EFFECTS OF COUNCIL ON ENVIRONMENTAL QUALITY REGULATIONS ON RURAL ELECTRIC COOPERATIVES

HEARING

BEFORE THE

SUBCOMMITTEE ON AGRICULTURAL CREDIT AND RURAL ELECTRIFICATION

OF THE

COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE

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U.S. SENATE,
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AND RURAL ELECTRIFICATION OF THE
COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9 a.m. in room 324, Russell Senate Office Building, Hon. Edward Zorinsky (chairman of the subcommittee) presiding.

Present: Senator Zorinsky.

STATEMENT OF HON. EDWARD ZORINSKY, A U.S. SENATOR FROM NEBRASKA

Senator ZORINSKY. I would like to call the committee hearing to order and proceed with the agenda of Wednesday, December 6, 1978, of the Subcommittee on Agricultural Credit and Rural Electrification of the Committee on Agriculture, Nutrition, and Forestry in the Senate. I guess otherwise this might be known as a midwinter fun-and-games session. But I feel it is necessary to have this hearing at this particular time of the year due to some consternation that has arisen within the rural electrification industry, together with some rules and regulations promulgated by the Council on Environmental Quality, and therefore I have taken this opportunity to schedule this hearing, and I would like to open the hearing with a brief statement.

The purpose of this hearing is to examine in detail the impact on rural electrification of certain proposed regulations developed by the Council on Environmental Quality to implement the procedural provisions of the National Environmental Policy Act. I have been informed that the regulations could have serious adverse effects on the rural electrification program, particularly the power supply aspect of the program.

Council Chairman Charles Warren has assured me it is not his intention to impede the development of rural electrification, nor to increase the cost of power to rural people, but I felt it would be useful to all parties involved to have a thorough airing of the matter. I hope this may lead to a resolution of any major problems that might exist. However, the Council has chosen to publish the final draft of these regulations prior to this hearing, and I wonder now whether there will be any opportunity to work out the problems we see.

However, I feel there are some positive aspects of these regulations. I think it is good that public participation is provided for in each of the applications of the regulations. This will allow project sponsors of all kinds to see the kind of acceptance problems which are likely to occur before millions of dollars are expended and projects might have to be stopped. However, there is a question in my mind whether the Council on Environmental Quality has the authority to transform the procedural process of drafting environmental impact statements into an enforcement process requiring agencies to add hundreds of additional technical personnel; and further, the regulations described actions coming under these regulations as those which include new and continuing activities, including projects and programs entirely or partly financed, constructed, regulated, or approved by Federal agencies, including legislative proposals. Strictly applied, it would seem that this process could hold up any Federal project, which a small minority might not like.

This committee has demonstrated a continuing interest in the success of rural electrification since the mid-1930's. If the CEQ regulations would jeopardize the ability of power supply cooperatives to provide electricity to farmers and other rural people, as some claim, then this committee must consider what can be done to protect its constituents from unduly high power prices and needless construction delays. On the other hand, we must not be so zealous in our efforts to promote development that we neglect or fly in the face of obvious environmental considerations.

The CEQ regulations are for the purpose of guiding Federal agencies in developing construction projects which these agencies initiate. However, in this case it is the electric cooperatives and not the Rural Electric Administration which does the initiating, and the cooperatives are not Federal agencies. The cooperatives say they do not want to be absolved from filing environmental impact statements for powerplant sites. Instead they say they would want to be treated in this regard just as investor-owned utilities are. That request does not seem unreasonable to me; nor do the concerns of Mr. Warren, the Chairman of the CEQ, seem unreasonable. In a conversation which I recently had with him, Mr. Warren indicated a willingness to work out the most serious problems that the cooperatives have with the regulations. Even though the final regulations have been published, I am informed that there is still flexibility in dealing with them; that is, if certain points are defined properly, most of the difficulties will be resolved.

Let us see if through the hearing record promulgated today, that reasonable people can now begin to define these problems to everyone's mutual satisfaction.

I would like to call the first witness to testify, the Assistant Secretary of Agriculture, Alex Mercure, you may introduce the people with you.

Mr. MERCURE. Mr. Feragen will be following me with a statement.

Senator ZORINSKY. Mr. Mercure, you may either present your statement in its complete text or you may paraphrase it any way you see fit. It will be put in the record in its entirety.*

*See p. 41 for the prepared statement of Assistant Secretary Mercure and p. 42 for the prepared statement of Mr. Feragen.

STATEMENT OF HON. ALEX MERCURE, ASSISTANT SECRETARY FOR RURAL DEVELOPMENT, U.S. DEPARTMENT OF AGRICULTURE

Mr. MERCURE. Let me just do a little paraphrasing here. This is not a very long statement, and I suppose I could read it. I think it is important to recognize REA, as was pointed out, was founded back in the thirties to make sure rural communities would get adequate electrical energy. It is doing that job. The responsibilities have expanded, and I believe that Mr. Feragen and I both share the view that it is important to maintain stability of that energy supply, but we also have to be concerned about protection of the environment. However, we don't believe that they are mutually exclusive concerns. I think the important challenge before us is to begin to develop the kind of balance between the protection of the environment and assuring adequate supplies of energy are provided for people.

Some of the concerns we have had I think are being addressed in conversations that Mr. Feragen and the Council on Environmental Quality staff have had in terms of adjusting or adapting the regulatory process to the kinds of conditions that REA as a Federal agency has and the rural electric cooperatives, as independent cooperative privately owned by the consumer, have in terms of satisfying both the environment considerations of a region, as well as the energy needs of that community. Beyond that, Mr. Chairman, I really don't have anything else, and our statement has been filed.

Senator ZORINSKY. Mr. Mercure, it appears that these regulations will result in a leadtime of approximately 4 years for an REA system from the time of initial decision to proceed with studies and investigations until completion of the NEPA process. Investor-owned companies and municipal power systems not directly involved with the Federal agency, but probably requiring Federal permits, would have a considerably shorter leadtime. Since the leadtime is so important to power project costs, the rural electric systems are put to a substantial economic disadvantage. Why do you feel there is no allowance that is made to correct this inequity?

Mr. MERCURE. Well, one of the difficult problems, of course, is that inaction by Federal agencies is subject to challenge. We are equally distressed about the time lag, and that has been a topic of discussion by Mr. Feragen and members of the REA. Perhaps at some later point Mr. Feragen might be able to answer that in more detail since he has been involved in the direct negotiations.

Senator ZORINSKY. Would Mr. Feragen like to make his remarks now and then possibly I could hold the questions and then hear from you both.

STATEMENT OF ROBERT W. FERAGEN, ADMINISTRATOR, RURAL ELECTRIFICATION ADMINISTRATION

Mr. FERAGEN. If you like, Senator, I would be glad to do that. We have given my statement to the staff for the record and I think in the interest of time I can summarize our discussion with CEQ and the problems we have and how we feel they have been resolved. At least we are on a track of resolving these problems through, I think, sincere and dedicated staff work on the part of both staffs.

As you said in your opening statement, Senator, the purposes of the National Environmental Policy Act are those that we all embrace and REA believes that we have seen gains in the environmental protection because of that act, and yet we recognize that that act has been used to delay projects by those who would delay any energy development and, on the other hand, perhaps not fully appreciated by those who would hurry through a project and use it as a justification for decisions made too early. What we seek through the NEPA procedures is a balancing those two extremes.

The President, in recognizing those problems that arise by this opposition of interest, issued Executive Order 11991 and directed CEQ to promulgate these regulations. These regulations have the laudable threefold purpose of reducing paperwork, reduction of needless delay and improved decisionmaking. Certainly the Rural Electrification Administration strongly supports those goals and we are working to see that they indeed are achieved.

The particular concern that we first had with these regulations was that there was a distinct possibility of delay and added cost and that arose primarily because the regulations appear to direct themselves primarily to project initiating Federal agencies, that is, agencies that build projects on their own like the Corps of Engineers, Department of the Interior, or Veterans Administration. These are agencies that build projects and therefore have a direct responsibility under NEPA for environmental impact statements. It was less clear as to the regulations' meaning for lending agencies which, because of the major Federal action decisionmaking, are required to file environmental impact statements regarding projects which are being built by sponsors that borrow money from the Government, and that is the REA situation.

I am satisfied that the CEQ has been responsive to REA's expression of concern. We have had staff meetings on a continuing and intensive basis and have been working on the practical details of these regulations.

I have been assured by my staff, and I continue to think that CEQ is addressing the central problem of the differences between the emphasis on initiating agencies and lending agencies. I personally discussed with Charles Warren these problems and REA's concern that the lending agency, and the cooperatives who are borrowers from that agency, were not put at this disadvantage. He has verbally assured me, Senator, that he and his agency will be fully cooperative with REA to resolve these problems. I further have been assured that the intent is not to place unreasonable restrictions upon REA, and I am proceeding on the basis of that commitment by Mr. Warren. The staffs are continuing to work together.

The one procedure we think that will help resolve this difficulty is CEQ's agreement to review and approve the REA regulations. Bulletin 20–21, which is being revised to update some considerations that have developed during REA's environmental permitting process, contains REA's regulations, and these will be taken to CEQ. They will review and approve those regulations so as to be consistent with CEQ's regulations, with the understandings that we have, which I

have already stated, that it will not put these cooperatives, these borrowers at a disadvantage in relation to other entities in the industry.

I think that already in the published version of November 29, section 1506(d), for example, recognizes specifically the need of borrowers to do certain things ahead of time because of the long leadtimes which you spoke of. These actions include the purchase of options on land, making coal contracts, perhaps even contracting and paying for options for coal or water and other similar things, none of which would have a final impact on the environment because they won't irrevocably commit the system to a particular site.

I think that the inclusion of this new section is a good demonstration of the CEQ's sensitivity to REA's particular problem, because to a large extent it is a leadtime problem. I have personally dealt with the process of licensing electric powerplants and understand the importance of protecting the environment. As a commitment to that, as Secretary Mercure has said, REA will increase—in fact we are taking actions right now to increase the number of people we have committed to our environmental section to be certain that REA is not part of any delay, and that we process these projects as quickly and as timely a fashion as we can.

Now the timing is difficult. I am sure that leadtime for an EIS may be, depending on where you measure the starting point, as long as 4 years. In reference to your first question, Senator, we think the actual permitting process in REA takes about 18 months to 2 years. Now the starting point may come a little later than with the earliest commitment by a board of directors to proceed with adding capacity. We will, nevertheless, make every effort to get as far up on the front end of these projects as we can to prevent delay. Recognition by CEQ, I think, of this problem is one of the keystones to a timely permitting process.

For example, CEQ has made changes in the earlier draft regulations which I think indicate its appreciation of a very key problem and that is whether the decision to be made is one for an "environmentally preferable" alternative as compared to what would be a much clearer decision or easier decision to make in identifying an "environmentally acceptable" decision. I think you can appreciate the difference between those. CEQ has reassured us that the language in which they set out that requirement can encompass an "environmentally acceptable" choice, which I think is a key consideration.

I have also been reassured by CEQ's position on cases where REA borrowers are participants in a large-scale plant—which may be a 1,150 megawatt nuclear powerplant. The cooperative may be a participant for as little as 10 megawatts or even 25 or 40 megawatts. That participation is often through an agreement which says that if the cooperative can't get the financing or something else prevents it from proceeding, the project goes ahead anyway and the company will buy back the cooperative's share. CEQ has assured us that in those cases where the REA borrowers participation does not trigger the construction of that plant, where its participation is not essential to the construction of the facility, that CEQ will recognize that the borrower and REA do not have to go through this full EIS process

which the lead agency, that is, the lead company, may already have completed or must do under NRC regulations. So, in summation, REA believes that the remaining issues can be resolved, that we can resolve these differences in a refined interpretation. We have outlined to CEQ the full procedures which we are using and are working with them on nearly a daily basis to get their understanding and their appreciation of the REA process.

I will be pleased to keep the committee staff informed of our progress and of the details of our working with the CEQ.

Senator ZORINSKY. Mr. Feragen, you seem to have many issues resolved, at least to your satisfaction, concerning misunderstandings with CEQ, and you say that you have proceeded on Mr. Warren's word. I talked to some bankers the other night and they don't seem to want to proceed on anybody's word. They would rather see the rules in writing. Then their bond counsels could assure people who purchase these bonds that there was more than someone's word backing them, because the Government's word is not very credible these days.

I am also interested to know why, in your estimation, there was such a rush to publish these new documents prior to the first of the year?

Mr. FERAGEN. I think Mr. Warren can answer that question much more accurately on the background. I appreciate what you say about bond counsels. I have struggled with them. I believe that the problem is, Senator, that the regulations attempt to cover all Federal agencies and as a consequence the language is quite broad and causes concern when read from the specific perspective of our own industry, of our own particular procedures. I was not surprised by the publication of the regulations. In fact, I discussed in detail the concerns that the borrowers had very early on, when we first saw the CEQ draft regulations. So we have addressed the regulations not just in general, but in specific terms, and of what these generalities of the CEQ language mean. I am assured that we do have CEQ's attention, and I will have to take Mr. Warren's word until I find otherwise. I think he appreciates our problem.

Mr. MERCURE. I think that one of the things that I hope we can strive for in all of these negotiations is, to put into writing some sort of interagency agreement that both of us can live by, that states in writing the kinds of assurances that financial institutions perhaps may need. We are sympathetic to the kind of problem that financial people have in terms of marketing instruments that have some underlying regulations like that that could invalidate the instrument and our hope is that we can work out these arrangements.

Incidentally, Mr. Chairman, just this past Friday we announced a major interagency agreement that related not to electrification, necessarily, but to the water and sewage system, where the basic decision to simplify or an attempt at simplification was to develop a single environmental analysis, rather than having several agencies do it, and the kind of lead-role responsibility that the regs are providing for will make that easier for us, and there has been such an interagency agreement worked out in that respect. We are hoping we can do the same thing here. I think we all recognize to the extent we can cut the leadtime down; we will reduce the cost of that capital investment very significantly.

The people who know a great deal about this tell me at the very least 1 year represents a 10-percent reduction in cost, if that could be done, so that is a very significant reduction in cost that we are striving for.

Senator ZORINSKY. I am speaking from personal experience. I have served on an electric board, a public power board in the State of Nebraska, which is an all-public-power State by law. And I know that even to the point of site selection it is important to determine early on whether your boiler vessels are going to come up on a barge or by rail or by truck, and that certain provisions along the route must be made, such as enlarging the dimensions of an overpass to get a boiler underneath it. These things have to be known in advance, and with some of these new impositions, it is going to be difficult, if not impossible, to prejudge and preplan even a route for a prepurchased item of hardware for a generating plant.

What is your feeling on whether these proposed regs would require environmental impact statements for an enlargement of a substation or an extension of a transmission line or a minor change of that nature?

Mr. FERAGEN. Specifically, those concerns have been addressed in our discussions with CEQ and that was part of the assurance, that these extensions for distribution systems or telephone systems will not be covered by these regulations, that they will be exempt from these regulations. I think that is appropriate. I think that otherwise the administrative load which would result from having to file an environmental impact statement on an extension of low voltage lines in a distribution system, or telephone lines, would be a burden that the Government would regret. I think the CEQ has given us clear understanding they understand that part of our process.

Senator ZORINSKY. What is the definition of low voltage—345 kilovolts?

Mr. FERAGEN. That is not a low voltage line. No; I think we are talking about distribution voltage, 69 kilovolts; and even 115 in some cases could justifiably be called low voltage. I think the purpose of a line and how it is fit into the system helps in that definition.

Senator ZORINSKY. Section 1506.1 places certain limitations on activities that can be taken by an agency during the NEPA process. Paragraph (d) apparently recognizes the unique process REA borrowers must go through in order to get a powerplant online by allowing "minimal expenditures not affecting the environment." What, in your judgment, is "minimal" in view of the fact that rural power projects frequently cost in excess of several hundred million dollars and require development costs for preliminary studies, investigations and purchases, and so forth, running to tens of millions of dollars. I happened to have been involved in one that started at $64 million and ended up at $70 million, and I can directly attribute much of that cost increase to rules and regulations promulgated here in Washington by some people who unfortunately have never had the experience of building a powerplant.

Mr. FERAGEN. My hope is, Senator, that minimal will be defined and understood in just the sense that you have put it here; that is, "minimal" in terms of the environment impact, recognizing that the actual

expenditures and commitments might be quite large, but that the final commitment as to site may not be made until the project is further down the line. The procedure now is to identify numerous sites during all of this preliminary process, reduce that consideration to maybe a half dozen or even three or four prime sites.

The commitment of equipment, of design of plant, is not crucial at that point; that is, you can move, particularly if you are using the same fuel, you can move it 5 miles this way or that way, as you well recognize, Senator, with your background.

I hope, and it is my understanding that CEQ is sensitive to this, that our staffs have talked about this issue. I would hope that everyone does understand that minimal may mean large amounts of money, that we may be talking about $30 or $40 million kind of commitments that can be made, have often been made. Even if the project were abandoned, it could be done without serious injury to an entity; that is, if decisions are made in a timely fashion, cancellation charges on a boiler are acceptable, if done early enough. Very often with the purchase of land, the value of that land is greater than the purchase price, and often the option prices are not that great.

I say this not in anticipation that we are going to have cancellations of plants. I hope that the planning process is so sound and the need for those plants is so well documented that those issues of whether or not to build are addressed pretty early on and that the level of confidence is pretty well established early on.

REA, again, cannot make the final commitment until it has gone through the full EIS process and that is required by NEPA. We believe we can do it and we believe we can do it in a timely fashion, and while I say that, I understand the concerns of the borrowers that we not be the impediment.

