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NEPA AND THE FREEDOM OF INFORMATION ACT: A PROSPECT FOR DISCLOSURE

By Gilda M. Tuoni*

I. A SEASON FOR INFORMATION

The 1960's saw a new wave of active public interest in governmental affairs sweep across the country. From this current, groups and individuals emerged seeking greater participatory roles in the workings of their government. Interested citizenry, desiring to become knowledgeable of governmental affairs, brought to Congress their requests for opening up the files of government agencies.

In response to this trend, Congress passed the Acts which this article discusses: the Freedom of Information Act of 1966 (FOIA), and the National Environmental Policy Act of 1969 (NEPA). Congress intended the Freedom of Information Act to make accessible governmental materials that had previously been unavailable to the public. The FOIA, which amended Section 3 of the 20-year-old Administrative Procedure Act, was intended to clarify and protect the right of the public to information.

Before NEPA, there was no one measure expressing national environmental priorities, goals and aspirations. NEPA was the first Congressional policy for the management of the country's present and future environment. The implementation of this policy depended partially on making public certain information on the environmental effects of governmental action. Through NEPA, Congress required the responsible federal agencies to consider the environmental effects of their actions and to disclose fully such preliminary considerations in the form of environmental impact statements.

Both Acts certainly opened many governmental agencies to public scrutiny. The NEPA provisions requiring the submission of environmental impact statements have been conscientiously enforced by the federal courts, usually at the request of public interest litigants. FOIA, on the other hand, has not been as effective as was
hoped. Although it has given interested individuals access to a great deal of government information, its exemptions of materials such as Executive-declared national security concerns and internal agency memoranda have been used to justify the nondisclosure of much information concerning agency actions.

This article discusses the overlapping public information functions of NEPA and FOIA. It evaluates both Acts as tools for the disclosure of the facts concerning the environmental effects of government action. Finally, it argues that information previously protected by the exemptions of the Freedom of Information Act may be required by NEPA to be made public.

II. THE FREEDOM OF INFORMATION ACT

Out of growing Congressional concern with the secrecy of agency practices and procedures came the Freedom of Information Act of 1966. The Act amended Section 3 of the Administrative Procedure Act of 1946 (APA). That section was a disclosure provision, but it contained broad areas of exemption and became an ineffective information tool. The "public information" section of the APA made information available only to "persons properly and directly concerned." Nondisclosure was permitted if secrecy was required "in the public interest," if records related solely to agency internal management, or for any "good cause found."

The Freedom of Information Act established the affirmative principle that all persons may have access to government records, with certain exceptions. It eliminated the vague areas of exemption in the Administrative Procedure Act and set up workable standards to determine exemption from public disclosure. The Act provided a procedure for citizen suits in federal district court contesting agency nondisclosure. Some provisions in the Act, however, work in derogation of the overall policy of full disclosure. First, all requests for information under FOIA must be for "identifiable" records. Second, the new Act also exempts from its scope nine areas of sensitive concern. These exemptions differ from the previous broad exemptions in that they delineate the matters to be exempt and provide a procedural mechanism for the classification of secret documents. The exemptions are the sole means by which officials may refuse to disclose data.

A. Interpretation Through Environmental Litigation

Government agencies reluctant to comply with disclosure have looked most frequently to exemptions 1 and 5 to support nondisclo-
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sure. Exemption 1 excludes matters "specifically required by Executive order to be kept secret in the interests of national defense or foreign policy;" and Exemption 5 makes disclosure provisions inapplicable to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The two exemptions constitute effective defenses for nondisclosure, especially as they have been interpreted in recent environmental case law.

In an early case, *Soucie v. David,* the Court of Appeals for the District of Columbia narrowly construed the inter-, intra-agency memorandum exemption and limited its applicability. That court allowed *in camera* inspection of a government intra-agency report on aspects of the supersonic transport program for a determination of whether public access to the document was required. Rather than allowing the agency decision on disclosure to be final, the court required judicial review, warning that: "... courts must beware of the inevitable temptation of a governmental litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue."

