentrate on financial matters and to prevent them from trespassing on substantive legislation. The Court accordingly held that appropriation requests did not constitute "legislation" for purposes of NEPA.

In support of its decision the Court relied primarily on legislative history and congressional practice which distinguished "legislation" from "appropriation" and on the newly revised and

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181 442 U.S. at 358-61.
182 See text at notes 89-92 supra.
183 442 U.S. at 359-60.
184 See text at note 96 supra.
186 See text at notes 95-99 supra.
187 442 U.S. at 364.
188 Id. at 361.
189 Id. at 359.
mandatory CEQ regulations\textsuperscript{160} which excluded budget requests from the definition of legislation, thus preserving this traditional distinction between legislation and appropriation.\textsuperscript{161} In further support of CEQ's position the Court set forth statutes,\textsuperscript{162} executive office circulars,\textsuperscript{163} and rules of both houses of Congress,\textsuperscript{164} all of which emphasized the continuing viability of the distinction.\textsuperscript{165} The Court accordingly concluded that since appropriation requests had the limited purpose of providing funds for authorized programs, they did not constitute legislation for purposes of NEPA.\textsuperscript{166}

2. Budget Requests as "Major Federal Actions"

The Court rejected the suggested alternative interpretation of an appropriation request as constituting "major Federal actions" for the same reason that such requests were not "proposals for legislation." Appropriations were not actions but merely funded actions,\textsuperscript{167} and NEPA applied only to the proposed programmatic actions themselves.\textsuperscript{168} Thus, if an agency were to expand or revise a program so as to constitute a major federal action significantly affecting the environment, an EIS would be required to accompany the underlying programmatic decision.\textsuperscript{169} By the same token, if an agency were to request appropriations to initiate a major new program that would significantly affect the environment, or were to fail to request funding so as to terminate a program, an EIS would

\textsuperscript{161} Id.
\textsuperscript{164} 442 U.S. at 360-61. See note 95 supra.
\textsuperscript{165} The distinction is maintained "to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation." CONGRESSIONAL CONTROL OF EXPENDITURES, supra note 92, at 19.
\textsuperscript{166} 442 U.S. at 361.
\textsuperscript{167} Id. at 362.
\textsuperscript{168} Id. at 363.
\textsuperscript{169} Id. at 363 n.22. The Court emphasized that major federal actions include both the "expansion and revision of ongoing programs." Id. at 363 n.21, quoting 1969 SENATE REPORT, supra note 2, at 20, LEGAL COMP., E.P.A. at 446.
be required for the proposed underlying programmatic decision. For the Court, the EIS issue was not "whether" but "when"; and to avoid redundancy, it directed that agencies prepare their statements prior to and apart from the appropriation process.

The Supreme Court's opinion establishes that OMB's power to make life and death decisions for federal programs through the budget process remains beyond the reach of NEPA. Just what NEPA does require of federal agencies under the Court's decision is, however, elusive at best. The unresolved issues fall roughly into the following four categories.

The Court decided by assumption, rather than by logic or reasoning, that an EIS would be recognized as required when agencies expand or cut back programs with environmental consequences. This assumption, however, may or may not be correct as a matter of agency practice. Human nature coupled with administrative considerations suggests that agencies will avoid preparing impact statements where there is a good-faith question as to whether or not one is required.

Secondly, the Court held that an EIS is required to be prepared on underlying programmatic decisions which constitute major federal actions and on proposals to expand or revise agency programs significantly affecting the environment. Thus, if an agency requests a higher level of funding to accommodate an expanded program which had been preceded by a comprehensive review and evaluation within the agency, the EIS requirement would attach to the underlying decision to expand, and not to the subsequent budget request. If an agency's revision or cutback is involuntarily imposed by OMB's fiscal decisions, the EIS requirement would attach when the agency revised its programs in response to the OMB budget cuts. It may be difficult to establish, however, that