Senator ZORINSKY. Can you tell me your philosophy on this? You are saying that a minimal amount can be invested which can later be recovered in the event that they have to move in a different direction; in other words, switch to a different methodology or a different site?

Mr. FERAGEN. Yes, with most contracts. I dont think that REA would approve a contract that didn't have a provision for getting out of it, say, early on.

Senator ZORINSKY. This is just like deja vu, because I heard that same statement made about a dam project initiated by the Corps of Engineers when they went to buy the land, condemn it, and pay for it. Now they own a lot of land just southwest of Omaha, but while all of this was happening the cost-benefit ratio kept being reduced until it is no longer cost effective to build it. Now they can't even give the land away. It always seems expensive when you go out to buy it, but once you have a capital investment in the ground, if the project becomes no longer feasible for some reason, or if for some reason it is reduced in size, the price is very low when you are selling it, especially if the Federal Government is trying to get rid of it. I think this is a reality we must face. I don't know how you can put a minimal investment in something that you can't get returned.

Mr. FERAGEN. I wouldn't dispute that, Senator. However, on the other side, powerplant sites are very tought to come by and——

Senator ZORINSKY. There is only one thing worse, and that is landfill sites.

Mr. FERAGEN. Yes, indeed. I understand that. That is the negative side of what we are looking at. I would hope that the cooperatives do not get into a position of having to abandon plants that they need and I will do everything I can to see that the utility responsibility that these systems have to their rural consumers is carried out. So I think instead of concentrating on that, I think the issue of minimal expenditures is a real one and should be raised with all of those concerned. It is our interpretation that front end commitments, provisional commitments, must be made. You cannot conduct a major power project without making these kind of preliminary commitments to major equipment, the land, the coal, and still get through the environmental process. For that matter, even if regulations weren't there you would make early commitments to these items before you made the final decision to go. So I recognize that process. I know the sensitivity to that delay that can come, and the expense.

I don't think that the REA procedure which we hope to take to CEQ and get their approval of will prevent those activities taking place in a timely fashion while REA is completing the EIS process.

Mr. MERCURE. I think the important requirement is for REA and the cooperatives to begin these conversations with regard to alternative sites. Well, the first question really is the power need, the feasibility of the plant, and those expenditures related to that that are not sites specifically, I think, can be committed early and the REA probably needs to participate in those discussions very early, as we begin to identify the alternatives, the potential sites that are available, without making very heavy commitments on real estate. I think the problem that we have encountered and I think the problem that legitimately concerns CEQ is that sometimes the expenditure is made which forecloses real open consideration of alternatives and I think that we all want to avoid that because the most expensive delays are the ones that come right in the middle of the process, when site selections are challenged in the court.

Senator ZORINSKY. Stated goals of these new regulations were to reduce paperwork and to reduce delays at the same time and to produce better decisions. How will these goals be achieved in view of the longer and much more complex REA environmental impact statement procedures and additional supporting documentation which would be required to implement the regulations?

It seems to me that additional paperwork would be required, rather than less.

Mr. FERAGEN. If CEQ had not agreed to the process of adopting the present REA procedures, then I think I would have to answer that we could not prevent additional paperwork, but I think their agreement and their understanding that they will bring our present procedures, our present process into the CEQ regulations and treat that as an addendum to it in some fashion and adopt REA Bulletin 20-21, which is our environmental requirements, that we can say that it will not significantly increase paperwork compared to our present procedure.

I am not satisfied, Senator, that perhaps our present proceures require an enormous amount of paperwork, and because of my back-

ground and my interest in this, we will certainly look at reducing it. But at the same time, because of the opposition to powerplants of almost every kind, I feel it is better to do a thorough job on the engineering and planning the front end of the project than having to explain it to a judge later. You are well aware, I know, because of the involvement of Nebraska systems, of the Laramie River situation where that kind of thing happened, not at any fault of the project. but because regulations come in late. To the extent that we can have early consideration, I think it is a key to progress of the project. I feel assured that if REA can use its present processes and CEQ lives up to the commitment that it has made to us, that they will deal with us in this way, then we will not significantly increase the paperwork.

Senator ZORINSKY. You just used the words "CEQ made the commitment to us that they will deal in this way." Where was that commitment made and by whom and how?

Mr. FERAGEN. Dr. Warren made that commitment to me on the telephone when I brought up this question of—as a matter of fact, last Friday, prior to the White House Conference on Rural Electrification.

Senator ZORINSKY. I am going to tell you something that very few people know about. I had a commitment from Senator Jim Allen that if Alabama beat Nebraska at football, I would buy dinner, and I can't honor that commitment now. The point I am trying to make is there has to be something that somebody can look at, legally evaluate and finally make a judgment about their ability to produce future electrical generating capacity. It cannot be based on a phone call, because a year from now you are not likely to remember even on what day the conversation was held.

Mr. FERAGEN. That is correct, Senator, and it is my expectation that immediately and continuing right now we are in that process of taking our regulations to CEQ and it will be a formal letter, a formal recognition of that process that I outlined. I don't expect it to remain just a matter of word between two Government employees that may disappear into the dust at any time.

Senator ZORINSKY. I didn't anticipate you would, but I wanted to get it on record that there would be further clarifications.

Mr. FERAGEN. Indeed. I believe that is necessary.

Senator ZORINSKY. The implementation of the CEQ regulations will impose greatly increased staff work on the affected agencies. What assurances are there that such staff increases and attendant funding would be provided by the agencies, including REA and other Federal groups involved in the implementation of the environmental impact statement procedures to enable the agencies to carry out their responsibilities under these regulations?

Mr. FERAGEN. Again if we did not have the assurance that we are going to use the REA process and if the regulations as written were interpreted strictly in a very, very conservative, antidevelopment manner, then I think that the fear that they would require a great increase in staff of Federal employees would be correct. But given the assurances, as we have just discussed, I think we can carry on with the staff we have. I say that at the same time that I have already made the commitment publicly and to you earlier in this hearing that we are going to increase our environmental staff in REA, even with the restrictions

on hiring. I believe that the load carried by these people is too great for there are 75 power projects which are being considered by REA borrowers. We have had a little staff of eight people and I know enough about the process to know you can't do it that way very long. My fear is that REA would become the impediment and the roadblock.

Senator ZORINSKY. Are you doing that strictly with your own people or do you have any consultant under contract?

Mr. FERAGEN. We do not have consultants at the present time, Senator. We intend to increase the staff assignments in that area.

Senator ZORINSKY. This one section of the rules and regulations definitely and specifically say each agency shall be capable in terms of personnel and other resources of complying with the requirements enumerated below. Such compliance may include use of other resources, but the using agency shall itself have sufficient capability to evaluate what others do for it.

That is pretty explicitly spelled out.

Mr. MERCURE. We have acted to increase the staffing by 10. In the climate of personnel limitations, that means we have to take them from someplace else, but the Secretary and I and Mr. Feragen have agreed if we are going to do an effective job in determining what is appropriate balance between environment and power requirements that we need to make that investment in personnel. It will require we shift some of those people, or at least the growth that they have, to strengthen the environmental review process.

Mr. FERAGEN. To respond specifically to that concern, and it was a real one when we first saw it, in the preamble of the regulations and also in our discussions with CEQ, it has been made clear to us that we do not have to have on our staff exquisitely trained specialists in, say, microbiology. We can use the resources of other Government agencies, and what will be acceptable are generalists, that is, people trained in general scientific disciplines and who can evaluate the work of others and deal with it. So the fear of suddenly having to hire a large band of specialists, I think, has been set to rest by CEQ's clarification of that point.

Senator ZORINSKY. Section 1502.2(f) reads "Agency shall not commit resources prejudicing selection of alternatives before making a final decision." This would seem to imply that REA cannot commit itself to helping a co-op until after all planning is completed. If in fact REA cannot involve itself early on without prejudicing the decision, would you state whether or not this could result in delays between planning and construction which could increase costs and possibly make the project uneconomical?

Mr. FERAGEN. Senator, that is a detail that I needed briefing on. I think that we are generally exempt from that particular requirement.

Can I call on Ken Kumer, of the REA staff, to help me respond?

Mr. KUMER. Section 1502.2(f), which I believe is the one you are referring to, at the end of that, in parenthesis, it refers to section 1506.1, which also includes the new section 1506.1(d), which gives certain general exemptions for early REA approvals of minimal expenditures.

Senator ZORINSKY. As the regulations are now written, isn't it possible that a project sponsor who has to make public disclosure of possi-

ble site selections before he has an opportunity to pick up options on the site, may face having to pay a higher price for the property?

In the past, it seems, Government agencies especially are trying to acquire land and it is much more readily available at a more realistic price if one is able to go out and pick up the property without a prior disclosure.

Mr. FERAGEN. That is certainly true and I don't know the extent that we can avoid that disclosure. There is not general public disclosure, but it is disclosed to other Federal agencies and the information will be treated as interagency information.

I think once the draft environmental impact is out, then these potentials are disclosed. Then we go through the public participation process.

Senator ZORINSKY. If the CIA can't keep a secret about the Government's position, how do you intend to make sure that those facts remain secret?

Mr. FERAGEN. Hopefully, we don't have to include the CIA, Senator.

Senator ZORINSKY. What process, if any, do you feel can be developed by the REA to insure that the co-ops do in fact select what is referred to as the environmentally preferable alternative? Can it be argued that no action is always the environmentally preferable alternative?

Mr. FERAGEN. As I commented in my opening remarks, we were quite concerned about that particular standard. Again, in working with the staff of CEQ, it is our understanding that they now will accept a broader definition of that to include the meaning "environmentally acceptable" and I think that is a key point. I think it is significant that you have centered on that because as an administrator I would be concerned that anyone can challenge a decision against, say, six alternatives, as to which is really the preferable one. The reason for that is that making a decision on a powerplant, as you are personally aware, Senator, is an enormous broad range of considerations that have environmental effects—all of the way from coal to the kind of design of a plant and air quality controls. There is just a broad, broad range of considerations and to say unequivocally that one choice is preferable in terms of being decidedly the best is a very difficult decision, and I think that an acceptable, environmentally acceptable alternative is a standard that can meet the requirements of NEPA and provide a basis for making administrative decisions in a wise manner.

Senator ZORINSKY. It is pointed out to me that the phrase is in only one section, but it remains a criteria for referral, which means they would still consider the "preferable alternative," so another avenue of utilizing the same argument remains open.

Mr. FERAGEN. I think it seems appropriate that CEQ provide this committee with an interpretation of that. It is our understanding that they are interpreting it to mean environmentally acceptable relief, and that that is the interpretation. I believe that we can operate under that criterion if that indeed is their interpretation of what that phraseology means throughout the regulation.

Senator ZORINSKY. A final question: Although I know we are primarily concerned with the effects of these regulations on REA and our rural electric co-ops, isn't it quite possible that the regulations cover a significant impact on the operation of some Farmers Home Administra-

tion projects? The programs that immediately come to mind are the business and industrial loan guarantee programs and the various community programs.

Mr. MERCURE. Yes, you are right, and it was in light of that that an agreement was worked out with regard to the community facilities and water and sewage systems this past week to consolidate all of these environmental considerations earlier in the stage. At this point we are evaluating what the effect is likely to be on the business and industry loan programs, for example, which are in a certain sense very similar to the REA considerations, which are the Federal Government; in the case of Farmers Home guarantees private capital, which has the purpose of attracting jobs and employment to rural communities, but you are right, I think that has to be evaluated, as well.

We are painfully aware of the necessity to take a look at a number of other considerations related to the environment and the EPA, for example, has announced that they will be considering very carefully the effect on investments, for example, in sewage disposal systems on the irrevocable withdrawal of farm land from production and for unnecessary kind of urbanizing development. We are concerned about that and we applaud EPA's move in that direction. It is going to require—I don't think there is any doubt—that if we are going to do the job of environmental protection adequately, at the same time we assure that communities have the resources to improve the quality of life, and it is going to require every agency, at least the ones I have any responsibility for, to work very closely with CEQ and EPA to assure that we have the best possible effect on the community, both environmentally and economically.

Senator ZORINSKY. Thus far all of your assurances have been that you feel through your conversations with CEQ that we can bring closer together current differences. In all of these assurances and consultations with the people from REA, do they have that same feeling as you have?

Mr. FERAGEN. Senator, I repeat this question to the staff over and over again to get that assurance from them and my staff has told me, the environmental section has told me—and they have been on the front line on this—that they are convinced that they are getting to an understanding and an agreement that will let us use our procedures and use them largely in the manner we have been using them.

The last note has not been sounded on this because we are in that process of taking REA's regulations to CEQ and hopefully we will find our way through these assurances to keeping this process.

Senator ZORINSKY. You know this situation resembles a triangle with three legs: It won't stand it any one of those legs isn't supportive.

Mr. FERAGEN. Yes, sir.

Senator ZORINSKY. I am concerned that people not actively involved in the actual production and creation of generating power capacity who are creating new rules and regulations. It is easy for us to say I can get along with this or I can get along with that because all I do is get on an airplane and fly back to Omaha or fly back here and sit in the office upstairs and hold hearings, I don't have to go out and commit land and dollars, once a decision is made that there is a need for more electrical generating capacity; nor do you.

I want to thank you, Alex and Bob, for presenting your statements and for your forthright answers to these questions. I want to commend you for the efforts that you and your staffs have made both personally and on behalf of the Department of Agriculture. Those efforts have led to the present will of everyone concerned to try to reach a harmonious resolution of this problem.

Mr. FERAGEN. Thank you, Senator.

Mr. MERCURE. I thank you for your interest because rural development often does not attract the interest of too many people in big cities. Thank you.

Senator ZORINSKY. Thank you.

I would like to call the next three witnesses up as a panel. Each one can present their independent statements as they see fit and then we will ask questions. Charles Robinson, deputy general manager and counsel for the National Rural Electric Cooperative Association; Stanley Bazant, Plains Electric G. & T. Cooperative, Inc., Albuquerque, N. Mex., and William E. Mickey, Tri-State G. & T. Association, Thornton, Colo.

STATEMENT OF CHARLES A. ROBINSON, DEPUTY GENERAL MANAGER AND COUNSEL, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Mr. ROBINSON. Mr. Chairman, my name is Charles Robinson. I am the deputy general manager of the National Rural Electric Cooperative Association. We are most appreciative of your taking time from a well-earned reprieve after a long session to provide this opportunity for us to be heard this morning.

I wonder if our statement could be included in full in the record. I believe I can highlight it briefly.

Senator ZORINSKY. Most certainly. Your complete statement will be included in the record.*

Mr. ROBINSON. Mr. Chairman, as you know, NRECA is the National Trade Association of Electric Cooperatives and our members generally consist of two types: The local distribution cooperatives or public power districts, as you know them in Nebraska, which serve the individual farmers and ranchers across the country, and the larger so-called G. & T. cooperatives which generate wholesale power in bulk quantities and transmit it to the local distribution system where it is sold to ultimate consumers.

Mr. Bazant and Mr. Mickey are managers of the larger type G. & T. systems, one of which serves in the State of Nebraska and you will be hearing some specifics from them in just a few minutes on what our problem is.

REA has been making and guaranteeing loans to G. & T. cooperatives for the construction of generating plants and transmission lines almost since the agency's inception in 1936, and of recent years, these loan guarantees for construction of major generating stations have increased both in size and in number.

Inflation, the fact that power companies now encourage us to build

*See p. 44 for the prepared statement of Mr. Robinson.

these plants, the fact there is no more Federal power coming on line, contributes to this.

When the National Environmental Policy Act of 1969 was passed, it imposed on each Federal agency the requirement to finalize an environmental impact statement before making any major decision of environmental consequence. The act also established the Council on Environmental Quality (CEQ) as what we thought was an advisory agency to the President. REA is a Federal agency, is subject to NEPA, and has beeen successfully handling its environment-related problems for almost a decade, while still being able to carry out its statutory responsibilities under the REA Act of approving loans and loan guarantees to build generating stations.

Now comes a very substantial block of regulations from CEQ setting forth in minute detail exactly how every Federal agency, and I might add, including, apparently, the Federal regulatory agencies, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, every single Federal agency will hereafter handle environmental impact statement responsibilities, and by doing so, CEQ has apparently transformed itself in one fell swoop into a new regulatory agency.

The problem for our members is that the regulations as promulgated by CEQ will make it extremely difficult and expensive, if not impossible, for them to use REA as a financing source to build generation and transmission facilities. We are faced, essentially, with the chicken and egg situation. REA requires detailed studies on anticipated loads, fuel supply, water supply, fuel transportation, site selection and all sorts of other important items connected with approving the need and feasibility of a generating station prior to the time the final loan is committed. These studies are all interrelated and, as you pointed out, Mr. Chairman, their completion requires certain decisions along the way, yet the CEQ regulations have specifically prohibited any such decisions which affect the environment.

The REA Administrator has referred to section 1506.1(d) as giving REA and its borrowers the opportunity to make these decisions in advance, but section 1506.1(d) very clearly and expressly and unambiguously limits these preliminary decisions to those not affecting the environment, and that is the language of the paragraph, and I really feel that almost any decision made in this day and age can be interpreted by someone as affecting the environment. Therefore, we don't believe that this section provides the necessary leeway.