However encouraging such a decision was, its effect was soon cast into doubt by the Supreme Court decision in *EPA v. Mink.* Congresswoman Patsy Mink sought, under the Freedom of Information Act, the disclosure of certain documents concerning a proposed nuclear test off Amchitka Island near the coast of Alaska. The Environmental Protection Agency had provided the President with these documents, which included recommendations on the advisability of the underground testing. The EPA said that all the documents in question were either classified or inter-agency and intra-agency memoranda and accordingly could be withheld from public view. The Court of Appeals had favored *in camera* examination of the documents to determine whether the "secret" components could be sifted out, separating the factual data from deliberative agency discussion, disclosing the former. The Supreme Court, however, overturned the Court of Appeals' order which had directed an *in camera* inspection. Mr. Justice White, writing for the Court, denied *in camera* examination for the purpose of separating "secret" from "non-secret" materials. He stated:

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classifica-
tion so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter.\(^{21}\)

Concerning the internal memoranda exemption, Justice White stated that although the exemption did not prohibit \textit{in camera} inspection of purely factual matter, neither did it require it.\(^{22}\) He explained that the historical interpretation of the exemption reflected important public policy imperatives for nondisclosure. Referring to Congressional discussion of Exemption 5, he noted the Congressional concern that frank discussion of legal and/or policy matters by agencies would be impossible if such remarks were open to public scrutiny. The efficiency of governmental operations would be severely hampered if agencies were forced to "operate in a fishbowl."\(^{23}\) Justice White noted the opinion in \textit{Kaiser Aluminum \& Chemical Corporation v. U.S.},\(^{24}\) where the United States Court of Claims had reasoned:

> There is public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.\(^{25}\)

Justice White concluded that the Environmental Protection Agency could avoid \textit{in camera} inspection by demonstrating through affidavits and testimony that the documents requested were deliberative rather than factual in nature.

The decision in \textit{Mink} seemed to minimize the effectiveness of FOIA. Mr. Justice Douglas, in his dissenting opinion, stated that "the much advertised Freedom of Information Act is on its way to becoming a shambles," if documents can be withheld from \textit{in camera} inspection merely by stamping them "Secret."\(^{26}\) Thus under FOIA, plaintiffs in environmental litigation could be denied access to relevant information either by virtually non-reviewable executive classifications of matters as national security concerns, and/or by agency characterization of materials as deliberative or as inter- or intra-departmental.

A case following \textit{Mink} further diluted the effect of the FOIA disclosure provisions. \textit{Montrose Chemical v. Train}\(^{27}\) broadened the exclusions set out in \textit{Mink}. The Court of Appeals for the District of Columbia held that summaries of the EPA's considerations of purely factual environmental matters constituted part of the deliberative process protected by Exemption 5 of the Act. The documents at issue were summary records of hearings held pursuant to the Federal Environmental Pesticide Control Act,\(^{28}\) to determine whether continued use of DDT should be banned. A chemical com-
pany brought an action under FOIA seeking the summaries utilized by the EPA in making a decision unfavorable to the company. After in camera inspection of the documents, the District Court, deleting minor portions of the documents, ruled that they must be disclosed. The District of Columbia Court of Appeals reversed, relying on the protective nature of Exemption 5:

This Circuit and others have emphasized that the purpose of Exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny.

The court held that summaries of factual material prepared by agency staff and used in administrative decision making were part of the deliberative process and exempt from disclosure. Thus, even factual material was protected by an exemption supposedly intended to protect deliberative material.

Although the substantive result of the decision (the cancelling of DDT registrations), may have been immediately desirable to environmentalists, the long-range implications for disclosure were not. Montrose established restrictive disclosure principles for environmental cases. Such matters often involve lengthy and diverse testimony and hearing records, and litigants under FOIA would want to focus on the portions of the materials upon which agency judgment was based. If agency summaries of such factual material are considered to be part of the deliberative process and therefore non-disclosable, there is not much public information available.

One issue that both cases raise and fail to resolve is the standard of proof necessary to trigger either exemption's coverage. The Supreme Court in Mink did suggest that proof through agency explanatory affidavits or oral testimony would be adequate. The Court did not detail, however, what specific elements would be required in these agency assertions. Litigating parties, not knowing exactly what constitutes interdepartmental memoranda or Executive-ordered national security concerns, cannot effectively challenge agency determinations that certain documents come within the protective exemptions. Under the Act, the courts were given no explicit directive for in camera review of agency decisions. The power and standards of judicial review in this area were vague indeed.

B. Remedial Legislation—The FOIA Amendments

In a concurring opinion in EPA v. Mink, Mr. Justice Stewart defended the majority's interpretation of the Freedom of Informa-
tion Act and pointed out that Congress, not the Court, had "ordained unquestioning deference to the Executive's use of the 'secret' stamp." He found that by enactment of Exemption 1, Congress chose to decree a "blind acceptance of Executive fiat." Justice Stewart deemed Congress responsible for the Act's effects, however frustrating to disclosure they might be. He suggested that only Congress could change the thrust of FOIA's exemptions.