170 442 U.S. at 363 n.22.
171 See H.R. REP. No. 697, supra note 8, 1974 U.S. CODE at 2748; see text at note 56 supra.
173 See Anderson, The National Environmental Policy Act, supra note 18, at 244-45.
174 442 U.S. at 363.
175 There is some difficulty in determining when, in these circumstances, FWS will be required by the Court's decision to prepare an EIS. From late September through December when OMB had made its final decisions as to what level of funding it would recommend for FWS, see notes 77-83 supra, FWS knew without the benefit of an EIS the level of appropriation it could expect for the next fiscal year. FWS's presidentially recommended budget would then have been considered by Congress, also without the benefit of an EIS. After Congress had approved a level of appropriation for FWS, see text at notes 89-104 supra,
either of these decisions has been made by an agency. In their complaint in the district court, for instance, the plaintiffs had alleged that the Interior Department had made major policy decisions and taken action to cut back significantly on FWS programs.\textsuperscript{176} The Department had denied this allegation, and the issue was dropped in the subsequent course of the litigation. It would have been a difficult question of fact, however, as to whether the Department had or had not reduced the FWS budget significantly, and this information is difficult to obtain in light of the traditional confidentiality of the budget process.\textsuperscript{177}

Thirdly, how is it to be determined whether or not a specific expansion or revision requires an EIS? The Court states that not every expansion or revision will occur as part of a programmatic decision constituting a major federal action,\textsuperscript{178} but it offers no standard for determining which do and which do not. Nor does the Court indicate whether the agency or the courts shall make such a determination.

Finally, under what circumstances is an agency under an enforceable obligation to prepare an EIS when it makes a decision to expand or cut back on a program? Courts are inherently reluctant to interfere with the free flow of information between the executive and legislative branches of the government,\textsuperscript{179} and a court may well be unwilling to enjoin the Interior Department’s budget request from going to Congress because the Department or OMB had reduced FWS’s budget and had failed to prepare an EIS on the underlying programmatic decision.

In sum, it is doubtful that requiring FWS to prepare an EIS when it revises its programs in response to OMB’s cutbacks effectively implements NEPA’s objective of infusing environmental concerns into vital policy decisions affecting the environment. The vital policy decision in these circumstances is OMB’s decision to

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\textsuperscript{177} See text at notes 85-88 \textit{supra}.

\textsuperscript{178} 442 U.S. at 362-63.

\textsuperscript{179} See note 145 \textit{supra}. 

FWS would have been in one of three positions: it would have been forced to revise its programs in response to reduced levels of appropriations; it would have been able to maintain its ongoing programs in response to roughly constant or unchanged levels of funding; or, it would have been able to expand its programs in response to increased levels of appropriations. In the first and last of these situations, FWS, according to the Court’s decision, would be required to prepare an EIS in reallocating agency funds to reduce or to expand programs. See text at note 174 \textit{supra}, 176-78 infra.
reduce the budget request of the Interior Department,\textsuperscript{180} and this
decision remains beyond the reach of NEPA under the Supreme
Court’s opinion. Requiring FWS to prepare such an impact state-
ment in response to OMB’s cutbacks would involve environmental
considerations only in less significant policy decisions connected
with FWS’s subsequent reallocation of its reduced agency
resources.

The Court’s decision, however, does strengthen NEPA in one re-
spect. The Court assumes throughout its opinion that an EIS is
indeed required when an agency takes action to expand or cut back
on existing programs significantly affecting the environment.\textsuperscript{181}
The only issue addressed by the Court is the timing of the prepa-
ration of the statement in the evolution of a project. From this
perspective, the Court supports the use of section 102(2)(C) of
NEPA\textsuperscript{182} to protect the environment against those who would
harm it through lack of foresight or interest or through active
disregard.