We have met with CEQ officials ourselves on several occasions and we know that the REA staff has done the same. We appreciate this courtesy by CEQ and we understand CEQ's difficulty in writing reguations which are designed to affect the entire U.S. Government. We have heard rumor and general statements that REA and CEQ have reached an accord, but as the REA Administrator pointed out in his testimony this morning, no such accord has been finalized, reduced to specifics in any form or even reduced to writing in general form. This is a very serious problem for us because if unchanged, the regulations will impose on electric cooperatives an environmental impact burden which is much greater and more expensive than that carried by any other sector of the utility industry, be it power companies or municipal

companies, and could well bar use of the entire REA program for G. & T. loans.

That is especially true with respect to joint ventures which we undertake with municipals over power companies. We do not believe Congress intended NEPA to be used to impede or frustrate the effectuation of statutory programs like REA, and we are seeking the help of Congress in solving our problem.

Finally, Mr. Chairman, let me point out that at least two major law firms filing comments on these regulations have very seriously questioned the legal authority, the statutory authority of CEQ to issue regulations will not in any way achieve their purpose of reducing paperwork.

The legal argument goes along the line that CEQ is established as an advisory agency to the President and that no portion of the National Environmental Policy Act confers the power to publish regulations of this kind.

The REA Administrator spoke in terms of alternatives which the Government faces in finalizing an environmental impact statement and, in our case, in guaranteeing a loan. The environmentally acceptable alternatives versus one environmentally preferable alternative, a whole group of alternatives may be environmentally acceptable. There is only one, perhaps, that might be environmentally preferable. If the regulations are interpreted to hold the REA borrowers to the environmentally preferable alternative, that is going to virtually destroy the usefulness of the act because in my judgment where many environmentally acceptable solutions, environmentally acceptable sites, environmentally acceptable fuel supplies, environmentally acceptable water supplies are available, there is probably much fewer environmentally preferable alternatives in each of these fields. If the environmentally preferable alternative is what CEQ is going to insist on, that is going to really place us in the worse kind of straightjacket.

Quite frankly, Mr. Chairman, in view of the fact that we have called the attention of our problem to CEQ almost from the day the proposed regulations were published, in view of the fact that we have met with them on more than one occasion since that time, and in view of the fact that REA has been doing the same thing, in view of the fact that the problem between REA and CEQ has not been resolved in any specific form, we really feel that the CEQ ought to suspend the effectiveness of these regulations until this rather major problem is solved and until the REA Administrator and the chairman of the CEQ have agreed that this is what it is going to be.

Mr. Chairman, that completes our presentation. Again we are most appreciative of the time to make our views known to the subcommittee.

Senator ZORINSKY. Thank you very much, Mr. Robinson.

Mr. Bazant or Mr. Mickey, would you like to make any comments?

STATEMENT OF STANLEY K. BAZANT, GENERAL MANAGER, PLAINS ELECTRIC G. & T. COOPERATIVE, INC., ALBUQUERQUE, N. MEX.

Mr. BAZANT. Mr. Chairman, in addition to my written testimony, I certainly would. I am Stanley K. Bazant, executive vice president and general manager of a generation and transmission cooperative that

serves approximately 60 percent of the land mass of the State of New Mexico and about 250,000 of its population. I also represent the NRECA/CFC Power Supply Study Committee and as such the task force that is looking into the effects of leadtime.

Mr. Chairman, I think, to start this off, what I would like to say is that I am speaking from a position of trying to run a G. & T. and looking at it under these proposed regulations, it is getting frustrating.

I know Mr. Mercure and Mr. Feragen personally. I think they are wonderful people, but as an operator in the field I may find fault with some of their positions as to what they think they (REA) can survive under. What we are looking at is the survival of our G. & T. cooperatives and their ability to serve the population that they represent. We are truly consumer oriented. We speak for the people.

Where are costs going? Senator, I think if you look back 10 years ago, you will see that the cost of constructing a powerplant was about $150 a kilowatt. Based upon regulations and inflation, for a plant in service in 1983 we are talking about a cost from $1,000 to $1,400 a kilowatt.

There are some that will say that 40 percent of that cost is tied up in regulations, of which the consumer is paying for. What we are projecting in the G. & T. programs is probably a very conservative position as far as where the rates are going, but we feel that within the next 5 to 7 years, the ratepayer will be paying double what he is paying today.

The intent of the regulations, we think is fine—to reduce paperwork. Personally, and for the committee, we feel that the paperwork is going to get even more significant than what we have seen in the past. It is unlikely that a generation and transmission cooperative is going to come in with a less amount of paperwork to prove its position. A G. & T. is going to have to come in with even more paperwork to substantiate its position.

We alo feel that the systems will be exposed to continuing and possibly more intense litigation to slow down or stop plants completely.

I think, Senator, what you have to look at right now, possibly in your own mind, is how many plants are progressing on a reasonable schedule today, and based upon the fact that we are faced with an energy crisis of a magnitude that this country has never experienced before, I would question what the intent is in the slowing down process of building coal-fired or nuclear powerplants.

These regulations make it very difficult to develop power supply projects, and I will go into that in more detail in a moment.

The G. & T.'s and the committee also question the legality of the CEQ regulations. We have talked to CEQ on one occasion and informed them, that we did not feel that a piecemeal patchwork type of adjustment to the regulations was going to do either party any good. The regulations as they presently are proposed deal with project initiating Federal agencies, not with G. & T.'s, due to the unique banker relationship of REA. We are not a Federal agency, nor should we be treated like one.

We also have very serious questions about the environmentally preferable rather than environmentally acceptable preference that has been set forth within the criteria. We feel that under the pro-

posed regulations the existing agencies that we deal with do not have the manning levels capable of moving a project along in a timely fashion. We feel that the leadtime as such is open ended from the Federal standpoint.

The chart which I have up on the easel at the present time will show that we are talking about a 4 year frontend approval program. To show the dichotomy of what is included in this there is no guarantee that the interested Federal agencies that we are dealing with are going to return our documents or approvals in the 4-year period that is required to move a project along properly.

We also have a very significant problem that no major commitment by the G. & T. can take place prior to or jeopardizing the final decision of the REA Administrator.

We feel that these commitments have to be made at the front end of a project so that it can come onstream within the proper timeframe.

Senator, approximately 10 years ago a coal-fired powerplant could be put on the line, from engineering to final construction and commercial roll date, in 4 to 5 years. This chart demonstrates that we are now talking about a 9- to 10-year process, depending on the project size and the complexity.

When we are talking about a coal-fired plant, let's use the example that the plant is a $300 million project for the first unit. If that project were to slip 2 years, we are talking about $63 million more that the cost will increase which will be borne by the ratepayer. I can tell you, Senator, that the ratepayer out there right now is getting livid with the excessive amount of Federal regulations and the resulting costs he is beginning to pay. We, the utilities, are on the frontline and we know how our people feel.

It may be interesting to note that Plains is in a transition program, as it were, between where we were 5 years ago and where we are proposing to go on a project under these regulations in the near future. Plains has recently had the opportunity to participate in a major coal-fired powerplant. Because of agency interpretations of the regulations of NEPA, Plains could not get approved a contract as a participant in that powerplant. That agreement could not be approved by the Administrator of REA until such time as the entire EIS process had run its course, which means that in effect we were second-class participants. Certain restrictions were placed on that private utility company, where no expenditures could be made to impair the environment. Our expenditure levels were limited so that in case the project failed we would not be financially damaged. As a result, we are not participating with that particular utility in the project and we are having to go it alone at this time. Plains has been studying the need for a 230-megawatt project for the last 4 years. We started the process in 1974. We have studied it to death and we are still not complete as far as meeting the requirements under the new procedures. We have expended over $1 million in that project. It is felt that we can probably extend ourselves to approximately $4½ to $6 million during the approval process without ever being guaranteed that we will have the powerplant in production when we need it, and we know that we need it.

We have also been denied the possibility of front end participation in a geothermal project. Public Service Co. of New Mexico announced that they were going ahead with Union Oil on a geothermal project to be located in the central portion of the State of New Mexico, but that due to the restrictions that were placed upon Plains it was not in the best interest of the company to affiliate itself with Plains in this project because it would slow down the entire construction program. They expect to have that project on line in 1982. Under the proposed regulations there is no way that cooperatives can participate in this type project.

I would like to show you, Senator, some of the problems we face from an operating standpoint. This entire front end approval process, if it went well, takes 38.5 to 46.75 months, but you will notice that there are many places that the time lengths of each part of the process are dependent upon the amount of deficiency found in the particular study, and let's face it, any environmental impact study is usually claimed to be deficient in some areas by somebody. It also depends upon the amount of people that are available to the participating Federal agencies and whether they have qualified people available. I can tell you right now in the West, with all of the other environmental impact statements that are developing on a regional basis, there is a question which project has priority and at that point if you are not on the high-priority list, you might not even complete, in this 4- to 5-year process.

The heart of the problem lies in the fact that at the front end of the project you have to define all alternatives. Those alternatives include nuclear, the soft technologies, a number of projects that we know we cannot participate in because of high risk, or that they are not going to be to the advantage or the benefit of the public, but we have to address all of these alternatives.

We then finally get down to the scoping sessions. In effect, we have to hold open the options that we are looking at as far down the road as we possibly can. After 3 to 6 months, in the first part of the process, when we have discussed the project with REA and have submitted preliminary site selection to them, REA sends pertinent information back to potentially involved Federal agencies for their review. There is 1 or 2 months for those agencies, supposedly, to respond. You then go into a scoping meeting at which all of the interested Federal agencies participate through comment at your site. At that scoping meeting, you progress to where it is said that you obtain water rights, land options or purchase land. Now it seems to me at that point you are getting very specific, but under the proposed CEQ regulations you already are starting to make commitments at this front end which could jeopardize the final decision of the Administrator of REA.

Question: How many sites do you go to, how many alternatives do you hold open? In the environmental analysis you have to drill and evaluate core samples to know what the substructure is for the development of the power complex. You have to specify where the coal is coming from and what kind of coal it is. How can a cooperative sign a contract for a coal supply, with a clause allowing the Administrator to terminate the contract if he finds fault with the overall project some 4 years in the future. There are a number of utility and coal com-

panies that are starting to look at that clause as a way for the cooperative to hedge on its commitments. These types of commitments have to be made at the front end of a project.

The method by which you are going to supply your power, and just like you said, Senator, you have to know if you are going to move the turbine by barge and how you are going to get it there and at what elevation you are going to put the boiler are all prejudgments. You have already made decisions at the front end of the project and at the far end, 4 or 5 years out, some of the decisions may change because of input, finding a better procedure, let's look at it again, but every time we get into this process there is always a potential of placing the project back to its initial stages resulting in delay and additional cost.

If a Federal agency cannot respond within a given time frame there is a procedure that is used and that procedure is they find some additional problems; we are then given back the questions for additional response. The answering of those questions could restart the entire clock procedure and place the project back to its beginning. A 4-year process, with variables inserted all through the approval process jeopardizes the success of the project and what is even more crucial is that plants presently being studied may be caught in a transition period of changing regulations and if there is slippage it is going to cost the ratepayers dearly.

This is a very complex situation, Mr. Chairman. Plains cannot afford losing $4½ to $6 million. We are not that big an organization. But the commitments that Plains will have to make next year, if we can get the proper type of contracts with progress payments, are going to commit us for substantial amounts of money in excess of $6 million.

Question: Can we even make those commitments? Will we know that we are going to get the approval?

No matter how well we have done our homework, it is always subject to litigation if anybody wants to stop that project.

I think your grasp of the situation is commendable. You have the feel for the problems that we are looking at in the future to provide power to our consumers, and I think we have to solve the problems that are here today. I don't take a commitment on the telephone between two individuals as a real commitment until I see it reduced to writing.

The G. & T. managers and the Power Supply Study Committee stand ready to work with the particular agency in developing a process by which we think we can survive. I think it is quite obvious that some of the regulations or some of the specific paragraphs just don't allow the G. & T.'s to function and at this point I wonder whether we will ever get another powerplant constructed and on line.

Senator ZORINSKY. Thank you very much, Mr. Bazant.

Mr. BAZANT. And I understand my statement will appear in the minutes.

Senator ZORINSKY. Your statement will be included in the record.*

Now, William Mickey, Tri-State G. & T. Cooperative, do you have some remarks?

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*See p. 47 for the prepared statement of Mr. Bazant.

STATEMENT OF WILLIAM E. MICKEY, GENERAL MANAGER, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., THORNTON, COLO.

Mr. MICKEY. Yes. Thank you very much, Senator, for the opportunity to be here this morning.

I am William Mickey, general manager of Tri-State Generation and Transmission Association, headquartered in Thornton, Colo.

Tri-State is one of the larger G. & T.s within the United States, serving 25 rural electric systems over a three-State area. The service area of Tri-State includes the northeastern quarter of Colorado, the western third of Nebraska, and basically all of Wyoming, except for the northeastern corner.

As a cooperative G. & T. receiving its long-term financing through REA and the loan guarantee program, Tri-State is reviewed in rate and contract matters by the REA as a part of its loan guarantee procedure. Because REA's loan guarantee function has been interpreted as a major Federal action, Tri-State's construction program is subject to the requirements of the National Environment Policy Act.

The rural electric users within the Tri-State area, we believe, are the original environmentalists. They carry the strongest commitment to and respect for the land and its limitations, as well as its wealth.

I would like to just paraphrase a great deal of my written testimony.

Senator ZORINSKY. Fine. Your testimony will be entered in its entirety.*

Mr. MICKEY. Thank you very much, sir.

I have to admit that I was very disappointed Monday when I opened the mail to find the final regulations had been received in my office. I really wondered if I had done all of this work in vain. I am now not really sure whether my comments are relevant. My testimony this morning is based upon the proposed rules of June 9, but if the rules as published November 29 were the same or very similar in import to those initially proposed, I think the substance of my comments would not change.

Mr. Bazant and Mr. Robinson both have expressed pretty much my same concerns, but I might reiterate just a couple of them. The only department I have at Tri-State that grows faster than my environmental staff is my legal staff. I presently have five attorneys to handle the litigation that has been brought over the three State area, primarily as a result of many of these regulations which were promulgated, as you said here, in our Nation's capital.

We really see five areas in which Tri-State has extreme problems in living with the proposed regulations. One is the requirement to designate the environmentally preferable alternative; two, the requirement that no action be taken to limit alternatives prior to the final issuance of a record of decision; three, the absence throughout of any requirement for positive action on the part of the agencies; four, the constructive denial of the opportunity for the resolution of early disputes, and five, the general net effect of necessarily increased leadtime.

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*See p. 62 for the prepared statement of Mr. Mickey.

It was suggested earlier that the environmentally "preferable" alternative language be changed to "acceptable." Given all the alternative sites in the 125,000 square miles that Tri-State covers, at what point do you stop studying alternatives, and whose determination of the "preferable" alternative do you accept?

We also have a unique position in that Tri-State's service area is the only electric utility area that is divided by our national grid. We serve on both the east side of the grid and west side of the grid. We have the only interconnection between the eastern and western grid—Stegall, Nebr.—a unique AC–DC–AC tie.

The National Environmental Policy Act contemplates consideration of economic and technical factors, as well as environmental impact, and leaves the administrative agency a degree of discretion to weigh the various concerns and reach a balanced and equitable decision. The judicial experience has been the application of NEPA as a procedural statute which simply requires that agencies fully consider the environmental effects of their actions. I can pass on nightmare tales of trying to build transmission lines, even though we do utilize the scoping process. I have one high-voltage transmission line that has been the subject of litigation for 3 years as a result of what would really amount to the question of the environmentally preferable route versus the acceptable route. As a result, we have had to spend millions of dollars on the generation of power using oil-fired turbines, rather than bringing it from lower cost generation, coal-fired sources.

In order to really understand the impact of the requirements of CEQ on a generation and transmission cooperaitve, it should be understood that the G. & T. has, in broad terms, four alternatives available to meet its existing and future power requirements. One is no action; two is the purchase of power from generating facilities owned and controlled by others; three is participation in construction of new generation facilities with others; and four, construction of its own generating facilities.

I have experienced the same thing that Mr. Bazant has experienced within his State in participating with other entities. Both the Nebraska Public Power District, as well as the Public Service Co., of Colorado have indicated they cannot afford the delays that we would cause them if we were to participate. We attempted to participate with Gerald Gentleman No. 2 at North Platte. We were told NPPD could not afford our delays.

Public Service Co. of Colorado is building a major generating facility in the middle of our irrigating area at Fort Morgan, Colo., and irrigation is approximately 60 percent of Tri-State's load. We were unable to participate in that facility because of delays we would cause them.

The most environmentally acceptable or preferable choice would be no action, of course, but the board of directors and members that I serve are unwilling to accept that as an alternative. It is critical that the rural areas we serve have adequate power for their purposes. We believe that in the final regulations, substitution of the word "acceptable" for "preferable" must be made in order for us to even have a hope that our people will be able to survive and be able to afford the cost of the energy that is coming out of these plants.

We have really five concerns, as I said. My second concern is the prohibition against any action or commitment of any resources prejudicing the decision prior to the final EIS. My attorneys tell me they would love to be the opposing attorney taking us on on what is a minimal action. With the need for leadtime for boilers, the coal supply, the turbine order, the back pressures, the cooling towers (everything is related), you could easily have $100 million committed. I think $40 million is a conservative figure. The penalties we will incur for cancellation are prohibitive. Our people just can't afford it. We really believe that any commitment of funds by an REA borrower toward these long leadtime items would be construed as a major Federal action and would lead us into litigation or endanger the possibility of project completion. I think it will remove any option we have for joint participation with other utilities throughout the area for the economy of scale of certain units.