In the wake of *Mink* and *Montrose*, serious Congressional concern arose. Legislation was formulated setting time limitations on agency response to requests for information and cutting the excessive fees previously required of FOIA litigants. Additionally, the amendments to the Freedom of Information Act replaced the requirement that requests be for specifically identifiable records with the requirement that requests "reasonably describe" the desired material. Thus citizens were better able to require agencies to disgorge requested records, even where they could not provide the exact file numbers. The amendments were passed by Congress in the early fall of 1974.

More importantly, the amendments sought to stop abuses of Exemptions 1 and 5. Congress established specific criteria to determine exemption coverage. Judicial inspection of the documents was explicitly authorized to facilitate inquiries into the propriety of withholding documents. Similarly, the amendments authorized court determinations of whether certain portions could be severed from nondisclosable sections and disclosed without loss of meaning. The amendments gave reviewing courts the discretionary right to examine all documents *in camera*.

In one of his first confrontations with the legislative branch, President Gerald Ford vetoed the measure on October 17, 1974. Congress responded quickly. The veto was denounced as perpetuating the "insidious secrecy that characterized the Watergate years," and members of Congress called for the repudiation of "traditional bureaucratic secrecy." The vetoed amendments subsequently were passed by the necessary two-thirds majority of both Houses, and became law.

The amended Act, however, still does not seem to be entirely satisfactory. The courts now have much discretion in the inspection of withheld documents, but problematical exemptions remain. Exemption 1, as amended, reads:

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Ex-
ecutive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;41

Congress has set no standards of "proper" classifications under Exemption 1. Absent a showing of arbitrariness or bad faith, Executive and agency decisions are presumably still the final word.

The amendments to FOIA do not touch the inter-, intra-agency exemption. The Act affords no procedure for citizen participation in or review of agency decisional considerations and disclosure procedures. The "deliberative process" guarded by the courts in Mink and Montrose appears to have retained its protective shield. Thus, while the Freedom of Information Act amendments accomplished some changes, a more complete renovation is still needed.

III. NEPA—Its Development as a Disclosure Tool; A Solution To FOIA Shortcomings

Both NEPA and the FOIA have moved some distance through judicial interpretation of their directives. However, as to information on the environmental effects of agency action, NEPA seems to be the more forceful disclosure law.

NEPA was originally intended to "contribute to a more orderly, rational, and constructive Federal response to environmental decision making."42 Congress had in mind several schemes of implementation. NEPA sought to establish a national environmental policy to guide Federal activities and incorporated certain "action-forcing" procedures to assure implementation.43 It required agency consideration of the environmental impact of existing or planned programs with research and study of ecological systems and environmental quality.44 It authorized the creation of the Council on Environmental Quality (CEQ), and required the submission of an annual Executive report on the status and progress of the Nation's environmental systems.45

The reach of the Act as a disclosure tool was uncertain in its early days because it was unclear exactly what agency actions were to be covered. Through litigation, however, NEPA has developed into what has been labeled an "environmental full disclosure law."46 Judicial interpretation has given strength to NEPA mandates, especially the "action-forcing" § 102(2)(C) which requires submission of environmental impact statements.47

Section 102(2)(C)(v) requires that environmental impact statements and relevant agency comments "be made available to the President, the Council on Environmental Quality and to the public.
as provided by section 552 of Title 5, United States Code [FOIA]. . .". However, it has never been established that the restrictions of FOIA have also been brought into NEPA. On the contrary, Executive Orders, CEQ Guidelines and court interpretation have mandated "full disclosure" as the rule, allowing a narrowing of NEPA information provisions in only the most compelling circumstances. Application of NEPA mandates to those areas where FOIA disclosure provisions have failed presents a possible solution to the difficulties experienced by public interest litigants.

A. The Basis for Judicial Review

Over the five working years of the Act, the courts have actively reviewed demands by citizens for NEPA's implementation. The mood of the country was ripe for the Act's enforcement. Courts were already concerned with the decision-making process of agencies, and NEPA was enacted at the height of such disquiet. The nation had become concerned about environmental abuses and citizens sought judicial control over governmental actions affecting finite environmental resources.