V. NEPA AND THE BUDGET PROCESS

The budget process controls the funding of all agencies and pro-
grams, and it should in some manner be required to comply with
NEPA if the goal of infusing environmental review into govern-
mental decision making is to maintain vitality. Excluding NEPA
from this process undermines the Act and weakens it as a viable
tool for implementing environmental review. The question, then, is
how to apply NEPA effectively. The Supreme Court held that this
application could not be done within the appropriation process. In
balancing the government’s interest in budgetary efficiency, which
substantially eliminates individual interests from budgetary re-
view, against the environmental benefit of exposing the process to
NEPA and thereby impeding that efficiency, the Court found in
favor of the government. There remains, however, the possibility of
applying NEPA to the authorization process.\textsuperscript{183}

The following sections of this article suggest that Congress or
CEQ can and should incorporate NEPA’s environmental review re-
quirements into the federal budget process through both the ap-

\textsuperscript{180} See text at notes 77-84 supra.
\textsuperscript{181} 442 U.S. at 363 n.22.
\textsuperscript{182} 42 U.S.C. § 4332(2)(C). See note 12 supra.
\textsuperscript{183} See text and notes at notes 96-99 supra.
propriation process and the authorization process. The Supreme Court decision excludes the appropriation process from NEPA's present scope. Congress and CEQ, therefore, should address the issue aggressively through both amendatory legislation and regulation since it involves sophisticated governmental machinery with which both have particular expertise.

A. The Appropriation Process

The appropriation process is an annual opportunity for Congress to review federal agencies and programs. Each year the House appropriations subcommittees examine extensively the financial practices and needs of all the agencies, and in considering individual budget requests, the subcommittees hold hearings. Each agency appears before its specified subcommittee with "justification books" which detail its programs, its past and present expenditures, and its budget requests for the next year. The subcommittee then questions the agency on any subject connected with appropriation requests or related matters ranging from trips by individual agency employees to long range program policies and goals. Consequently, the appropriation process is an effective form of congressional control over agencies and would serve NEPA's purpose of infusing environmental review into important government decision making. It is arguably for this purpose and reason that CEQ originally and through 1979 defined NEPA to include appropriation requests.

The revised CEQ regulations make it more practical to accommodate impact statements to the budget process, for the revised regulations attempt to streamline the EIS process by reducing paperwork and delays. Furthermore, the regulations offer an improved process for preparing such statements for legislative proposals, which could be redefined through amendatory legislation

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184 CONGRESSIONAL CONTROL OF EXPENDITURES, supra note 92, at 31.
185 In 1977, "these subcommittees conducted hundreds of hearings, heard 4,276 witnesses, and accumulated 64,762 pages of printed hearings. The Senate hearings tend to be less detailed and extensive, and they often concentrate on appeals by Federal agencies for the restoration of cuts made by the House." Id.
186 Id.
187 Id.
188 Id.
189 See text at notes 26, 27 supra.
191 See 40 C.F.R. § 1506.8 (1979).

to include budget requests. The legislative EIS would be considered as part of the formal transmittal of the legislative proposal to Congress, but it could arrive up to thirty days late as long as it was available for the relevant hearings and deliberations.\textsuperscript{182} Permitting the agency to produce its completed budget EIS thirty days after the President transmitted his budget to Congress would release some of the pressure attributable to the tight timing schedule of the budget cycle. It would not, moreover, detract from the spirit of NEPA as long as the agency had previously incorporated environmental review into its own budget decisions, despite delayed submission of the statement.