For example, if we wish to consider the construction of a coal-fired plant in the Powder River Basin of Wyoming, our EIS would be expected to address, as we understand the regulation, the effect of our project on the human environment. It would be necessary to describe the impact on air quality as a result of stack gas emissions. This impact is not predictable unless the quality of the coal is known, and since we are prohibited from entering into contracts for coal supply before the completion of the EIS, we can only assume some average coal quality which may or may not be comparable to what is available to us when we are ultimately allowed to sign the necessary contracts to assure coal supply for the plant.

REA will advance no funds unless and until we have an assured coal supply. REA requires a written contract and will not rely on oral assurances.

The third major concern is the absence of any requirement for positive action on the part of the agencies. We must make management decisions as we proceed; that is our job. Yet there is absolutely no requirement for compliance within any time structured by a participating agency. Failure of an agency to act leaves the future of a project in limbo.

I think the other apparent problem I am concerned about is that the opportunity for the resolution of early disputes has been constructively denied. The stated aim to reduce delays seems to be negated by provisions of the regulations which provide for referral of disputes between Government agencies to the CEQ. Necessary steps in the preparation of the referral document assumes the completion of the draft EIS. So we have a Catch 22. I have to fulfill certain requirements, but I can't because there hasn't been the opportunity to resolve initial questions. I can see litigation coming from all directions. I also question any agreement between REA and CEQ as being binding upon the public if such an agreement should become a subject of litigation. I think, as Mr. Bazant indicated in his chart, delay has been the common theme throughout.

We cannot afford the delays. There are more and more delays, and those delays cost millions and millions of dollars. The end result is that the power may not be there the day that the people need it. The reserves in the Rocky Mountain area this summer were critically short.

We are down to 2-percent reserves, versus the 20 percent which is industry acceptable. I will be very surprised if there are not major power outages within the Rocky Mountain region this summer, and that includes western Nebraska, Senator.

In establishing its goals for the regulations, the Council chose the admirable one of reducing delays. Through the procedural requirements developed in the regulations, however, they have created the opposite condition for the REA cooperative. The Council, in the introduction to the proposed rules, asserts that the lead agency is responsible for the professional integrity of reports, and care should be taken to keep any possible bias from data prepared by applicants out of the environmental analysis. The Council should be no less accountable for the professional integrity of it regulations and should take action to insure that the regulations comply with their asserted goals.

I would like to say thank you very much for the opportunity to be here today, Senator, and we also stand ready to work with CEQ in trying to make regulations which we can live with but which do not require addition of staff at all levels, as well as additional delays.

Senator ZORINSKY. Thank you, Mr. Mickey, for your statement.

I would like, just for the record, to clarify one statement that was made. I believe it was by Mr. Bazant. You stated that you feel the rates will double within the next few years. It probably should be pointed out that this is not completely due to the additional economic impact by these rules. Escalating labor costs and increased cost of fuel, plus inflation itself must also be included. I didn't want to let stand the implication that these rules alone will double the cost of electrical energy in the future. It certainly might contribute to that increased cost, but would not double it.

Mr. BAZANT. That is correct.

Senator ZORINSKY. I would like to thank you gentlemen for giving us the industry's view of this. Laws and Government regulations are intended to give society some parameters to determine the future development of our environment. We need your testimony as to those subject to the regulation. I certainly sympathize with your problem, and I am quite familiar with time flow charts such as these, which become pointless when subjected to the realities of Government regulation beyond the intent of Congress.

Mr. BAZANT. I think, Senator, one of the things that sort of brings it home is a comment that I heard from a member of the industry, and it was that it wasn't even frustration any more that we were feeling, it was despair and not knowing what could be done if we are to meet our needs in time.

We have the requirement placed upon us by the State regulatory agencies that we must provide dependable and adequate power at the lowest cost possible. Conservation isn't going to get the job done; slowing projects down isn't going to get the job done. We are going to have to meet the needs of the public, and I don't think that we are going to be capable of meeting those needs unless we get the assistance here in Washington, because that is where a great number of these problems are stemming from, and I think what we are saying is that we are crying for help. We don't know where we can get that help. We are bleeding and we are the ones on the frontline and, Senator, all I can ask for is help.

Senator ZORINSKY. We certainly recognize your plea, and we are going to do what we can to bring about a resolution satisfactory to all concerned. However, I have to admit that may be difficult in some instances. Obviously, you are not totally satisfied with these new revisions as some members of the USDA testified they are.

Have you taken part in the ongoing negotiations?

Mr. BAZANT. From the industry standpoint, the task force met one time with CEQ. A number of the G. & T.'s did provide written comment to the regulations some time during the summer of 1978. Our input to CEQ, as far as the G. & T.'s were concerned, was more of the same kind of plea that we would like to work with CEQ concerning our problems. Basically, the interface has taken place between NRECA and the REA, but as a result of all of these discussions, as Mr. Mickey said, we have just received the final published regulations, and we have no way of knowing whether our needs are met or not.

Mr. ROBINSON. Mr. Chairman, I apologize for my voice today. I am catching the flu or something.

The NRECA staff has met on more than one occasion with the CEQ staff; and in my presence and the presence of Mr. Ives and Mr. Koch, who are sitting in this room, and some of the rest of our staff, the General Counsel of CEQ, Mr. Yost, opened one of the meetings in which I participated by a statement to the effect that: "We want you to be able to live with these regulations; we do not want to place you in a position with these regulations which is disadvantageous to that occupied by other sectors of the industry, the power companies and municipals." We keep receiving these general assurances of a desire to protect our position, but when the regulations come out, that desire is not expressed in writing, and that is where the problem comes in. The regulations open up an entirely new area of litigation. There is language throughout these regulations which is susceptible to judicial interpretation, and I am sure that will be sought. The regulations open to public participation, virtually the entire process, as Mr. Bazant pointed out, which has not been true before.

Let me also point out that REA has been living under the National Environmental Policy Act since its passage and there has been very little trouble with REA's interpretation of that act and REA's operating under the act. We see no reason to saddle us with an entirely new set of standards and an entirely new set of procedures; we see no reason to impose this additional burden on us. There is no purpose to be served, really, and for the life of me, if CEQ is bona fide in its expressed desire to take care of us, then in my judgment that should have been written into the regulations, or the finalization of the regulations postponed until that was achieved. I think that is the least we could have asked for.

Senator ZORINSKY. Thank you very, very much, gentlemen, for being here as witnesses.

Mr. BAZANT. Senator, I also had a prepared statement. I would like to have that entered in the record.

Senator ZORINSKY. Yes; that will appear in the record as if presented in its entirety.

Mr. MICKEY. Senator, as I say, we just got the final regulations, and we are evaluating them here, or my staff is.

Senator ZORINSKY. There will be 10 days after adjournment of this committee hearing for the inclusion of any additional statements or comments or input into these committee hearings; you may certainly afford yourself of that opportunity.

Mr. MICKEY. Thank you, sir.

Senator ZORINSKY. Thank you.

The Honorable Charles Warren, Chairman, Council on Environmental Quality.

STATEMENT OF HON. CHARLES WARREN, CHAIRMAN, COUNCIL ON ENVIRONMENTAL QUALITY; ACCOMPANIED BY NICHOLAS YOST, GENERAL COUNSEL, AND BALLARD JAMIESON, COUNSEL

Mr. WARREN. Mr. Chairman, my name is Charles Warren. I am Chairman of the Council on Environmental Quality, and I am accompanied here today by Nicholas Yost, who is General Counsel, and his associate, Mr. Jamieson. I am here to respond to your request for a discussion of the NEPA regulations which have been drafted and published by the Council, and their effect on REA and cooperative organizations.

I appreciate this opportunity to talk with you about the Council on Environmental Quality's new regulations for implementing the National Environmental Policy Act. We are aware of the concern for programs administered by the REA and welcome this chance to explain our new regulations and how they will apply to that agency.

I would like to begin with some background. The National Environmental Policy Act was enacted by the Congress in 1969. Section 102 (2) (C) of that act requires that Federal agencies prepare and consider environmental impact statements, or EIS's, on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment. It has been clear since enactment that "Federal action" as used in that act meant projects directly undertaken, like building a highway; funded, like building a sewage plant; guaranteed, like certain kinds of subdivisions; or permitted, like a mining lease on public land or a project intruding into navigable waters, by Federal agencies. The purpose of the EIS has been well described as an "environmental full disclosure." This document must assess the environmental implications of agency proposals and look at reasonable alternatives, including measures which could mitigate adverse environmental effects.

Congress established the requirement for an environmental impact statement to improve the chances that environmental factors would influence the course of agency action and lead to decisions which enhance environmental quality. By requiring the responsible Federal official to consider an environmental impact statement, Congress intended that NEPA reduce the risk that the potential adverse effects of Federal activities will be arbitrarily discounted or simply ignored. In short, by enacting this law, Congress required agencies to "look before they leap" into potentially destructive projects.

In title II of NEPA, Congress also created the Council on Environmental Quality in the Executive Office of the President. In the 8 years since NEPA was enacted, the Council has been responsible for overseeing Federal efforts to comply with this law.

NEPA is widely credited with significant improvements in Federal decisionmaking. As President Carter noted in his environmental message last year, "in the 7 years since its passage, it has had a dramatic—and beneficial—influence on the way new projects are planned." These changes occurred under guidelines established by the Council for the preparation of environmental impact statements.

At the same time, however, the environmental review process has been criticized as being cumbersome and time consuming. At the Council, we believe that the environmental impact statement has too often become an end in itself, rather than a means to better decisionmaking. Many have lost sight of NEPA's overriding concern for a better environment. The result has been too much paperwork and too many delays.

It was for this reason that President Carter directed the Council, in May, 1977, to issue new regulations for implementing NEPA. As part of the overall effort to improve agency decisionmaking, the President issued Executive Order 11991 mandating the Council to develop regulations which provided for shorter and more useful environmental impact statements; faster and more efficient environmental reviews; and better decisions following NEPA reviews. As the President stated in his environmental message, we are concerned "with quality, not quantity. We do not want impact statements that are measured by the inch or weighed by the pound." The regulations fulfilling the President's directive, which appear at 43 Federal Register 55978, will replace the guidelines which are in effect, which appear at 38 Federal Register 20550 and at 40 Code of Federal Regulations, part 1500, and I will place copies of the 1973 guidelines and the 1978 regulations in the record.*

The Council was greatly assisted in its task by the hundreds of people who responded to our call for suggestions on how to make the NEPA process work better. In all, the Council sought the views of almost 12,000 private organizations, individuals, State and local agencies, and Federal agencies. In public hearings, which we held in June, 1977, we invited testimony from a broad array of public officials, organizations, and private citizens, affirmatively involving NEPA's critics, as well as its friends.

Among those represented were the U.S. Chamber of Commerce, which coordinated testimony from business, from the business sector; the building and construction trades department of the AFL–CIO, which did the same for labor; the National Conference of State Legislatures, for State and local governments, and the National Resources Defense Council, for environmental groups. Scientists, scholars, and the general public were also represented.

There was broad consensus among these diverse witnesses. All, without exception, expressed the view that NEPA benefited the public. Yet most felt that the process had become cumbersome and should be streamlined. The degree of unanimity about the good and bad points of the NEPA process was such that at one point an official spokesperson for the oil industry rose to say that he adopted in its entirety the presentation of the Sierra Club.

*The above-mentioned guidelines have been retained in committee files.

Following the public hearings, we distributed questionnaires for public response, circulated numerous drafts of the regulations for agency comment and consulted informally with literally hundreds of individuals, public officials and private interest groups. We met with every single group which requested an opportunity to talk with us about the regulations. We also requested the staff members for congressional committees with jurisdiction over NEPA to let us know if they learned of concerns with the regulations, and we took the initiative to meet with all of those referred to us in any way. The result of these many conversations was constant refinement of the regulations. Between the time the regulations were issued in proposed form in June of this year to their issuance in final form last week, for example, we amended 74 of their 92 sections, making a total of 340 changes based on comments received from the public and others.

The new regulations we honestly believe reflect the collective wisdom of those who took part in this process. Let me briefly describe some of the important innovations that have been made. In doing so, I will stress that the Council has adopted and put into place nearly every one of the recommendations made by the Federal Paperwork Commission and by the General Accounting Office in their exhaustive and excellent studies of how best to implement the National Environmental Policy Act.

Now the details:

First, in order to reduce excess paperwork in environmental reviews, we provided for:

Shorter environmental impact statements which normally shall be less than 150 pages long, instead of the bulky, multivolume documents that appeared in the past.

A renewed emphasis on the real choices facing the Federal decisionmakers to insure that vital issues are not obscured by mounds of background data, which we eliminate from the EIS.

We have also provided for early cooperation among all affected parties through a scoping process for early identification of the problems an environmental impact statement must study, as well as the elimination of the other areas thought not to merit detailed study.

We have provided for plain languages for EIS's that can be read and understood by the ordinary citizen.

We provided for a clear format for EIS's to make it easier for people to find the information they need.

We provided summaries of EIS's so that the essence of an agency's analysis can be quickly reviewed.

We provided for the elimination of overlapping reviews between Federal and State and local requirements through the preparation of a single EIS that will comply with both NEPA and equivalent State laws, and elimination of duplication by permitting one Federal agency to adopt an EIS prepared by another.

We have provided for consistent terminology so that citizens dealing with the various Federal agencies will have a consistent set of terms to deal with.

We have incorporated or permitted incorporating background materials by reference to slim down the EIS.

We have also permitted the combining of ESI's with other planning and decisionmaking documents to cut down on paper flow, and we have

provided simplified procedures for updating an EIS. We have also taken steps to reduce delay in the process.

The regulations, among other things, provide for mandatory time limits on environmental reviews for private applicants to replace the open-ended agency deliberations which have occurred in the past.

We have provided for an early start on NEPA reviews so that they will not be a roadblock to agency action once the planning and decisionmaking is over.

We have provided for integrating the EIS with other environmental review requirements to get the whole job done at one time.

We provided for better cooperation among agencies in preparing EIS's to avoid last-minute problems at the tail end of the process.

We have provided for a rapid resolution of disputes over which agencies must take the lead in preparing an EIS.

We have provided for conducting broad environmental reviews for entire programs to simplify the analysis for individual projects.

We have provided for accelerated procedures for environmental analysis of legislative proposals, to better fit congressional schedules, and we have also provided for categorical exclusions that will permit agencies to designate many activities which do not have significant environmental effects which may then bypass the NEPA process completely.

Finally, Mr. Chairman, we are also determined to produce a better end product for the NEPA process. In the past, agencies have often failed to establish the link between what is learned through the review process and how that information can contribute to decisions which further our national environmental policies and goals. So the regulations now require that agencies bridge this gap by explaining the relationship between environmental factors and their ultimate decision. Agencies will also be required to follow up on their decisionmaking to insure that precautions which they deemed necessary are actually taken to protect the environment.

In describing these innovations, I do not want to create the impression that we are talking about radical departures from the existing NEPA process which has been in effect for the past 8 years. We are not. On the contrary, based on the overwhelming sentiment of those who worked with us on the regulations, we determined that the basic NEPA foundation was solid. We have built upon that foundation based on our experience over the last 9 years.

The regulations have been enthusiastically received by practically everyone involved in the process of developing them. Business organizations, State and local officials, environmental groups—the vast preponderance have said that the regulations are a big improvement over the existing guidelines.

We recognize, however, that the job is only half over. Since our regulations apply to many different Federal activities, they are necessarily couched in general terms and do not address the specifics of agency decisionmaking. This job will be done by the individual Federal agencies themselves. We have established a period of 8 months for the development of implementing procedures to translate the broad direction of the regulations into practical action at the decisionmaking level. The public has been guaranteed a meaningful role in this process, and

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the Council will be providing its advice on what the implementing procedures should contain for each agency.

With this background in mind, I want to address the specific concerns of the Rural Electrification Administration and the rural electric cooperatives which deal with this agency. In the course of developing the regulations, we met on several occasions with representatives of the National Rural Electric Cooperative Association, and the REA, to discuss their concerns with certain provisions under consideration by the Council. Indeed, I think it is fair to say that our staff has devoted more time and energy to their concerns than to those of any other single purpose group brought to our attention in these past months.

We made this effort because of the unique character of the rural electrification program. We are aware, for example, that the rural electric cooperatives operate in a competitive market with investor-owned utilities. And we appreciate the importance of front-end financing and the hardships involved in long leadtimes for planning and building a rural electric project.

We at the Council are committed to putting the cooperatives on an equal footing with others in their industry through a sensible application of NEPA to REA. We have taken the following steps to this end:

First, let me draw your attention to section 1506.1. This section incorporates into the regulations the basic holding of many court suits which in turn accurately carried out what the Congress required. Basically Congress said that agencies had to prepare environmental impact statements before taking major Federal actions significantly affecting the quality of the human environment. The EIS was designed to aid the agency's decisionmaking. Some agencies flouted Congress' command and started to take actions before preparing the EIS. The courts have been diligent in enforcing the law and stopping agencies from shortcutting its commands. Section 1506.1 restates these wise requirements. Some commentators said to us that we should make an exception to this general rule for initial steps such as plans or designs or other steps necessary to apply for permission or funding to take the large action. The Council concluded there was no conflict with the law and added the first sentence of paragraph 1506.1(d). The rural electric cooperatives argued to the Council that they needed more specific acknowledgment of a problem they faced. Competing investor-owned utilities get their front end financing for such items as long leadtime equipment and purchase options from the money market without the need for approval by a Federal agency. Their applications to Federal permitting agencies come later. The rural electric cooperatives, on the other hand, depend for their financing exclusively on the Federal Government, the REA.