NEPA mandates procedures to be followed, although it may not require agencies to reach the substantively pro-environmental results of the policy-declaring sections of the Act. From the first days of NEPA litigation, the Act's strength was within the enumerated procedural requirements of Title 1, § 102(2)(C). This section requires agency preparation of a detailed statement of the "environmental impact of the proposed action," including "alternatives" to such action. NEPA became a full disclosure law through the case-by-case enforcement of the provisions of § 102(2)(C).

Two early cases established judicial oversight as an important aspect of NEPA enforcement even in the absence of a judicial review provision in the Act itself. In Environmental Defense Fund v. Hardin, an action to enjoin the Secretary of Agriculture from employing certain chemicals in a federal-state insecticide program, the District Court for the District of Columbia held that independent review under NEPA could take place even if another Act was also relevant to the agency action examined. In Citizens for Clean Air v. Corps of Engineers, an action to determine the validity of a construction permit, the District Court for the Southern District of New York stated that judicial review was "crucial to NEPA implementation." In that case the court enforced NEPA by declaring that failure of the Corps of Engineers to evaluate the environmental impact of its permit for the construction of a water intake system
to be used in a proposed power plant rendered the permit invalid.\textsuperscript{55} Thus the project could not proceed without an impact statement.

The courts then began to assert jurisdiction to review agency actions and enforce compliance with NEPA. Preliminary determinations of whether a controversy came under NEPA and its requirements became significant. Judicial inquiry also focused on the standing of plaintiffs to challenge governmental action, interpretation of the language of the Act, exemptions from coverage and the prescribed content of impact statements submitted.

The results of FOIA controversies may very well have been different under NEPA. NEPA as interpreted requires federal agency compliance in disclosing certain information, and it consequently makes agency action a more open process. In practice, NEPA narrows the FOIA exemptions because it weighs the balance in favor of public disclosure of environmental information. In the Freedom of Information Act cases, the disclosure mechanism of § 102(2)(C) of NEPA might have been made to operate. NEPA could provide a basis upon which a litigant could challenge agency failure to produce impact statements containing information as to the environmental effects of proposed actions. Although it may be argued that the Freedom of Information Act alone governs certain controversies, the option of an independent review under NEPA has been established by \textit{Environmental Defense Fund v. Hardin}.

\textbf{B. Standing to Sue}

NEPA plaintiffs must establish that they are involved in actual controversies capable of judicial resolution.\textsuperscript{56} Constitutional requirements for standing call, among other things, for “injury in fact” suffered or to be suffered as a result of the actions in question.\textsuperscript{57} The Supreme Court has held that injury in fact includes harm to “aesthetic, conservational, recreational or spiritual values,” as well as economic interests.\textsuperscript{58} In \textit{Sierra Club v. Morton},\textsuperscript{59} petitioners sought an injunction to restrain federal officials from approving an extensive ski area development in the Mineral King Valley of the Sequoia National Forest. The Supreme Court held that a person seeking judicial review must allege injury to \textit{himself}, whether economic or otherwise, to satisfy standing requirements.\textsuperscript{60} Although the Sierra Club claimed a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,\textsuperscript{61} the Court found that this interest was “not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved.’”\textsuperscript{62}
However, the rule that plaintiffs must allege "injury in fact" to themselves from agency actions was eventually given special interpretation in NEPA cases. *Sierra Club v. Mason* was an action in which the District Court for the District of Connecticut enjoined the dredging of New Haven Harbor and the deposit of the materials into Long Island Sound. The court held that a plaintiff could establish standing by alleging that the proposed federal action threatened the quality of the environment where he lived or worked or enjoyed recreational activity. The court found that such a test was particularly appropriate in a suit seeking to require an impact statement where there is little public knowledge about the environmental effects of the proposed action.

In *SCRAP v. United States*, an action seeking an injunction against an Interstate Commerce Commission order, the District of Columbia District Court set an even more lenient standard. The plaintiff organization alleged that its members used the "forests, streams, mountains, and other resources . . . for camping, hiking, fishing and sightseeing," and that this use was disturbed by the adverse environmental impact caused by the ICC action. The court found that "aesthetic and environmental well-being, like economic well-being," were important ingredients in the quality of life in society. These interests were to be legally protected even if they were only shared by the plaintiffs with the public at large.

These two latter cases, although not departing significantly from *Sierra Club v. Morton*, have expanded both the class of those injured and the nature of injuries suffered in NEPA controversies. Frederick R. Anderson, in his commentary on NEPA standing requirements, suggests that the Act may create:

> . . .new legal interests which enlarge the category of injuries which the public may sustain, so that harm to the public's right to know, to participate, and to have the interests of future generations protected may constitute injury in fact.