The revised regulations further provide that, in most instances, only a draft EIS need be prepared.\textsuperscript{183} This eliminates the necessity of both a draft and final EIS, such as is required for major federal actions,\textsuperscript{184} and would further reduce paperwork for agencies preparing such budget statements. Finally, the revised regulations make provisions for the non-publication of confidential data.\textsuperscript{185} Were it to be determined that there was a clear and unavoidable conflict between the requirements of NEPA and the requirements of the Budget and Accounting Act\textsuperscript{186} as to confidentiality within the budget process, those provisions of NEPA mandating publication of statements would be ineffective.\textsuperscript{187} Those communications between OMB and the agencies which qualify as confidential could remain so under the new regulations,\textsuperscript{188} while the remaining decision-making activities could fully comply with NEPA. This would provide Congress with an EIS detailing the environmental costs of agency budget decisions while Congress is reviewing and acting upon individual agency budget requests without destroying the confidentiality OMB requires to function effectively. It should also be emphasized that once an agency has developed its first budget EIS, that particular EIS could serve as a model for each subsequent statement. In some cases the initial EIS would simply need

\textsuperscript{182} Id. § 1506.8(a).
\textsuperscript{183} Id. § 1506.8(b)(1), (2).
\textsuperscript{184} Id. § 1502.9.
\textsuperscript{185} Id. § 1507.3(c).
\textsuperscript{186} Ch. 18, 42 Stat. 20 (1921) (codified in scattered sections of 31 U.S.C.).
\textsuperscript{188} 40 C.F.R. § 1507.3(c) (1979).
to be supplemented as changed circumstances so dictated.198

If applying EIS requirements to annual budget requests were to be too cumbersome and impractical, the requirements could apply beneficially to other more limited situations within the appropriation process. When an agency initiates or terminates a program having significant environmental effects, for instance, the agency could prepare an EIS to accompany its relevant budget request. It is to be noted, however, that there would be practical difficulties in preparing an EIS to accompany any budget request which fails to continue a program. Although an EIS should have accompanied the underlying programmatic decision to initiate or terminate the program,300 that programmatic statement, even if it had existed, would not necessarily have addressed the specific considerations involved in a budgetary analysis of environmental factors.301 The agency's initial budget EIS could then be updated in the future if the agency significantly changed the scope of the existing program.302

Another viable possibility for an EIS within the appropriation process is a combined programmatic-budget EIS, such as that which FWS prepared for NWR303 in which FWS's programmatic review of the System included a section discussing general alternative funding levels over a ten year period.304 The major shortcoming of such a programmatic-budget EIS is that, by its nature, it deals in generalities305 and consequently does not address the types of issues peculiar to the annual budget cycle, such as timing and expenditures of funds during the fiscal year. The programmatic-budget EIS could, however, be useful as a budget EIS if it were supplemented annually306 to address those issues relevant to the budget cycle.

198 Id. § 1502.9(c)(1).
301 The district court rejected FWS's proposed programmatic statement as an insufficient substitute for a budget EIS. The court noted that the programmatic statement is directed at long range goals, while the budget EIS is directed at goals being considered in developing specific appropriations proposals. Sierra Club v. Morton, 395 F.2d 1187, 1191 (D.D.C. 1975).
302 This was the approach taken by the court of appeals. See Sierra Club v. Andrus, 581 F.2d 895, 904 (D.C. Cir. 1978).
303 See Final Environmental Statement, supra note 108.
304 See Table 26 at p. 228.
305 See note 22 supra.
B. The Authorization Process

Absent amendatory legislation to incorporate the appropriation process within NEPA's scope, the only effective method through which to incorporate impact statements into the budget process is the authorization procedure in Congress.\textsuperscript{207} Authorization legislation accomplishes two congressional purposes.\textsuperscript{208} It sets up or continues the legal operation of programs and agencies, and it establishes maximum funding levels for these substantive operations during their authorized period.\textsuperscript{209} As mentioned previously,\textsuperscript{210} authorizations fall into three categories depending upon their duration: permanent,\textsuperscript{211} multi-year,\textsuperscript{212} and annual.\textsuperscript{213} Over one-half the budget is permanently authorized. These permanent activities are regularly considered only by congressional appropriations committees, since Congress has set up these programs and authorized them to continue until further notice with whatever sums are necessary.\textsuperscript{214} Multi-year programs constitute approximately 10 percent of the federal budget in a given year, although in total they constitute approximately one-quarter of the budget, and must be renewed when their two- to five-year authorizations run out.\textsuperscript{215} Annual authorizations, which require an agency or program to go through both the legislative and appropriations committees yearly, constitute less than 15 percent of the budget.\textsuperscript{216} Indeed, the fact that over one-half of the budget is reviewed solely by appropriations committees without any legislative committee review further emphasizes the importance of the appropriations process in terms of any application of NEPA to budget policy. As has been noted, however, the Supreme Court has held that NEPA does not apply to the appropriations process.\textsuperscript{217}