They feared that an application to them of the general rule of law embodied in section 1506.1 would result in the EIS requirement attaching before preliminary work of the sort described and earlier than the EIS requirement attached for other powerplants owned and financed in other ways. The Council agreed with them and concluded their request was not incompatible with the law. We therefore added the second sentence of 1506.1(d), which reads, and I quote: "Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment—

for example, long leadtime equipment and purchase options—made by non-governmental entities seeking loan guarantees from the Administration."

This single elaboration we added to the regulations effectively deals with the most severe problem the rural electric cooperatives brought to our attention, which differentiates them from others building power plants for which some sort of Federal authorization or assistance is necessary.

Second, we have advised the REA that fullscale environmental reviews may be avoided altogether for many cooperative activities. For example, we do not believe that EISs are necessary for many low voltage transmission and telephone lines constructed under the rural electrification program. This is the sort of issue which REA may appropriately handle under its implementing procedures, and specifically under its new authority to adopt categorical exclusions, as set forth in section 1508.4.

Third, we have agreed that the cooperatives will not have to spend large sums of money investigating an unreasonable number of alternative sites for rural electric projects. While evaluation of alternatives is the heart of the congressional mandate, the courts have never demanded study of an unreasonable number of them. We have advised REA of several ways to avoid undue burdens for the cooperatives in this area.

Finally, we have agreed formally to review the implementing procedures ultimately developed for the rural electrification program. As I have said, each agency is to develop such implementing procedures over the next 8 months. These procedures will translate the general direction of the Council's regulations into concrete steps for REA review and approval of applications for loan guarantees under NEPA. We have promised to indicate whether these procedures conform to NEPA and the regulations so that REA and the cooperatives may proceed with assurances that they are in compliance with the law.

I want to conclude by assuring you that we share the subcommittee's desire for a faster, more efficient environmental review process. At the President's direction, we have spent the past year and a half developing regulations for accomplishing this goal. In the process, we have taken extra steps, consistent with the statute, to harmonize the requirements of NEPA with the objectives of the rural electrification program. And we now stand ready to work with the REA and the rural cooperatives in resolving any additional issues which may arise as the regulations take effect in the coming months.

This concludes my statement, Mr. Chairman. I will be happy to answer your questions at this time.

Senator ZORINSKY. Thank you very much, Mr. Warren, for your presentation.

I would like to first ask you how you define the Council on Environmental Quality's mission. In your own words, what do you feel your task is and what do you believe comprises your responsibility to the administration and the Congress? I am asking for a job description.

Mr. WARREN. Of course the quick and briefest answer is to perform those activities assigned to us in title II of NEPA by Congress.

Specifically, we are instructed to prepare an annual report on the status of the environment and make available such report to the

President and to Members of the Congress. We serve an advisory role to the President, being placed at the direction of the Congress in the Executive Office of the President, so on matters affecting the environment and its quality, we offer advice and guidance to the President as requested.

We perform the specific statutory missions that Congress has given us from time to time. We perform environmental reviews of, for example, the alternative routes for the transmission of Alaska North Slope natural gas. We are presently undertaking a review at the specific request of Congress to determine means by which nonfuel mineral resources can be recovered without unnecessarily damaging the surface soils. We are performing tasks assigned us by the President, whether such assignments are made by Executive order or by his direction in environmental messages.

Finally, and more specifically, we perform the oversight of the means by which Federal agencies implement the statutory provisions of NEPA itself.

Senator ZORINSKY. You are aware that the Council is not empowered to impose procedural regulations binding on independent regulatory agencies?

Mr. WARREN. Our information is that the regulations which are before you are binding on the independent regulatory agencies, except to the extent that they might conflict with their specific statutory mission.

Senator ZORINSKY. You said your information says that. Where does your information come from?

Mr. WARREN. From the Department of Justice.

Senator ZORINSKY. Do you have a legal opinion to that effect?

Mr. WARREN. I have not with me; no, sir.

Senator ZORINSKY. When was the last legal opinion, or was one ever sought?

Mr. WARREN. Let me refer your question, Mr. Chairman, to Mr. Yost, our General Counsel. He may be able to give a more specific answer.

Mr. YOST. If I can answer it in a somewhat larger sense, Senator Zorinsky: Before undertaking the regulations in the first place, an opinion from the Justice Department was sought, which has not been made public. It basically said there was no question as to CEQ's authority as to executive branch agencies and there were arguable questions as to independent regulatory agencies. Therefore the Justice Department gave other opinions to other agencies of the Executive Office of the President on what the President could and could not do with respect to independent regulatory agencies, taking basically the position that procedural regulations could be imposed by the President, that substantive regulations could not.

We have written the regulations, as the Executive order was itself written, to make very clear that in any case where there is a specific statutory requirement imposed on an agency, and here we are talking mainly about independent regulatory agencies, that that must prevail over anything in the regulations.

Senator ZORINSKY. You have been operating under that advice for how long?

Mr. YOST. About a year and a half.

Senator ZORINSKY. You know NEPA was created by the Congress I might quote Senator Jackson, who said "I am the father of NEPA and I find it difficult to recognize my child any more."

Do you think these regulations are going to make the child more recognizable to Senator Jackson? Have you asked whether he still thinks this is the——

Mr. WARREN. I was going to add, if I may interrupt, what date Sentator Jackson made that observation, because perhaps he made that observation for the same reasons we determined that the reform regulations were necessary.

Senator ZORINSKY. Well, I don't know what date, but I certainly can find out.

My question to you was will these new regs make NEPA more recognizable to him.

Mr. WARREN. I think so.

Senator ZORINSKY. The people that actually produce electrical generating capacity say the opposite. I am wondering why we are dealing with something this important so hastily? Today is the 6th of December, pretty soon a lot of people are going to be away and away for Christmas shopping and for the holidays, and a lot of people are taking their vacations at this time of year. I am wondering why did these final regulations have to be published prior to the Congress convening. You probably could have printed these new procedures a long time ago. I am curious as to the cause for this timing? Mr. Warren or Mr. Yost, have you ever built any power generating plant or have you ever worked for a company that did? Have you ever been involved in the initial construction and planning of electrical generating facilities?

Mr. WARREN. I have not. I don't know whether Mr. Yost has.

Mr. YOST. No, sir.

Senator ZORINSKY. Well, that concerns me very deeply. I don't want to leave the impression that I am wholly on the side of REA. In fact, I was not their favorite a few weeks ago when I aided in stopping the Gray Rocks Dam project in Wyoming. I happened to be on the other side of that issue when an amendment was introduced to exempt that project from certain provisions of the Endangered Species Act. These issues are complex and it concerns me when people who have no experience in the business of generating power capacity set the rules for those that do.

The President has given you a mission to simplify environmental impact statements, to reduce paperwork flow. The President has also issued statements concerning a shortage of energy within this country. I spent a month in filibuster on natural gas and all other phases of energy, and it became quite a paramount issue during the 95th Congress. It seems absurd now to introduce new rules which may preclude rural electric co-ops from participating in the development of new sources of energy, at the same time the country is seeking additional energy sources and giving economic incentives, oil depletion allowances, and deregulating various areas of energy. On the one hand, we are saying make it simpler, make it easier and, on the other hand, we are reducing the co-op's ability to compete to the extent that private energy groups are barring co-ops from participation in construction projects because of the additional encumberances these new rules will impose.

What is your feeling on this?

Mr. WARREN. Let me respond this way: from listening to the testimony from the three prior witnesses, it seemed to me to a considerable extent that their comments addressed the draft form of the regulations as was published in June and I believe in at least one instance, admittedly, the witness admitted he was not familiar with the provisions of the regulations in their final form. Between the time we issued the draft and published the final form of regulations, the meetings or my personal meetings with the REA and the cooperative associations occurred. The changes which I recited in my testimony, which were made in recognition of the problems which the cooperatives brought to our attention, were made during that period of time and do not appear in the draft form of the regulations.

Second, it also seemed to me from the testimony that you heard this morning that their concerns were either premature or unrelated to NEPA. They are premature because, as I attempted to set forth in my statement, the implementing procedures to be adopted as they would affect the REA and the cooperatives will be done over the next 8 months and will be done by the REA itself. Also, it seems to me that the complaints which were given you had nothing to do with the regulations that we are proposing; they have to do with a system or process which has, admittedly, existed until this time and which we are trying to simplify and improve.

I really don't believe that they have given our efforts a fair evaluation either because they are unfamiliar with what we propose or they are uncertain about the concept which we have provided.

I would like to call your attention again to the fact, and I have brought with me for your information the specific recommendations of the Commission on Federal Paperwork as it concerned their evaluation of how NEPA was being implemented, and also the General Accounting Office, and I think if you will review both of those documents you will find on each and every occasion the problems which they identified for comment and criticism have been addressed and generally addressed in a manner that they recommended.

I would also like to point out as far as I know no other agency in Government or any private sector group has complained of the work that the council has done in issuing these regulations in final form. So, frankly, we are somewhat troubled, if not confused, by some of the testimony that has been expressed here today by the G. & T. cooperatives, particularly.

If I may also comment on the Gray Rocks situation, I was recently supplied the district court's decision in Nebraska versus REA and it is clear to me one of the benefits that NEPA provides, not only private citizens, but the States generally, is making sure that even REA cooperates in the accomplishment of their desirable objectives and does so in a way which does not muck up the environment of a downstream State, for instance. You are familiar with that situation, particularly. That was, as you know, an REA proposal, which took place in Wyoming, which would have, apparently, a somewhat devasting effect on Nebraska.

Senator ZORINSKY. I would like to clarify for the record, that Mr. Robinson's statement was on the new regulations. He fully intended

for those statements to be directed to the revised regulations and not any prior ones.

Second, I know of very few Americans that do not want to lead this country to a better way of life for their children and their children's children. No one objects to the environmental quality being bettered, to preserving one's air and Earth and soil for the use of future generations. I have been a member of the chamber of commerce as a private businessman long enough to know that any time I go off to a hearing on behalf of the chamber of commerce, I certainly will support the aims of the Council on Environmental Quality and all of those good things and of marriages continuing to produce offspring and apple pie continuing to come out of the bakeries.

I also, as a member of a public entity called the Omaha Public Power District, located in Omaha, Nebr., was confronted with many environmental hindrances. Some we overcame, but we used the ratepayer's money to overcome them. The people that purchase electricity are the ones that pay the bill. Sometimes the environmental monitors at the Federal level overstep their bounds in promulgating additional rules and regulations. I can cite a specific instance. You say it can't happen and I say it does happen, and all too frequently. At the time I was on the OPPD board, we were constructing a nuclear powerplant and we had to purchase right-of-way on farm areas for transmission lines from that nuclear powerplant. It was discovered that some of this area was a very well-used duck and geese flyway. Some people feared that the transmission lines might strangle the ducks and geese when they flew through the area. They didn't want to strangle the birds, because the hunters wanted to shoot them. As ridiculous as it may seem, this is why Washington is a joke itself. The Federal Government doesn't concern itself enough with the needs of the very people they are trying to protect.

You know these are small items, but as a result of that environmental situation, the price on the right-of-way rose substantially. Finally, it boiled down to one thing—more money.

Mr. WARREN. But the point, Senator, if I may, is that NEPA had nothing to do with that. The environmental impact statement only advised you of the conflicting claims on the ducks. That told you to look at that. They did not force a decision one way or the other, and the EIS process does not compel a decision; it merely makes sure that the decisionmaker is informed. That is all it does.

Senator ZORINSKY. It forces those alternatives at an early stage.

Mr. WARREN. Consideration of those alternatives. It forces no decision.

Senator ZORINSKY. But it forces everything to be held in abeyance until a final decision is made.

Mr. WARREN. It forces a delay in any decision which will adversely affect the environment, to be postponed until such time as the environmental impact statement is prepared, yes, in order to make sure that the decisionmaker is fully informed of the effects of his decision, whatever that decision may be, so in terms of the ducks, NEPA and EIS had nothing to do with the dimension of that problem.

Senator ZORINSKY. I would remind you that any time there is an additional encumberance of specific investigations or studies that that additional paperwork, those additional attorneys, the additional staff-

ing required has to be paid for by someone. Any time a Federal agency promulgates a new rule or regulation there is a compounding of effort. I am concerned that you are exceeding your scope as an advisory council, that you are getting into the legislative process, which was not intended when the CEQ was created. I certainly don't think it was Senator Jackson's intent in creating NEPA.

You say that maybe the new regulations will restore some semblance of sanity to the current paperwork requirements. OK, you say this is going to simplify matters, and the industry that has to live under it says it is going to complicate matters. Then we have a third statement from Mr. Feragen saying he has many oral understandings with you. What kind of oral understandings are there that will assure the industry that many of these types of problems can be resolved?

Mr. WARREN. I wasn't here to hear his statement, but I suspect that the oral understandings which he described are contained in my formal statement as presented to you today of our willingness to work with REA in the development of the implementing procedures so that the objective that cooperatives will be put in no worse place than the investor-owned utilities can be matched and achieved.

Senator ZORINSKY. It is your sincere desire to work to that end, that the co-ops will be placed at no further economic disadvantage?

Mr. WARREN. To the maximum extent permitted by law, yes, sir.

Senator ZORINSKY. And to that end you have agreed with REA officials? Well, Mr. Feragen said in previous testimony that he has an understanding with you on various aspects of simplifying this so REA can live with it; however, if something happens to you I want to make sure that that understanding is perpetuated in some form of written documents or through the testimony of this hearing.

Mr. WARREN. Mr. Yost was quoted by one of the co-op witnesses, and I believe it was quoted accurately, and we are prepared to stand by that statement.

Senator ZORINSKY. Let me ask you why was it necessary for you to publish the rules and regulations this past week? I called you about a month and a half ago and asked you if you could hold them up until Congress gets back in session, so we could have a hearing and get another round of input.

Mr. WARREN. One moment, please.

I just wanted to confer with Mr. Yost to make sure I answered the question correctly. We felt it was important to have the regulations published at this time for a very specific and compelling reason, and that is NEPA has been viewed by some as requiring the preparation of environmental impact statements for budgetary proposals to Congress. A lawsuit has been filed which seeks to establish that principle. Indeed NEPA could be construed as requiring that. These regulations which we have written provide that an EIS is not necessary in the preparation and submission of a budget to Congress, and in order to have that decision published as quickly as possible, we determined to issue the regulations when we did.

Senator ZORINSKY. Do you remember what answer you gave me when I asked this very same question a month and a half ago?

Mr. WARREN. I would hope that the answer that I gave you at that time included that, in part.

Senator ZORINSKY. No; as a matter of fact, you said there had been ample opportunity, that you had hearings and everybody had an opportunity to speak on the subject and that is why you felt that you should publish them. Nothing was mentioned about the other matter.

Mr. WARREN. I believe I recall correctly, and I hope you will confirm this, that before the regulations would be published that I would meet with REA officials.

Senator ZORINSKY. Yes, which I understand you did.

Mr. WARREN. And with the cooperatives and that we would try to fully accommodate their fears, to the extent we could, and I think we did, Senator. I am really, rather frankly, surprised by the continuing lingering concern with some of the REA and co-op officials. I think we did respond to the matters which they brought to my attention, and I think we will respond to the other matters about which they have some reservations during the course of REA preparing the implementing procedures.

Senator ZORINSKY. Mr. Warren, I can assure you if all their questions had been resolved through communications with your staff, I wouldn't be sitting at this table, nor would you.

Mr. YOST. Could I add a little bit to a couple of the answers, Senator?

First, it hasn't been said, but it probably should be in the record that we have continued to talk with, keep advised, the folks from the committees on both sides of the Hill, both the Senate and the House, which have jurisdiction over NEPA, the Environment and Public Works Committee and the Merchant Marines and Fisheries Committee, and, second, perhaps the testimony of one segment of the electrical generation industry; that is the rural electric co-ops who are testifying today, leads you to a certain impression on the views of the electrical generation industry, but we have both met extensively with representatives of that industry and received the written comments of a significant number of individual power companies and from the Edison Electric Institute, which represents a majority of the capacity of the electricity generated in the United States.

I will leave with you a summary of their bottom lines and their comments on the June draft. They have generally gone out of their way to praise the directions in which the Council has gone. Each of them expressed reservations at that time about specific provisions. Most of those provisions, particularly the ones which Edison Electric, on behalf of large segments of the industry, brought to our attention we have changed in our final regulations, so while the rural electric co-ops do have a view, which obviously they have spoken for themselves and have told you about today and on other occasions, the electrical generation industry generally has a very different view and one of which we have been trying very carefully to listen to—to all of those who have expertise in the areas that these regulations are going to affect.

Senator ZORINSKY. Well, you are substantially correct in a great deal of your comments concerning input from electrical power and light companies. As a matter of fact, you have a letter dated August 11 from representatives of many power companies, Duke Power, Jersey Central Power & Light, Pennsylvania Electric Co. which says in essence that the proposed regulations are in some respects laudable,

to the extent that they attempt to reduce procedural tangles and paperwork. However, the letter continues, "we strongly object to the substantive changes in the administration of NEPA which the proposed regulations would effect." Even at that early point—and we have many other letters of input—both sides of the coin were represented. We have testimony from those that are charged with providing an adequate supply of electrical energy, and from the consumer. When that consumer wants to utilize that power, if it isn't there, they are not going to come looking for you—you are either going to be in a private law firm by then or on the staff of a congressman or in private practice for yourself, or whatever—but they are going to go looking for the people responsible on the local level. For example the statutes of the State of Nebraska specifically state that elective board members of power districts shall provide an adequate supply of electrical energy at the lowest rates possible. These are the people that are charged with the mission and you, I think, are placing a very heavy emphasis on those that use the electrical generating capacity and not those that produce the electrical generating capacity.