NEPA thus provides citizens with new ways to challenge federal agency action.

The first problem in applying NEPA to FOIA cases is standing. Consider the *Mink* case as if it were a NEPA suit, and recall the enlarged category of new interests which NEPA may create. The plaintiff could argue under NEPA that the Amchitka tests constituted a very real physical threat of injury to the environment; and alternatively, that agency refusal to disclose information concerning the nuclear test through an adequate impact statement threatened
harm to the public's "right to know" and thus to participate in government decision making which affects the environment, as NEPA intended. The availability of the litigant's cause of action under NEPA would be established and standing requirements would be met.

C. When is an Impact Statement Required?

A second problem in triggering the disclosure mechanism of NEPA is that §102(2)(C) applies only to those "major Federal actions," "significantly" affecting the environment. These factors, prescribed by the language of the Act itself, determine whether federal action requires the submission of an environmental impact statement.

The focus of this inquiry is on the degree of federal involvement in environmental actions. Problem cases concern private actions in federal areas, and federal fundings of otherwise private actions. Where federal control over private action has been exclusive or where federal and state control have been combined, courts have found sufficient federal action to meet the requirements of § 102(2)(C). Where federal monies totally or in part fund private or state actions, "federal action" has been found. The evaluation of direct or indirect federal participation has not caused much difficulty, and the slightest federal involvement has been found to constitute federal action.

A more complex concern is the determination of "major" actions "significantly affecting the environment." Some courts have applied differentiated formulas, but whether an action is a "major" one has frequently been dependent upon the significance of its environmental effects. Thus, in some circuits, the test for both factors is singular. In Citizens for Reid State Park v. Laird, the Maine District Court applied such a test. That court found that an impact statement was not required in the Navy's mock amphibious attack on an oceanside park because of the insignificant environmental effects of the project. In dicta, the court noted that NEPA required all federal agencies to incorporate into their planning processes consideration of the environmental consequences of proposed actions. Whenever these considerations indicated that actions might significantly affect the quality of the environment, agencies were to prepare and file detailed impact statements.

In deciding what actions are major and of significant effect, the courts have considered the Guidelines set by the Council on Environmental Quality. The Council is an advisory body created by
Title II, § 202 of NEPA. The Council Guidelines interpret NEPA mandates and direct agency compliance. Courts view the Guidelines as suggestions for NEPA implementation rather than as enforceable legal requirements. The CEQ's role has been described as follows:

...the council still does not officially approve or disapprove particular agency procedures, statements, or failure to prepare statements, relying instead on informal consultation, although it has played an active role in getting the agencies to prepare their own procedures for NEPA compliance, has guided them to a broad reading of the Act, in the CEQ Guidelines, and has occasionally criticized particular statements on a non-systematic, ex parte basis.

The pertinent Guidelines define the size and importance of federal action necessary for the operation of NEPA and they seem to visualize NEPA as covering a broad range of federal action.

In applying NEPA to the FOIA cases, the determination that an action is a "major" one significantly affecting the environment is crucial. This requirement might be met by several approaches. In Mink, the application of large-scale planning, time, resources and expenditures to a nuclear testing program could be proof of the existence of a major action. Another approach is to apply a reasonable-man standard; i.e., what ordinary persons would view a major action to be. Certainly, the average person regards nuclear testing, even underground, as an awesome and major action. The Mink plaintiff could have also suggested the singular test found in Citizens for Reid State Park in support of her attempt to gather information regarding the possible environmental effects of the nuclear explosions. A showing of the great environmental harm that nuclear testing had created in the past and could create again, would seem to meet the requirement of a major action significantly affecting the environment.

The CEQ Guidelines present other means of satisfying these requirements in FOIA cases, and they could be persuasive to a court. The Guidelines suggest that highly controversial actions should always be covered in submitted impact statements. The substantial public dispute concerning the proposed Amchitka test could surely trigger NEPA applicability.

A third problem with NEPA as a disclosure tool is the possible exception of the Environmental Protection Agency from certain of its requirements. In 1971, the CEQ put forward the theory that § 102(2)(C) does not cover the EPA. Section 5(d) of the 1971 Guidelines read:
Because of the Act's legislative history, environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements under section 102(2)(C) of the Act. 83

There has been considerable dispute over this matter, and recent legislation indicates that Congress is concerned about implied EPA exclusion. The Federal Water Pollution Control Amendments of 1972 84 specifically exempt the EPA from impact statement requirements in many areas of the agency's water quality control program. However, EPA must prepare an impact statement concerning the issuance of discharge permits for new sources and the making of grants for publicly owned waste treatment works. 85 Thus Congress appeared to state that the exclusion of EPA programs from impact statement requirements cannot be implied, but rather must be specifically stated by Congress.