By congressional definition, authorizations are basic substantive

\textsuperscript{207} See text at notes 95-99 supra.
\textsuperscript{208} See note 96 supra.
\textsuperscript{209} Id.
\textsuperscript{210} See text at notes 96-99 supra.
\textsuperscript{211} Id. at 19.
\textsuperscript{212} Id. at 20-21.
\textsuperscript{213} Id. at 22-23.
\textsuperscript{214} Id. at 19.
\textsuperscript{215} Id. at 20.
\textsuperscript{216} Id. at 22. These percentages are very general and vary from year to year. They do not represent specific portions of the whole for any particular year.
legislation, and CEQ defines legislation to include agency-developed bills and legislative proposals sent to Congress. Authorizing legislation is included, therefore, in NEPA's environmental review requirement for legislative proposals significantly affecting the environment. Thus, when an agency drafts a proposal for authorizing legislation in which it seeks to extend or continue a program having significant environmental effects, either at the same or at a different level of funding, this proposal arguably constitutes a proposal for legislation for the purposes of NEPA and must be accompanied by an EIS. An example of how this suggestion would work may be illustrated by the proposal of the Appalachian Regional Commission ("ARC") to complete the Appalachian Development Highway System ("ADHS") by extending the Commission's authorization and increasing its authorized funding levels to accommodate an enlarged highway plan at a resulting higher cost.

The Appalachian Regional Development Act of 1965 authorized federal agencies to develop programs directed at stimulating economic growth in Appalachia. Pursuant to the Act, ARC developed a program for construction of a highway system designed to improve access to the area. Initially 397.9 miles of highway were planned, but as of September, 1979, construction had been completed or was being completed on 1700 miles of highway. Although a substantial amount of the construction took place prior to the passage of NEPA in 1970, environmental impact statements for specific segments of highway had been prepared for approximately 80 percent of the system. A programmatic EIS analyzing the environmental effects of the system as a whole, however, had not been prepared. In order to complete the highway project, ARC proposed that authorization for ADHS funding, which would run out in 1981, be extended to 1986 and that the authorized funding

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levels be substantially increased to accommodate the project's increased size and expense.\textsuperscript{237} No EIS accompanied this proposal for legislation to Congress. The National Wildlife Federation accordingly brought suit in a federal district court seeking a declaratory judgment that ARC violated NEPA by failing to submit an EIS to Congress along with its legislative proposal to extend the Commission's authorization and increase its funding level.\textsuperscript{238} The district court, however, never reached the issue of NEPA's applicability to the authorizing legislation involved for the reason that it found that there was an unavoidable conflict between NEPA and the Appalachian Regional Development Act which relieved ARC of its obligation to prepare an EIS in connection with the highway system.\textsuperscript{239}

The ARC case presents a situation in which a legislative EIS could well serve the purposes of NEPA. Such an EIS would allow Congress to engage in informed decision making in its consideration of whether or not to permit ARC to complete the proposed highway system through Appalachia in view of environmental factors as well as increased costs. The declaratory relief sought would provide the court with an opportunity to state definitively whether NEPA had been violated and would, moreover, serve the purpose of alerting other agencies to their duty to provide an EIS with future authorizing legislation for programs significantly affecting the environment.\textsuperscript{240}