Mr. YOST. I was talking about the producers, the companies that generate electricity.

I will leave with your clerk, if I may, a 1-page summary of comments from the electrical generation industry.

Senator ZORINSKY. I would appreciate that. Also, I would like to include in the record two legal briefs with CEQ for a number of power companies. These opinions indicate that not all power companies are comfortable with the new regulations.*

[The summary referred to above follows:]

COMMENTS FROM THE ELECTRICAL GENERATION INDUSTRY

The Council on Environmental Quality's regulations were proposed in the Federal Register on June 9, 1978 for public review and comment. Most members of industry who commented on the proposed regulations had specific suggestions for improving them. The Council also received these general expressions of support from representatives of the electrical generation industry.

Edison Electric Institute and Florida Power and Light Co.

"We appreciate the fine work that the Council is doing toward improving the EIS process and welcome the opportunity to comment on the proposed regulations published June 9. Overall, we are pleased and encouraged by the aims identified in the regulations and their approach toward achieving these ends. Our comments are intended to further the effort so ably begun, and we hope that any critical comments will be viewed in the positive manner in which they are advanced."

General Electric, Nuclear Energy Projects Division

"In general, the proposed regulations are positive steps toward a logical environmental quality program."

Arizona Public Service Co.

"The Council is to be commended for the goals it set in writing the NEPA regulations; the reduction of delay, reduction of paperwork, and the need for better decisions to be generated by the environmental impact statement process are goals that Arizona Public Service Company ('APS') heartily supports. These proposed NEPA regulations go far in promoting the Council's stated goals; it is APS' intent that its comments will provide the Council with information in order that it may achieve an even greater degree of success in accomplishing its objectives."

*See p. 71 of the appendix for the above-referred to legal briefs.

Public Service Co. of New Mexico

"On the balance, the proposed new NEPA regulations appear to be quite useful and beneficial. Of particular merit are those sections calling for elimination of duplication, exclusion of information not related to the specific EIS, and allowing the lead federal agency to set a time limit on the EIS process. Increased emphasis on alternatives, and using the EIS data to decide among alternatives, is also a good point."

Northern States Power Co.

"The overall aim of these proposed regulations—to reduce paperwork and develop a more efficient process for Environmental Impact Statement (EIS) review—is commendable. A concise, clear EIS covering significant issues in a limited number of pages will definitely benefit the planning efforts of utilities. A number of regulatory processes are undertaken before a power plant becomes operational. . . . Cooperative consultation among agencies during EIS preparation, rather than adversary comment upon EIS completion (Section 1501.1), will favor a more efficient process. This effort to streamline the EIS process will help to shrink the ten-twelve year regulatory/construction time for new power plants.

"Since their conception, EIS's have been undergoing an evolutionary change. Many have been written attempting to address all issues and attacked for doing in-depth analysis in few areas. Using scoping to identify significant issues should result in a concise analytical document. An amassing of needless detail will be eliminated. . . ."

Pacific Power & Light Co.

"Pacific wishes to commend the Council for its efforts to reduce paperwork and delay, which should lead to improvements in the decision making process."

Wisconsin Electric Power Co.

"Your efforts to reduce paperwork, to reduce delays, and to produce better decisions under the National Environmental Policy Act (NEPA) have been very encouraging to those of us in private industry who frequently must cope with Federal agencies and the NEPA process."

Senator ZORINSKY. Are there any other statements you wish to make before I summarize what I feel?

Mr. WARREN. No. Thank you for the opportunity.

Senator ZORINSKY. Mr. Warren, I would hope that as a result of these hearings that if you weren't aware of any dissatisfaction prior to the hearing that you might have noticed some areas of concern on behalf of some of the people in REA and that—I said this before—that I feel it is a triangle that needs all three legs satisfied and that being the USDA people, yourself, and REA, and without support of all three, a structure of three-legged sides will not stand, and if at all possible, as mature people around the table and with people involved that have to put up a lot of front money, and generally the consumer is the one that picks up the tab regardless of what happens, and I know the elderly, the people on fixed income and pensions have plenty to say about the escalating costs of electrical energy, which translates into how much the bond payments are concerning the construction of the facility, and that goes into the depths and details of the very essence of cost of generating capacity, and because of time delays and as much as we are trying to stem inflation and the cost of construction, the realities keep going up, so time means money and money means additional electric rates.

I would like to ask you if it would be all right if we had additional questions to submit for the record to submit them to you and then have them answered by your counsel.

Mr. WARREN. That would be fine, and may I also suggest, with your permission, Mr. Chairman, may we have an opportunity to come visit you from time to time to keep you up to date on the progress we achieve in assisting REA in developing its implementing procedures?

Senator ZORINSKY. I certainly appreciate that opportunity and I look forward to a continuing dialogue as a result of today's hearings. I hope this will open up lines of communication and increase the input of rural co-ops and make constructing powerplants easier rather than more difficult. I will ask Mr. Feragen to further explain some of the comments he made with regard to his oral understandings with the CEQ.

Many times conflicts develop over interpretation, rather than actual wording.

Mr. WARREN. That is correct.

Senator ZORINSKY. I hope we can clarify some of this.

Mr. ROBINSON. Before you adjourn, at the risk of seeming discourteous, I wonder if I might ask a question. Is it possible that we could get an agreement between the Chairman of CEQ and Administrator of REA as to the timeframe within which they might expect this problem to be resolved?

Mr. WARREN. I am not quite sure what the problem is that the gentleman refers to, but if he is referring to the development by REA of its implementing procedures, we are talking about the next 8 months. It could be done before then, depending upon the extent to which REA is able to turn its resources and attention to the task, but at the outside it would be 8 months.

Senator ZORINSKY. Mr. Robinson, does that answer your question?

Mr. ROBINSON. I didn't hear the number of months?

Mr. WARREN. Eight.

Senator ZORINSKY. Does that answer the question you asked?

Mr. ROBINSON. Assuming the REA Administrator agrees to it, I guess it would.

Mr. WARREN. The regulations require it be done in an 8-month period.

Mr. MERCURE. Mr. Chairman, as Assistant Secretary for the Department to which REA reports, I would like to aim for a much faster target, and I think the Council for Environmental Quality and we could reach a resolution of the implementation regulations sometime by, I hope, the 1st of March.

Mr. WARREN. We are available forthwith.

Mr. ROBINSON. I apologize for that.

Senator ZORINSKY. That is quite all right. As long as we have all spent the effort to get here and try to do something about this problem, I certainly don't want to leave, intentionally, any questions unanswered.

The time period for additional extensions of remarks for the record or for the submission of additional statements will be 10 days from today.

Thank you for your kind attendance. The subcommittee is adjourned.

[Whereupon, at 11:45 a.m., the subcommittee adjourned, subject to call of the Chair.]

APPENDIX

STATEMENT OF ALEX P. MERCURE, ASSISTANT SECRETARY FOR RURAL DEVELOPMENT, U.S. DEPARTMENT OF AGRICULTURE

This is our first opportunity to appear before this committee since you assumed the chairmanship and we look forward to working with you, the other distinguished members and your fine staff.

This is also part of the premiere of Bob Feragen, whom you confirmed as Administrator of the Rural Electrification Administration in the closing hours of the last Congress. I want to express my deep appreciation to you and the full committee for completing the confirmation process at a very busy time as the 95th Congress was winding down.

The early reviews of Mr. Feragen's performance have been good. As you know, he succeeded a popular Administrator who had made substantial contributions to REA and rural America in his 14 years in the job. Bob is spending a great deal of time learning the agency and meeting its employees. And as you would imagine, he is traveling some to become more familiar with the program across the nation.

Many of the members of this Committee have watched with interest and concern the events surrounding the Missouri Basin Power Project on the Laramie River and the lawsuit which resulted from some environmental concerns—the issue which I understand brings us here today. The manager of the project and one of the participants is Basin Electric Power Cooperative, Inc., Bismarck, North Dakota.

As a result of the efforts of Mr. Feragen and of many others, we believe that the project will be able to proceed with its development and that the questions of environment and wildlife preservation have also been adequately addressed.

This project is an example of what we hope will happen less and less frequently in the future; understanding that the general predictions are that REA and its borrowers will be facing more and more frequent challenges. Mr. Feragen is significantly increasing the environmental review unit in REA so the agency can do a more complete and objective review of impact statements, particularly in regard to site selection.

Many REA borrowers, like Basin, have provided national leadership in dealing with environmental questions in an open and aggressive manner, usually going far beyond what is expected or required of investor-owned utilities. We expect borrowers to make reasoned judgments about how best to reach that delicate balance between the need to insure an adequate supply of energy for rural America and the protection of the environmental qualities which are making rural America an attractive place to live to an increasing number of Americans.

I believe that within USDA, and specifically within the jurisdiction of the assistant secretary for rural development, that we have the diversity necessary to moderate the demands of those who want growth at any cost and those who would protect the environment at any cost. I am one who does not believe that growth in rural America and protection of the environment are mutually exclusive. I think that through solid staff work, both by the REA borrowers and the REA staff, and through negotiation we can reach decisions about power plant siting which will satisfy all those but the most extreme at either end. We are also committed to making sure that as part of developing our total energy supply that alternative systems are included in the mix. I think there are big payoffs, both economically and environmentally, in pursuing alternative energy sources appropriate for a particular area or region of the country.

The proposed regulation of the Council on Environmental Quality, like the Laramie River action, have caused many of you and your constituents concern—

and you should be concerned, just as we are. Mr. Feragen will provide you with more detail on the discussions—negotiations—with CEQ related to REA's problems with the content and interpretation of the regulations as they now are written. I think we are making good progress on this issue.

Last Friday, the President, the Vice President, the Secretaries of Agriculture, Interior and Labor, the Deputy Secretary of Energy and others of us participated in a wide-ranging discussion with some 300 rural electric cooperative representatives and other folks from rural America in a White House session that lasted more than four hours. There were announcements which were certainly welcome to those who came from around the country, and others which only reduced the levels of concern about particular issues. But the most important feature, I think, was the rare opportunity for open and candid discussion. In summary of the meeting, the President reiterated this Administration's commitment to the rural electrification program as it is presently operating. We will recommend no legislation in the coming session which deals with funding formulas, etc., and the formal OMB–USDA study of REA has been concluded. There are issues concerning water policy and environment which require ongoing attention, such as the CEQ regulations.

With that, Mr. Chairman, I am pleased to introduce Bob Feragen. Thank you.

STATEMENT OF ROBERT W. FERAGEN, ADMINISTRATOR, RURAL ELECTRIFICATION ADMINISTRATION

Senator Zorinski, I apprecaite very much this opportunity to appear before this committee to discuss the Rural Electrification Administration's environmental permitting procedures and our expectations of what will be required of the agency under the Council on Environmental Quality's regulations.

The National Environmental Policy Act was designed to encourage Federal agencies to give meaningful consideration to the environmental effects of their contemplated actions. While almost all persons will agree that NEPA has generally led to better Federal decisions which balance environmental considerations with other social and economic factors, certain practical problems have arisen which limit the usefulness of the NEPA process or make it unduly cumbersome. On the one hand, certain parties have used NEPA as a tool to delay or prevent projects they find unacceptable; on the other hand, in some cases NEPA may have been used to legitimatize decisions reached prior to a sponsors entering the process. Serious controversey has arisen as a result, and delays in needed energy producing projects have greatly increased costs which will be paid through higher rates to the consumer.

Recognizing this problem, President Carter issued Executive Order 11991 which directed the Council on Environmental Quality to develop and issue regulations for the implementation of NEPA. On June 9, 1978, CEQ issued these regulations in draft form. The threefold purpose of the regulations was stated to be (1) reduction of paperwork, (2) reduction of needless delay, and (3) improved decision-making. The Rural Electrification Administration supports all efforts to implement these goals. We are committed to ensuring that the letter and spirit of NEPA are carried out, that environmental considerations continue to be an integral part of our decision-making, and that all projects receiving REA financial assistance are environmentally acceptable.

The Council's proposed regulations were well received by the Department of Agriculture and Secretary Bergland has given strong support to CEQ's efforts and the laudable purposes of the new regulations. At the same time, however, the regulations raise what we believe may be significant administrative difficulties for the electric and telephone programs administered by REA. REA is particularly concerned about the distinct possibility of added costs and delays which will put the rural electric cooperatives at a competitive disadvantage with others who supply power. Most often these issues arise because of the different relationship REA has, as a lending agency, with the cooperatives, compared to those federal agencies which initiate projects of their own. CEQ's regulations appear to deal more clearly with the latter.

I am satisfied that CEQ has been responsive to REA and has shown an understanding of the problems we have raised. On a continuing and intensive basis, the CEQ staff has worked with the REA staff to address the practical problems

the regulations may impose on REA and the borrowers. There has been an excellent dialogue between the staffs and a dedicated effort by CEQ to address the problems of constructing major electric generation and transmission projects with REA loan funds and guarantees, as well as address the smaller but far more numerous electric distribution and telephone construction projects. REA has outlined in detail its proposed method of implementing CEQ regulations and has been verbally assured by CEQ staff that the REA concept is acceptable to them and that there is nothing inherently in conflict between the REA concept and the CEQ intent. I have personally discussed our concerns with Mr. Charles Warren, Chairman of the Council, and he has verbally assured me that there will be full cooperation to resolve REA's practical problems. I have been assured that it is not the CEQ's intent that the regulations place unreasonable restrictions on the rural electric or telephone programs or to place the cooperatives at a competitive disadvantage to investor owned utilities by making the environmental permitting process more difficult for the cooperatives than for other utilities. The CEQ staff has also met on at least two occasions with representatives of the cooperatives to better understand how the regulations could apply to them. We are encouraged by CEQ's efforts and its commitment of cooperation expressed by Chairman Warren to permit our program to operate effectively within the regulations.

These concerted efforts by CEQ, REA, the cooperatives, the National Rural Electric Cooperative Association, and the National Rural Utilities Cooperative Finance Corporation (CFC) have resulted in important improvements in the regulations. Final CEQ NEPA regulations published on November 29, 1978, on balance, satisfy many of our concerns. By its own count, CEQ has made 340 amendments in producing the final regulations. Moreover, CEQ's introductory remarks to the regulations clarified its intent with respect to REA and borrower actions.

Several changes have been made which specifically address the problems REA raised and make the CEQ regulations more workable from REA's viewpoint. There is a new section 1506.1(d) which recognizes that REA borrowers may need unusually long lead time for ordering items such as boilers and for optioning or purchasing land, water, coal, etc., and that to avoid expensive delays some of this activity is permitted to take place before issuance of the Environmental Impact Statement.

Changes in sections 1502.14 and 1505.2 emphasize that the primary concern of CEQ is to ensure that environmental projection is balanced with economic and social impacts. Moreover, these changes indicate CEQ's appreciation of the problem of identifying a single "environmentally preferable" alternative, compared to the clearer decision which can be made to identify an "environmentally acceptable" choice. Section 1500.3 states that trivial violations of the regulations should not give rise to an independent cause of action. This adds flexibility to the regulations. Assessment of the need to develop an environmental impact statement can be prepared by applicants subject to Federal agency independent review (Section 1506.5(b)). This will make it possible for REA to expedite reviews. One-step adoption, rather than going through both a draft and final process is now permitted under certain circumstances (Section 1506.3). Commenting Federal agencies must now comment on a Federal EIS within the public comment period (Section 1503.2) and cooperating agencies must, in their comments, indicate any reservations they may have to a project and potential mitigation measures (Section 1503.3(c) and (d)).

I have been assured by CEQ that it is sensitive to USDA's concerns that the new regulations not place the member-consumers of rural electric cooperatives at an economic disadvantage with those who are supplied power by investor owned utilities. For example, an REA borrower will join another utility in the construction of a power station and in many instances the cooperatives participation has no impact on the basic decision of whether or not the plant would have been built. When this is the case—that the REA borrower's participation does not effect that basic decision—there is the obvious question of what will be required by the CEQ regulations. We, again, have assurances from CEQ that this can be clarified to the satisfaction of REA and its borrowers. The concerted efforts of CEQ, REA, the cooperatives, NRECA and CFC have resulted in considerable progress in resolving the practical problems that REA perceives.

REA has explained conceptually its proposed NEPA process to CEQ staff. The CEQ assures us that it sees no basic conflict between this procedure and the CEQ

regulations. Early review of REA implementing procedures and formal written approval of them by CEQ is essential to the continued vitality of the REA program.

In summation, REA believes that the remaining issues can be solved. The procedure we have outlined to CEQ will fulfill the goals of NEPA, comply with the intent of the regulations and yet preserve the vitality of the REA program and competitive position of the cooperatives. We are confident that continued CEQ–REA cooperation will resolve the present areas of concern. We would be pleased to keep the committee staff informed of our progress.

STATEMENT OF CHARLES A. ROBINSON, DEPUTY GENERAL MANAGER AND COUNSEL, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

My name is Charles A. Robinson, Jr. I am the Deputy General Manager and Counsel for the National Rural Electric Cooperative Association (NRECA). NRECA is the national organization which represents nearly 1,000 REA financed, nonprofit cooperative electric systems which deliver power to approximately 25 million people in 2,600 out of 3,100 counties in the United States. These consumer owned electric systems serve nearly 75 percent of the total area of the United States which, for the most part, is sparsely populated, containing only about 10 percent of the total population.