The exception of EPA is currently more doubtful because the 1973 revised Guidelines entirely omit reference to the EPA exclusion. 88 Indeed, EPA has in practice submitted many impact statements regarding actions under its regulation. 87 The present CEQ Guidelines and the actual compliance by EPA in submitting statements suggest that EPA is now considered to be subject to NEPA mandates. Surely the agency exerting perhaps the largest impact on environmental factors through its regulatory activities is not meant to escape NEPA's provisions.

D. Toward Full Disclosure: NEPA As An Answer to the FOIA Exemptions.

The provisions of NEPA may serve to narrow the restrictive exemptions of the FOIA. The exemption for Executive-classified secrets is the more difficult exemption to overcome, because courts are apparently reluctant to apply NEPA in matters smacking of national security and military affairs. One example of this hesitation comes from the Tenth Circuit's opinion in McQueary v. Laird, 88 a case in which plaintiffs sought an impact statement from the military detailing the effects of continued storage of chemical and bacteriological warfare agents. The court held that public disclosure of information relating to military defense facilities via environmental impact statement created serious problems of national security. 89 The court felt that traditional "unfettered control" of the internal management and operation of federal military establishments should be left to the federal government. 90
Two decisions may conflict with the McQueary ruling. In People of Enewetak v. Laird,\textsuperscript{81} the Federal District Court of Hawaii held that NEPA's requirements did apply to military detonation experiments on the Enewetak Atoll. The court granted an injunction halting the military's Pacific Cratering Experiments until an adequate environmental impact statement was prepared. Although the experiments were being conducted to test the vulnerability of strategic defenses to nuclear attack, and were supervised entirely by military personnel, the court found no national security concerns sufficient to prevent the application of NEPA.

The case of Committee for Nuclear Responsibility v. Schlesinger\textsuperscript{92} also discussed NEPA's application in this area. That action concerned the sufficiency of an impact statement prepared by the Atomic Energy Commission (AEC) regarding the same nuclear testing off of Amchitka Island which concerned the Mink litigants. Plaintiffs, a citizen's group, sought an injunction in district court to halt the test because of the allegedly insignificant attention paid by the AEC to environmental dangers. On the day the test was scheduled to be made, the Supreme Court denied injunctive relief and the test proceeded with no further impact information being submitted. However, the Supreme Court did not deny the applicability of § 102(2)(C). The inadequate time left for investigation and deliberation before the scheduled testing appeared to be the reason for the denial of the injunction.\textsuperscript{83} The Supreme Court order denying the injunction referred to the U.S. Court of Appeals decision which held:

\ldots Our failure to enjoin the test is not predicated on a conviction that the AEC complied with NEPA in setting forth dangers. The NEPA process—which is designed to minimize the likelihood of harm—has not run its course in the courts. We are in no position to calculate dangers from Cannikin testing.\textsuperscript{84}

Thus, the lower court directly, and the Supreme Court indirectly, required adherence to NEPA processes and impact statement requirements. The testing at Amchitka proceeded, but agencies were given implied notice not to disregard NEPA even in such sensitive matters as military and national security affairs.

The major difficulty in the application of NEPA to FOIA problems lies in these security matters. However, the inclination of courts seems to be to demand NEPA compliance in environmental disclosure cases. The Court of Appeals in the first of three opinions in Committee for Nuclear Responsibility said:
Plaintiffs also alleged the existence of reports by federal agencies recommending against [the project] specifically because of the potential harm to the environment. NEPA clearly indicates that the agency responsible for a project should obtain and release such adverse reports. If these reports exist, and they are not subject to some statutory exemption, plaintiffs must prevail on this contention as well.95

The argument could arise that the FOIA restrictions may act as a "statutory exemption" for the reports requested. The Court of Appeals referred to this issue in a footnote, stating:

We do not consider whether the court may decline to order the release of agency comments. . .on the ground that they are exempt from public disclosure by virtue of exemptions set forth in the Freedom of Information Act, 5 U.S.C., Section 552 (1970), which should be transported into NEPA. No such grounds were presented to us at this time, and accordingly we express no opinion thereon.96

There being no precedent of FOIA exemption applicability to NEPA impact statement provisions, judicial inclination toward disclosure in environmental cases might prevail.