Legislative environmental impact statements\textsuperscript{241} accompanying authorizing legislation for programs significantly affecting the environment offer a practical method of incorporating NEPA's action-forcing provisions into the budget process. Congress itself has declared, by enacting NEPA, that it seeks to consider environmental factors in acting upon legislative proposals; and an authorization EIS would allow this kind of informed congressional decision making with respect to the extension and refinancing of a federal program. An authorization EIS would also be less of an administrative burden for the agencies, OMB and Congress than an appropriation EIS. Programs due for reauthorization each year constitute less

\textsuperscript{239} Id. at 8.
\textsuperscript{240} But see note 145 supra.
\textsuperscript{241} See 40 C.F.R. § 1506.8 (1979).
than 15 percent of the budget and would not, therefore, overburden the agencies and congressional subcommittees involved, especially in light of the revised CEQ regulations for a legislative EIS.

There are, of course, some difficulties with using authorization proposals as a NEPA implementation tool, but they are not insurmountable. Legislative proposals must be pending in Congress before any judicial action can be brought since, by definition, there is no "proposal" for legislation for purposes of NEPA until the legislation is transmitted to Congress to be considered. A greater difficulty, once a proposal is before Congress, is the reluctance of courts under various concepts of "justiciability" to interfere in the legislative process at any point prior to final congressional action. The courts should recognize, however, that NEPA's prime purpose is to guarantee informed governmental decision making through consideration of the environmental effects of proposed legislation. In the case of authorization legislation, a legal action should accordingly be fully ripe for decision at this ongoing stage of the legislative process rather than after final legislative action has been taken. Congress was surely aware of this situation when it included proposals for legislation within NEPA's action-forcing provision. It may be concluded that it was the intention of Congress, in light of this knowledge, to provide some sort of judicial relief at this stage which would not be considered an undue interference in the legislative process. Declaratory relief would be such a remedy. It would clarify the EIS issue and place agencies on notice of their NEPA obligations, while at the same time avoiding unnecessary judicial interference in the legislative process.

VI. CONCLUSION

In Andrus v. Sierra Club, the Supreme Court banned application of the National Environmental Policy Act to the appropria-
tion phase of the federal budget process while at the same time assuming the existence of an EIS requirement for programmatic changes within an agency which occur prior to or apart from that process. This article suggests, however, that the most significant governmental decision making affecting the environment is agency, Office of Management and Budget, and congressional action on the federal budget. NEPA's environmental review requirements should be extended at an early stage into this budget process and thereby into federal resource allocation decisions made at the highest levels so as to effectuate clearly the purpose and spirit of the Act.

Congress should recognize through amendatory legislation that the appropriation process is the most effective vehicle for routine environmental review in budgetary decisions since it would involve the agencies, OMB, and Congress in a yearly evaluation of the environmental effects of those decisions. Environmental impact statements in the appropriation process would reduce OMB's flexibility by revealing the hidden environmental costs of OMB's budgetary decisions, but NEPA was enacted to reveal just such information and to encourage, as a result, decision making which is more responsive to environmental concerns.

If appropriation environmental impact statements are too cumbersome or impractical in view of the time constraints of the budget cycle, then authorization requests are a viable alternative for extending NEPA's scrutiny to budgetary questions. Authorizations are substantive legislative proposals which come within the Act by virtue of their legislative nature. An environmental impact statement requirement extended to proposed authorizations for programs significantly affecting the environment would be less of an administrative burden within the budget cycle due to the relatively small number of programs which require reauthorization each fiscal year. Further, authorization impact statements would permit Congress to engage in environmentally informed decision making early in the evolution of a program before irreversible financial and planning commitments have been made. To further these ends, Congress should refuse to consider proposed authorizing legislation on programs significantly affecting the environment unless and until those proposals are accompanied by legislative impact statements. In the absence of such congressional action to enforce NEPA's mandate, the courts should be ready to do so through the issuance of declaratory judgments that the Act has been violated. This would serve both to enforce the Act and to put
agencies on notice of their continuing obligation to comply with its provisions.