I appreciate the opportunity to express the views of NRECA on the subject regulations promulgated by the Council on Environmental Quality.

SUMMARY OF NRECA POSITION

The membership of the National Rural Electric Cooperative Association (NRECA) is most aprehensive concerning the regulations recently promulgated by the Council on Environmental Quality (CEQ); assertedly to implement the National Environmental Policy Act (NEPA) and its requirement for environmental impact statements (EIS) on "major federal actions significantly affecting the quality of the human environment" (NEPA Sec. 4332(c)). In our judgment, the regulations will very substantially raise the cost of electricity supplied by rural electric cooperatives above that supplied by other types of power suppliers, or even make it impossible to use REA financing for construction of generating stations or transmission lines. Thus, they will in our judgment impede the Rural Electrification Administration (REA) in exercising its statutory authority. We believe that the regulations are inappropriate for federal agencies such as REA which do not initiate actions. We also question CEQ's basic authority to issue the regulations under NEPA. We doubt that the regulations will either accomplish the objectives set by CEQ of shortening and simplifying the EIS procedure or that they are really responsive to the intent of NEPA.

Let me make it clear that NRECA understands the need for environmental impact statements as required by NEPA. We also recognize the Herculean task undertaken by CEQ to write a single set of regulations applying to all federal agencies and we appreciate the efforts made by CEQ to resolve our problems. In spite of the changes made by CEQ, however, we still have serious reservations as to how these regulations will impact rural electric cooperatives.

We most respectfully urge the Subcommittee to understand that REA is essentially a loan agency and does not intiate projects. In this somewhat unique arrangement, the construction of facilities is initiated by electric cooperatives to meet the power needs of their consumer owners, but the construction loan is insured or guaranteed by REA which must prepare an environmental impact statement on the loan. Through its security documents, REA completely controls the cooperative on all matters involving the commitment of funds and must approve fuel and equipment purchases, power contracts and engineering studies.

Planning a generating station requires a series of pre-loan studies and decisions related to future loads, power availability, plant conceptual design, long lead time purchases, site selection, environmental studies, and financing, all of which must be made by the cooperative responsible for the project and approved by REA. Each of these decisions eliminates some alternatives. Thus, the regulations, if rigorously interpreted, could require a separate EIS for each such decision. After the completion of these studies, the most desirable sites usually become clear and the cooperative applies to REA for a loan guarantee. We must also

make pre-loan commitments on some long lead items prior to the subsequent finalization by REA of its EIS. REA must then prepare the environmental assessment, the scope, the draft EIS, the final EIS and a record of decision (new requirement) on a project for which REA has no direct responsibility other than guaranteeing or insuring a loan. We are convinced that the subject CEQ regulations will greatly complicate and prolong the REA loan approval process for the following reasons.

I. THE REGULATIONS WILL RAISE THE COST OF CONSTRUCTING GENERATING STATIONS

In the initial stages of the rural electrification program, the expectation was that much of their wholesale power needs would be purchased from investor owned companies and from federal power agencies like TVA and the Bureau of Reclamation (now WAPA). However, the availability of federal power has nowhere near kept pace with the increasing demands of our consumers. Moreover, power company wholesale rates to our members have risen more rapidly than their retail rates and in some cases the wholesale power rates of some power companies are about the same as their retail rates to large industrial customers. This makes it very difficult for cooperatives to serve the large loads which develop in their service areas, and thereby hold down power costs to individual consumers. In addition, the investor owned companies are now encouraging electric cooperatives to build the generating capacity required to serve cooperative loads, either as separate cooperative generating units or in joint ventures with the companies. Our consumers expect to receive power from these plants at the lowest possible cost.

We are, therefore, very concerned with Sec. 1506.1 of the subject regulations which would substantially delay the planning of power generating stations. The increased lead time delaying REA loan approval during this period would cost on the order of $225,000 per day for a 1,000 MW plant. It is virtually impossible to build an economic power plant without the capability to make early commitments on the need for additional power, fuel supply, fuel transportation, water supply, and site selections. Sec. 1506.1 appears to preclude any decision on any of these matters prior to REA's final EIS, or in the alternative requires a separate EIS on each decision. We note that new language (Sec. 1506.1(d)) has been added to the regulations in this regard, but the language is so ambiguous as to make unclear whether these early commitments will be possible for REA borrowers. This section will also render impossible or increase the cost of generating projects in which cooperatives participate with investor owned or municipally owned utilities. The delay resulting from a separate EIS by REA on a plant already subject to one EIS will not be acceptable to other utilities because of the increased cost to their consumers. Conversely, if an REC wishes to invite participation in a power plant by another utility, the higher cost will make such participation by other utilities unattractive. In this fashion, the consumers served by RECs will not be able to receive the economies of scale which make joint ventures advantageous.

II. THE CEQ REGULATIONS WILL OPEN AN ENTIRELY NEW ARENA OF JUDICIAL CHALLENGE TO DECISIONS BY THE REA ADMINISTRATOR

The regulations are written in terms that are subject to broadly varying interpretation. And, while it is provided that an agency head may seek guidance from CEQ as to the intent of the regulations, such guidance is certainly no guarantee against legal challenge. Interpretations by judicial precedent is an expensive and time consuming process. For these reasons we believe that the regulations should expressly disclaim any purpose or intent to deny agency heads authority to carry out their program authorities, as such existed prior to the regulations.

The language of the regulations is apparently directed to agencies which initiate proposals and programs on their own. REA, however, is an agency which responds to proposals from nonfederal applicants and, therefore, may find it difficult to follow the letter of the regulations as they are written. So encompassing are these regulations in prescribing in minute detail how the EIS is to be prepared, and so great is their emphasis upon strictly following the prescribed procedures that a flood of litigation prior to completion of an EIS could effectively halt the REA program. The CEQ apparently recognized rather fully this danger and included in the regulations (Sec. 1500.3) a statement that "It

is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a finding of no significant impact, or takes action that will result in irreparable injury". A statement of intention, however, is not binding upon the courts and, because of the importance that the regulations themselves place upon such preliminary matters as "scoping", for example, it is wholly possible that a court might be persuaded that irreparable injury will occur unless there is judicial intervention during or even prior to the EIS process itself, and upon that basis enjoin the whole project.

The Rural Electrification Act, at 7 U.S.C.A. § 930, provides as follows:

"§ 930. Congressional declaration of policy.

"It is hereby declared to be the policy of the Congress that adequate funds should be made available to rural electric and telephone systems through direct, insured and guaranteed loans at interest rates which will allow them to achieve the objectives of this chapter . . . ."

We submit, therefore, that the CEQ regulations provide a whole new area of the law through which the intent of Congress as set forth in the REA Act can be frustrated.

III. THE REGULATIONS EXCEED THE STATUTORY AUTHORITY GRANTED BY NEPA TO CEQ

In our opinion, the National Environmental Policy Act does not authorize CEQ to write these kinds of regulations which can be used to veto or control nearly every single action of every government agency (Sec. 1508.17(a) and (b)). CEQ was established by NEPA as an advisory agency to the President and as such was granted no regulatory authority. If this regulatory authority is based on an Executive Order directing the activities of the executive branch, then these regulations would not apply to the legislative or judicial branches and the independent agencies. Regulations based on an Executive Order, however, must conform to the Administrative Procedures Act and should not extend the authority of the enabling legislation from procedural to substantive including enforcement.

The Supreme Court of the United States has affirmed that NEPA's mandate is essentially procedural but the regulations venture into substantive matters by vesting decisional and enforcement authority in CEQ. The regulations (Sec. 1504) provide for the referral of inter-agency disputes and disagreements to CEQ for either settlement or referral to the Presdent. This procedure actually vests final decisional responsibility in the CEQ and removes it from REA where it is vested by Congress.

The regulations (Sec. 1505.2) require that REA adopt a "monitoring and enforcement program". This implies that NEPA has vested substantive enforcement authority in CEQ, and CEQ has the right to transfer or delegate this authority to another federal agency.

The regulations (Sec. 1508.17) extend CEQ authority over nearly all decisions of federal agencies, and possibly legislation enacted by Congress through the EIS process. CEQ includes the following actions as being subject to the EIS (Sec. 1508.17(a) and (b)):

"(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.

"(b) Federal actions tend to fall within one of the following categories:

"(1) Adoption of official policy, such as rules, regulations and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

"(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

"(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

"(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions ap-

proved by permit or other regulatory decision as well as federal and federally assisted activities."

In our opinion, the intrusion of CEQ into nearly every action of government is unwarranted and unauthorized by NEPA and we can visualize CEQ even extending its control over Congressional actions by requiring an EIS for (Sec. 1508.17 (b)(3)) "allocating agency resources to implement a specific statutory program . . .".

IV. THE CEQ REGULATIONS WILL INCREASE PAPERWORK AND DELAY, AND NOT NECESSARILY IMPROVE ENVIRONMENTAL DECISION MAKING

The alleged objectives of CEQ are commendable, but in practice we believe they are counterproductive and will increase paperwork and delay as an EIS Scope Document (Sec. 1501.7(a)(1)), and a Record of Decision (Sec. 1505.2) must be prepared in addition to the draft EIS and EIS already required. The regulations mandate that the public become involved in these processes. This could easily result in a formal record on each document when in the past, impacted federal agencies informally participated. In our opinion, there is no need for the public to become involved at this stage because the federal agencies are supposed to represent the public view and have informally resolved major differences in the past, prior to publication of a draft EIS. If there are individuals and "public interest" groups whose views have not been considered, the draft EIS is the point where they should be given the opportunity to be heard. We believe that designing a mechanism which can delay projects at each stage is not in the public interest and most certainly will not speed up the EIS approval process.

The arbitrary limit set on the length of an EIS (Sec. 1502.7) may be satisfactory for federal agencies, but intervenors usually view an omission of any real or even barely plausible impact as rendering the EIS "inadequate". All that the regulations will do in this respect is shorten the main body of the EIS and lengthen its appendices. However, the requirements of Sec. 1502.14 will materially increase the amount of paperwork as it mandates that the federal agency "rigorously explore and objectively evaluate all reasonable alternatives" with no definition of what reasonable means. It also mandates "substantial treatment to each alternative" with no real limitation on what substantial means. Secs. 1502.15 and 1502.16 require a practically separate EIS on every alternative course of action mandated in Sec. 1502.14 which will tremendously increase paperwork and increase delays as the meaning of "reasonable" and "substantial" can be litigated for decades.

The CEQ regulations are unnecessary as there are existing procedures for preparing an EIS which have been tailored by each federal agency to meet its specific mission and to integrate environmental values in its proceedings. As the missions, priorities and environmental impacts of each federal agency are different, each federal agency's EIS meets different criteria which depend on the individual agency's responsibilities, the need to satisfy NEPA and, last but not least, the need to satisfy the objections of intervenors. Objections by intervenors are one major reason that the EIS has increased in size and delays have multiplied. Adding due process to the procedure will not reduce delays. Each issue on which a challenge to the adequacy of an EIS is based must be addressed in the next EIS and, as more and more issues are brought before the courts, each subsequent EIS is expanded to address each new issue. No arbitrary shortening of the EIS can prevent litigation of the many issues that are always cited in any challenge to the adequacy of an EIS.

Thank you, Mr. Chairman, for the opportunity of expressing NRECA's views on these regulations.

STATEMENT OF STANLEY K. BAZANT, EXECUTIVE VICE PRESIDENT/GENERAL MANAGER, PLAINS ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., ALBUQUERQUE, N. MEX.

Plains Electric Generation and Transmission Cooperative, Inc. (Plains), is a cooperative nonprofit membership corporation, founded in 1952 and existing under the Rural Electric Cooperative Act for the purpose of delivering power and energy to its membership. Plains is currently composed of eleven New Mexico rural electric cooperatives and public utilities; an Arizona rural electric cooperative which also serves as a utility in New Mexico; and the Salt River Project in

central Arizona. Plains delivers power and energy at wholesale for resale by its members to the public within territories served by such members. For such purpose, Plains owns, operates and maintains an electric generating plant, a system of transmission lines and associated facilities, together with interconnections, service and power and energy agreements with the United States Department of Energy and Public Service Company of New Mexico, among other activities related to its purpose. Plains serves approximately sixty percent of the land area in New Mexico and twenty-five percent of the population.

Today, I am representing the National Rural Electric Cooperative Association (NRECA)-National Rural Utilities Finance Corporation (CFC), Power Supply Study Committee, of which I am Chairman of the Lead Time Task Force. The members of that Committee are listed at the beginning of this testimony.

Through that Committee I am representing over 1,000 rural electric distribution cooperatives and 52 rural electric generation and transmission cooperatives. These cooperatives supply electric service to more than 25 million rural farms, ranches, business and families throughout the United States who are truly member/owner consumers.

I appreciate the opportunity to comment on the proposed Council on Environmental Quality (CEQ) regulations 43 FR 25230 concerning the National Environment Policy Act (NEPA), which I now understand have been published in final form (Nov. 29, 1978 Federal Register).

Because there are a number of environmental and regulatory concerns associated with siting, construction and operation of both electrical generating and transmission facilities, we are extremely concerned with NEPA and its interpretation. Since the Rural Electrification Administration (REA) is the primary source of financing for most rural electric cooperatives, and because REA assumes the lead agency position for assuring compliance with NEPA through the Environmental Impact Statement (EIS) process relating to Cooperative activities we are extremely concerned about any regulation promulgated to implement NEPA.

The presence of a clean and healthy environment is one of the most pressing needs of our time, and it is incumbent upon the energy industry to minimize any negative impact it may have upon the environment. Passage of NEPA by Congress some years ago was, at that time, widely supported by the rural electric cooperatives of the United States because of the recognized need to give special consideration to programs that modify the environment on a long-term basis. We say—at that time was widely supported—because; through the apparent lack of Congressional oversight, the intent and purpose of NEPA has been exceeded and even changed. It is my feeling and opinion that implementation of NEPA should be increasingly considered a case of mismanagement by the bureaucracy. Or is it? A new kind of individual, from what is loosely called the counterculture, is being introduced into the public service. The strength of these new men and women, who dot government agencies and who in many instances came out of activist organizations, is that they feel in possession of moral legitimacy. They seem to be intolerant, almost religious in the intensity of their beliefs.

What they all seem to agree upon is that they want a reduction of our per-capita energy consumption by *half*. They also seem to want the end of central power generating plants in favor of small neighborhood stations under local control. Lastly, they seem to want to shift from all fossil and nuclear fuels to soft technology. Beyond this, their philosophy gets very murky to me. Whatever it is, I don't believe it includes private enterprise, capitalism or private ownership.

My contention is this. By stopping every energy development in sight—using delaying tactics in the courts—they will in fact be responsible themselves for producing the very energy shortage and economic crisis they seem to want and need to put into effect whatever their vision of the future is.

If what I am contending is at all true, what better weapon could they use, than NEPA?

Turning from the philosophical to the feelings of the Power Supply Study Committee I am representing, I should point out that we are more than concerned about what has taken place and what is taking place, including the *proposed* CEQ regulations. We are apprehensive and angry.

POSITION STATEMENT

In reviewing in detail the proposed CEQ regulations it is the position of the NRECA/CFC Power Supply Study Committee that the proposed CEQ regula-

tions will have the following adverse results on REA-financed power supply systems without any additional environmental benefits:

Expose the systems to time-consuming and delaying litigation;

Create an atmosphere which will discourage other power systems from making participation arrangements with rural electric systems;

Make it extremely difficult, if not impossible, to develop new power supply and transmission projects;

Increase power costs to the extent that these systems will be at a competitive disadvantage with other power systems; and

Increase power costs to such an extent that they will be prohibitive to millions of American farmers, ranchers, rural business and rural families, which would impinge on the national security.

In total, the adverse effects of the proposed regulations may result in the inability of the rural electric cooperatives to survive.

Let's look at where we have been, where we are at and where we are going. In recent years federal and state governments have enacted layers and layers of environmental legislation, with resultant rapid fire regulations and guidelines, which because of lack of precision have become vehicles for obstructing, delaying or entirely preventing the development of energy facilities that are needed to meet legitimate and urgent needs. This has created the prevention of needed business growth and expansion to meet the legitimate needs of the American consumer.

Also such hindrances and/or delays of necessary projects for months and even years causes excessive cost increases due to inflation. As an example, a power generation project estimated cost $300,000,000 now, will cost $330,000,000 one year later. Two years after the original date, this project would cost $363,000,000 or an increase of $63,000,000 without any obvious benefit.

Add to this regulatory requirements imposed by state and federal agencies, often with overlapping authority, which leads to duplicatory and unnecessarily lengthy and costly efforts to meet requirements for environmental impact assessments and statements. This need for excessive documentation results in excessive dollars being spent for consultants, lawyers, and large unnecessary "in house" staffing as well as resultant increased administrative costs.

Add to this existing inconsistencies in the interpretation of environmental regulations, including NEPA, by various state and federal agencies and even within these agencies themselves and their regional offices.

As a prime example, review the interpretations of these regulations by EPA. You will find that the interpretations and the manners in which the rules are administered are as varied as the ten jurisdictional areas this agency governs.

That is where we have been and this is where we are at. Experience now dictates that we and the Congress must question the regulations and policies promulgated to implement such laws, as well as the manner in which such regulations are administered.

We must question whether the intent and goals of the laws are being achieved.

We must question interpretations by government agencies that exceed the intent of the law, such as, NEPA interpretations by many agencies.

We must question if the cost benefits with relation to the degree of achievement being obtained, can be justified.