Justice Douglas, in an appendix to his opinion regarding the denial of injunctive relief in the Amchitka case, voiced his view that no exemptions can be implied:

Disclosure of these statements to the public by any federal agency which has 'special expertise with respect to any environmental impact involved,' is indeed required by Section 102(2)(C) of the Act. And the courts have consistently held that a defect in the Impact Statement presents a justiciable question and is the basis for equitable relief.97

Thus, under NEPA, environmental matters excluded by the exemptions of the FOIA pertaining to classified materials, might be made available for public disclosure through impact statement preparation and submission. This approach could remedy a crucial deficiency of the Freedom of Information Act.

The requirement of full disclosure in impact statements under NEPA would apply especially to the areas excluded by Exemption 5 of the FOIA. Impact statements must contain a detailed discussion prescribed by § 102(2)(C).98 Agency compliance with full disclosure requirements must be shown by reference in the impact statement to relevant public contributions and by inclusion of all reasonable alternatives to the agency action.

In interpreting § 102(2)(C), the courts have required public contribution in the preparation of impact statements—in addition to final full disclosure to the public. CEQ Guidelines have also set
stages in impact statement preparation where public input is required. Guideline 7 of the 1973 revised rules reads:

"...agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties." 49

The District Court for the District of Washington addressed itself to this issue in Lathan v. Volpe. 100 That court found that the public could raise environmental questions by commenting on agency draft statements. Officials were to give more than cursory consideration to the public suggestions when preparing the final impact statements. The court held that if final statements did not produce satisfactory answers to reasonable and relevant public questions, they would not meet the minimal statutory requirements. 101

An effective way to remedy FOIA's shortcomings in disclosure is through these mandates. Public participation calls for public awareness of the issues and information being discussed. It was suggested by one court that agency comments made prior to the issuance of the impact statement in final form must be included in impact statements by virtue of §102 of NEPA. 102 Executive Order No. 11514 (Protection and Enhancement of Environmental Quality), pursuant to NEPA, directed the heads of Federal agencies to:

"Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings and shall provide the public with relevant information, including information on alternative courses of action." 103

Thus, relevant internal agency memoranda were to be made available for public study. The CEQ Guidelines have addressed the issue of the applicability of the FOIA exemption of agency memoranda to the preparation of environmental impact statements. Section 11(d) of the 1973 Guidelines reads:

"The agency responsible for the environmental statement is also responsible for making the statement, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C., sec. 552), without regard to the exclusion of intra-agency or inter-agency memoranda, when such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action..." 104 (emphasis added).
Court interpretation, Executive Order and CEQ Guidelines would seem to indicate NEPA's potential as a disclosure tool in an area of FOIA exemption.

Just as NEPA compels the disclosure of agency considerations, it also requires a showing of "good faith" in these considerations. In *Calvert Cliffs’ Coordinating Committee, Inc. v. Atomic Energy Commission*, an action seeking review of an AEC order precluding consideration of various environmental issues, the District of Columbia Circuit Court of Appeals required all agencies to use a "systematic, inter-disciplinary approach to environmental planning and evaluation," and prescribed a balancing test to insure good faith considerations. The court held that agencies must:

"...identify and develop methods and procedures...which will insure that presently unquantified environmental amenities and values must be given appropriate consideration in decision making along with economical and technical considerations...In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and systematic balancing analysis in each instance."

In *Environmental Defense Fund v. Corps of Engineers*, and *Natural Resources Defense Council, Inc. v. Morton*, the courts discussed "good faith" considerations with regard to the inclusion within impact statements of alternatives to proposed actions as § 102(2)(C)(iii) of the Act requires. In *Environmental Defense Fund*, an action for injunctive relief against any further contract negotiation or construction work on a proposed dam across the Cossatot River, the court focused on alternatives which should be set forth in impact statements. The court stated that NEPA itself required agencies to:

"...study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

An agency decision to reject its own proposed action was to be one of the alternative possibilities.

In *Natural Resources Defense Council*, the court rejected a mere "listing" of alternatives. Rather, it held that NEPA was intended to require all alternatives to be developed in sufficient detail to permit reasoned choices on the part of responsible officials. The discussion of reasonable alternatives need not be "exhaustive" as to all effects. Nevertheless, environmental aspects of alternatives which were "readily identifiable" by agencies, or meaningfully pos-
sible, were to be included within the prepared impact statement.\textsuperscript{113}

These balancing process requirements under NEPA afford another disclosure mechanism. They supply distinct and identifiable standards for judicial review of the adequacy of impact statements which have been filed. They are different from and could remedy the vague standards for review under FOIA.

A final disclosure deficiency of FOIA is the substantial time allowed for agency response to requests for information. NEPA implies limitations for agency submission of impact statements. The court in \textit{Calvert Cliffs} explained that agencies must comply with NEPA in a timely and adequate manner:

\textquotedblleft Compliance to the 'fullest' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action. . .\textquotedblright\textsuperscript{114}

As the District Court in \textit{Daly v. Volpe},\textsuperscript{115} emphasized:

\begin{quote}
Given the purpose of NEPA to insure that actions by federal agencies be taken with due consideration of environmental effects and with a minimum of such adverse effects, it is especially important. . .that the statement be prepared early.\textsuperscript{116}
\end{quote}

Thus, the information-seeking litigant who invokes NEPA not only increases the availability of environmental information, but also hastens its disclosure.

**CONCLUSION**

Certainly the application of NEPA to areas previously off-limits under the Freedom of Information Act is a legally intricate proposition. Nevertheless, NEPA is a good disclosure tool for use in public interest litigation, and its attempted application to FOIA controversies is important. What NEPA cases illustrate is the judicial inclination to read that Act in the broadest, most reasonable disclosure-oriented way. To assure accessibility to information concerning Federal agency processes, public interest groups should consider this potential of the National/Environmental Policy Act.

It is appropriate to look to Mr. Justice Douglas' concluding remarks in \textit{EPA v. Mink}:

\begin{quote}
We should remember the words of Madison—

'A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean
to be their own Governors, must arm themselves with the power which knowledge gives."117

FOOTNOTES

*Staff Member, ENVIRONMENTAL AFFAIRS.


3 Act of June 11, 1946, Ch. 324, § 3, 60 Stat. 327.


7 For an excellent historical view of NEPA cases, see F. Anderson, NEPA IN THE COURTS, A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973). [Hereinafter referred to as Anderson.]


10 Id.


12 Id.


16 448 F.2d. 1067 (D.C.Cir. 1971).

17 Id. at 1079.

18 Id. at 1078.


20 464 F.2d. 742 (D.C.Cir. 1971).

21 410 U.S. at 84.

22 Id.

23 Id. at 87.


25 Id. at 946.

26 410 U.S. at 109.

27 491 F.2d. 63 (D.C.Cir. 1973). [Hereinafter cited as Montrose.]


29 491 F.2d. 63 (D.C.Cir. 1973).

30 Id. at 70.

31 410 U.S. at 93.

32 Id. at 94.

33 Id. at 95.
38 Id.
40 Id.
43 Id.
44 Id. at 9-10.
45 Id. at 10.
49 See text at nn. 89-117.
54 Id. at 703.
55 Id. at 709.
60 Id. at 735.
61 Id. at 730.

62 Id. at 739.


64 Id. at 424.

65 Id.


67 Id. at 195.

68 Id. at 196.

69 Id.

70 Anderson, supra n. 7, at 26.


73 Ely v. Velde, 451 F.2d. 1130 (4th Cir. 1971); Lathan v. Volpe, 455 F.2d. 1111 (9th Cir. 1971).


76 Id. at 788.


85 Id.
87 Perusal of the Federal Register indicates that the Environmental Protection Agency regularly submits impact statements on proposed projects.
88 449 F.2d. 608 (10th Cir. 1971). [Hereinafter cited as McQueary.]
89 Id. at 612.
90 Id.
93 Mr. Justice Douglas, commenting on the denial of injunctive relief, expressed this opinion: "We plainly do not have time to resolve this question between now and the scheduled detonation." 404 U.S. at 920.
95 463 F.2d. 783, 788, as amended (D.C.Cir. 1971).
96 Id.
97 404 U.S. at 921.
100 350 F.Supp. 262 (W.D.Wash. 1972), 455 F.2d. 1111, 1122 (9th Cir. 1972).
101 Id. at 265.
105 449 F.2d. 1109 (D.C.Cir. 1971). [Hereinafter cited as Calvert Cliffs.]
106 Id. at 1113.
107 Id.


111 325 F.Supp. at 761.

112 458 F.2d. at 836.

113 Id. at 836, 837.

114 449 F.2d. at 1118.


116 Id. at 256, quoting Lathan v. Volpe, 455 F. 2d. 1111, 1122 (9th Cir. 1972).

117 410 U.S. at 110-111.