We must question whether bureaucracy is presently capable of developing and administering such regulations with respect to either adequate and/or competent staffing, let alone administer proposed future requirements they will be faced with.

We must question a process such as developing an Environmental Impact Statement (EIS) which requires that any question, alternate suggestion or demand, no matter how arbitrary or capricious, raised by virtually anyone, in or out of the government, to be answered to the satisfaction of the individual government agency and which creates delay and a resetting of the EIS review procedure clock, if such a clock really exists.

We must question whether or not the nature of and how private enterprise functions has been incorporated in the development of regulations and implementation policies.

We must question whether the cost effect put upon the little person down at the end of the line—the consumer—can be justified, or if he was even considered.

We must question the overlapping of responsibility of various government agencies that fight among themselves as to interpretation of regulations and poli-

cies, who require different approaches, and different forms and methods to achieve the same results; and because of their own inter-bureaucracy clashes; punish both private enterprise and consumers through costly delays, and expenditures and inferior compromise solutions. Conflicts between various government agencies essentially eliminates any economic and timely progress.

Concern for the environment can and is being displayed by harassment, obstructionism, and other ulterior motives not related to the environment. This can cause a continuing delay in the completion of an EIS, and the longer the EIS is delayed, the more questions that are raised. In addition, the process can become so lengthy that by the time the EIS is ready to be published, the data upon which the original application for the project was based may have changed and it may become necessary to re-establish the justification for the project. The time lost in re-establishing the justification could quite readily see new laws passed, new questions raised, and a further delay ensue.

In general the present NEPA process is a mess and therefore in theory CEQ is to be commended for undertaking to improve the NEPA process and also to reduce NEPA paperwork, which leads us to CEQ's proposed regulations and where we are going.

The Power Supply Committee strongly feels that the proposed regulations should not directly effect REA and therefore any bandaid approach to revising the CEQ regulations to fit the unique circumstances of REA would be inappropriate. If such a bandaid approach were undertaken it may well seriously damage the original intent as the regulation would relate to other federal agencies.

Mr. Chairman, our Committee, members of our Committee, distribution cooperatives and G&T cooperatives wrote CEQ on many issues concerning all or part of these proposed regulations. We offered to hold joint meetings with CEQ and in any other way to assist them in developing acceptable procedures specifically for REA. Our offer to jointly participate in working out an acceptable solution went unanswered which is evidenced by the publication of final regulations without such an interface.

It is therefore with a great deal of regret that I appear before you today and the comments which follow are only given to illustrate the weakness of the regulations and are not intended to suggest revision which would be inconsistent with the Study Committees anti-piece meal bandaid approach.

I should also point out that when reference is made to a specific paragraph, it is assumed that the final regulations, as just published, are consistent with those of the proposed regulations. Unfortunately, we have not yet been provided with any documentation related to the final regulation publishing in advance of this testimony.

GENERAL COMMENTS

Let's consider paperwork first. We are convinced that the proposed CEQ regulations will not achieve the stated goals because a fundamental factor which is responsible for much of the flood of paperwork and the maze of NEPA procedures is beyond the reach of these or any regulations.

Experience demonstrates that NEPA paperwork is a symptom rather than a cause of the problem of EIS delays. The fundamental problem is the litigation spawning propensity of NEPA itself. The flood of paperwork in which the EIS process is now drowning is a direct response to judicial challenges to the adequacy of EIS's. So long as it is possible to litigate the question of whether an EIS adequately touches all the environmental bases, paperwork is not going to be reduced. EIS writers are going to continue, indeed they will be forced to continue, to attempt to make their EIS's sufficiently comprehensive to withstand the inevitable judicial review either in the main document or through appendices. Page limits and exhortations to avoid the trivial and gobbledegook, like reminders that NEPA's purpose is not to generate paperwork, however excellent and while obviously desirable, will not relieve the basic difficulty.

Procedural litigation will continue and probably increase under the proposed regulations. Unless suitable legislative remedies are adopted, achievement of the CEQ's objectives to reduce paperwork cannot be met.

Now in general terms, lets consider CEQ's effort to improve the NEPA process through its proposed regulations and where we may be going as a result.

(a) The CEQ proposed these regulations after lengthy discussions and debate among the various federal agencies which are directly affected. Privately-owned and cooperatively-owned entities which are also directly involved and can be severely damaged by the proposed regulations, were not asked to participate

in development of the regulations and have not been heard. Every entity which relies on federal actions resulting from these CEQ regulations should have been permitted to express their views on record at public hearings before the proposed regulations were developed or published.

(b) *CEQ Does Not Possess Legislative Authority to Promulgate Regulations.*—Since the passage of NEPA, CEQ has maintained guidelines for the administration of the NEPA process, particularly the preparation of environmental impact statements. Although only advisory, the guidelines have served as a touchstone for administrative and judicial intrepretation of NEPA.

In accordance with Executive Order 11991, CEQ has proposed to issue regulations to supplant the guidelines. By their terms, the regulations are to apply to "All agencies of the Federal Government. . . ." In the absence of any statement to the contrary, it must be assumed that the agencies to be bound include not only the elements of the executive branch, but all independent administrative entities and elements of the legislative and judicial branches of the federal government as are subject to NEPA.

Guidelines are merely advisory and the CEQ has no authority to prescribe regulations governing compliance with NEPA. Nor should such authority be implied as necessary for CEQ to carry out its function.

Should the support for the regulations be that the President can direct (or delegate direction of) the activities of his departments, then corresponding limitations on the applicability of the regulations should be delineated. Certainly regulations resting on the executive authority of the President would not apply to the legislative or judicial branches, nor to the independent regulatory commissions.

(c) *The Proposed Regulations Would Improperly Change Standards For Agency Decisionmaking.*—NEPA's mandate is procedural. If the proposed regulations are promulgated as is, the regulations would transform NEPA's procedural mandate into a substantive environmental standard for decision-making.

The focus of the proposed regulations is to require that environmental interests weigh more heavily in agency actions subject to NEPA. Under Section 1502.14 (a), an agency would be required to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. Section 1502.14 (e) would require the identification of the "environmentally preferable alternative . . . and the reasons for identifying it." Finally, Section 1505.2 (b) would provide that if an alternative other than that designated pursuant to Section 1502.14 (e) is selected by the agency it must explain "the reasons why other specific considerations of national policy overrode those alternatives." Section 1505.2 (b) at least implies that only substantial and specific national policy considerations can justify selection of an alternative other than that which is most environmentally preferable.

There is a big difference between what is environmentally acceptable and what is environmentally preferable. Presumably, no projects, no people, no activity at all would be preferable.

NEPA does not state that the environmentally preferable alternative must be selected or even be given priority. Rather it required federal agencies to fully consider the effects of their actions on the human environment, and integrate this into the decision-making process. The use of "overrode" suggests a bias in favor of the physical environment rather than a balancing of all factors. Furthermore, balancing only national policies may not be appropriate in all cases. There may be many instances where state and local laws may override the most environmentally (physical) acceptable choice from a national viewpoint.

Section 1502.14 states that identification and comparison of alternatives is the heart of the EIS. This section continues on to say that the agency shall devote substantial treatment to all reasonable alternatives. The lead agency may not narrow the set of alternatives during the process. Its end product would set out a potentially large number of alternatives for ultimate selection by the decision-maker in the case of electric generation and transmission projects. Such a procedure would be both intolerably expensive and an undue cause of delay and may in many cases be physically and economically impossible.

Further, the regulations do not recognize two types of EIS efforts. Where a federal agency makes a proposal, the danger of bias or conflict of interest is most accute. In instances where the federal agency is acting upon applications from outside entities, there is less chance of a parochial interest. The regulations do not permit agencies to narrow the set of alternatives considered. From

a set of environmentally acceptable alternatives the agency then would be permitted to focus field studies and further analysis on only a few of the alternatives. This selection would be based not only on environmental matters as used in these regulations but on factors such as economic or social well-being, all of which constitute parts of man's total environment. The final detailed study would be carried out on the one or two finalist alternatives to determine whether detailed investigation supports the earlier finding that the alternative is environmentally acceptable.

Many factors other than environmental effects may properly be considered by an agency in reaching a decision, any one of which may be of greater weight than environmental impact in a particular case. Cost-benefit balances, which the proposed regulations would relegate to an ancillary consideration, have long been accepted as important tools in placing environmental effects in perspective. Costs, efficiency, technological restraints, and socio-economic factors are all considerations which may tilt the balance of agency decision making but which do not rise to the level of "national policy" considerations as contemplated by Section 1505.2(b).

(d) *The Scoping Process Should Be Redefined For Federal Permitting Activities.*—As presently proposed, the regulations contemplate beginning the scoping process, including public notice and interagency participation, "as soon as practicable after its decision to prepare an environmental impact statement." Section 1501.7. As a practical matter, this is attuned to the process involved in the development of a federal project rather than the administration of federal permits and licenses and loan guarantees.

The primary objective of the scoping process is to narrow the inquiry of the NEPA process to the key issues, so as to permit more intensive examination of important alternatives. To the extent possible, environmental impact statements, and the environmental studies upon which they are based, should not become a mere cataloging of all environmental data pertaining to the proposed action. Rather, the NEPA process should focus on analysis of data which is important, which could make a difference to the ultimate selection of alternatives. However, in identifying issues for either further study or exclusion, two new problems are introduced. First, what mechanism will be used to resolve early disputes as to what is important and requires study, and what is not? In a similar respect, how should the NEPA process handle issues which were not identified for study during early scoping but which are raised subsequently by an interested person or agency?

Given the history of proceeding under NEPA, it is entirely reasonable to anticipate that parties opposed to an agency action will search among the issues excluded from review in the scoping process to find one or more which should require more detailed analysis. Indeed, a party given to obstruction could well "sandbag" a proceeding by not raising issues during the scoping process, with the expectation they will not be covered and can be raised later to block or delay a timely agency action. Not to come to grips with such delaying tactics and simply to adopt the scoping process as proposed would be contrary to one of the stated objectives of the regulations, reduction of administrative delay.

(e) *The Proposed Requirements for Analysis of Alternatives Extend Beyond the Bounds of NEPA.*—Section 1502.14 (c) and (b) of the proposed regulations would require that agencies "rigorously explore" and "devote substantial treatment to" each of the principle alternatives identified for the proposed action. Viewed in the context of other selections of the regulations, including Sections 1502.14 (e) and 1505.2 (b), it is apparent that what CEQ envisages is a consideration of several alternatives to equal depth, with agency action predicated upon identification of the most environmentally preferable alternative. While "rigorous" and "substantial treatment" may be construed to refer to the quality of an analysis rather than the quantity of data reviewed, the implication of the proposed regulations is that the development of information on each alternative must be nearly as detailed as that necessary for complete agency review of the action proposed.

Any requirement to extend the study of alternatives to the scope described is wholly beyond the bound of NEPA and is not supported by any decision of the courts. The premise for requiring such extensive analysis already has been shown to be without support in NEPA, as discussed in Section (c) above. In federal licensing, the action under review is essentially as proposed by a private person and takes into account a wide variety of private and public interests, including

environmental concerns. NEPA no more mandates that private (or state or local) decisions be based primarily on environmental interests than does it require such decisions by federal agencies. It follows, then, that NEPA does not require federal agencies to substitute their judgments for those of private applicants as to which, all things considered, is the "best" alternative to pursue. Federal agencies are required only to measure the proposed private action against defined, substantive standards, with weight given to environmental effects, to determine whether it is acceptable or may be rendered better, within the bounds of cost-effectiveness. For example, where nuclear power plants are concerned, it should not be the NRC's function to select a site in the first instance, or to decide which of several acceptable sites should be developed first.

With this understanding of the requirements of agency review and NEPA procedures, it is apparent that the scope of investigation of alternatives contemplated by the regulations is, as a rule, unnecessary and not supported by NEPA. What NEPA requires is a "detailed statement" of alternatives. This may, or may not, involve rigorous analysis and detailed environmental studies. It depends upon the case, and the type of federal action proposed.

For example, consider again the siting of a new electric generating station. The proposed regulations seemingly would require that extended on-site field studies be conducted in detail (air modeling, terrestial monitoring and inventory, discharge modeling and aquatic impact analysis) for each alternative site available. Not only would such studies be horribly expensive, and time consuming, but they may not be of any significant difference to the ultimate decision. The site proposed would have been selected by a permit applicant with its operating and financial requirements in mind (including whether it already owns or could acquire the land and water rights), as well as environmental effects. While reasonably available alternative sites may exist, and, indeed, may be somewhat "better" in purely environmental terms, "coarse" data may show that they should be developed later, or do not offer any overall advantage, i.e. one which is cost effective. Where "coarse screening" rules out a site, "rigorous" environmental analysis should not be required.

(f) *Environmental Impact Statements Need Not Be Prepared In Every Case Where Federal Actions Are Delegated To The States.*—In defining the concept of "major federal action" (Section 1508.17), the regulations propose that actions taken under federal programs delegated or transferred to the states remain subject to NEPA, and that the responsible federal agency continue to ensure the preparation of environmental impact statements where they would be required but for the delegation.

Some cases indicate that certain state activities pursuant to delegated authority are so intertwined with continuing federal involvement or responsibilities that the appropriate federal agency should prepare an environmental impact statement on the state action. Whether or not those cases are correctly decided, they certainly do not represent a universal rule. Most state actions pursuant to delegated authority are not so intertwined with continued federal activity as to require preparation of an environmental impact statement. A specific example of this is state issuance of an NPDES permit under authority delegated by EPA pursuant to Section 402(b) of the Federal Water Pollution Control Act (33 U.S.C. para. 1342(b)). NEPA does not require the preparation of an impact statement for new sources under these circumstances as would a comparable EPA action. This type of exception should be recognized in the regulations.

(g) *The Regulations Do Not Encourage The Finality Of An Administrative Decision Reached Under NEPA.*—As now structured, the regulations would effectively require repeated reviews by all federal agencies taking action with respect to a proposed project. (For an electric generating station, separate reviews are possible with REA, DOE, DOI, NRC, FERC, EPA, the Corps of Engineers, and others. And different decisions on identical facts are possible with each). This would occur despite numerous opportunities for resolving conflicts provided by interagency participation and referral of disputes to CEQ (See Part 1504) during the lead agency's NEPA review. There are no mandatory time limitations for agency review processes at all stages which would expedite turnaround times in the EIS process.

The opportunity to use multiple forums encourages project opponents to "forum shop", foregoing or limiting participation at one stage with the expectation of a better reception, or better appeal possibilities, somewhere else.

This, of course, leads to incomplete and fragmented review; split appeals to the courts on nearly identical issues of fact and law; additional paperwork; and delay.

While the concept of "cooperating agencies" (Section 1501.6) appears to foster interagency coordination and support by permitting the lead agency to compel cooperation, its mandates are too narrow since "non-cooperating" agencies are not deemed to have participated fully in the NEPA process. As a consequence, they must retrace steps already taken by the lead agency. (Compare Sections 1506.3(a) and 1506.3(b).)

Decisions reached after full and complete NEPA balancing are not to be deemed final for all agencies identified as possessing interest in the decision. No useful purpose is served by relitigation, especially where disputes may already have been resolved by CEQ referral. Similarly, the decision is not final with respect to interested private parties and non-federal agencies. With adequate public notice, this would encourage early and complete participation in the lead agency's proceedings.

The regulations are not clear that where multiple agency actions are involved (e.g. NRC issuance of a construction permit and, thereafter, an operating license) NEPA does not require that the second action be supported by an entirely new review and impact statement.

(h) *Lead Agencies.*—There remains a major defect in the lead agency procedure. No time limit is established for CEQ to step in and designate a lead agency where the agencies themselves are in disagreement. CEQ can act only if it is requested by one of the disputants. If regulations along these lines are to be put into effect, CEQ should not be reticent about resolving lead agency selections at the beginning of the process and thereby eliminating significant delays due to this matter.

(i) *Significant Issues.*—Focus on "significant issues," which could be another useful concept, may unduly affect the tone of environmental impact statements. In almost all cases, major projects will have some adverse environmental impacts. However, at the same time, these projects will produce significant positive effects, such as increasing agricultural productivity and improving the quality of life by providing adequate electrical power at the most reasonable cost. Environmental Impact Statements tend to be negative and we are concerned that positive benefits will be overwhelmed throughout the environmental impact statement process by concentrating on more spectacular, but adverse, "significant issues." We believe it is the intent of NEPA to present a balanced view of environmental, social and economic costs and benefits.

SPECIFIC COMMENTS

Now in specific terms as it directly relates to rural electric cooperatives, lets consider CEQ's proposed regulations and where the Rural Electrification Program may or may not be going.

EQUAL TREATMENT UNDER THE LAW?

These CEQ regulations treat electric cooperatives as if they were a Government agency. Rural electric cooperatives are not Government agencies.

These regulations put rural electric cooperatives at a great disadvantage as compared to private utilities which are not involved in Government approvals and the EIS procedures required of and by REA in developing a generation or transmission project.

Rural electric cooperatives are non-profit organizations which represent the consumers whom they serve. They are utility cooperations subject to appropriate state and federal laws and regulations. They are also subject to the same economic, business and management forces and principles that every other entity and utility operates under. That is to say they must compete in the same world to meet their objectives and survive.

We are asking for equal treatment under the law within the utility industry. Any regulations should enable rural electric systems to operative on a parity basis with private utilities in meeting NEPA requirements.

REA—FROM BANKER TO PROJECT MANAGER

REA, by administering CEQ regulations, literally becomes the project management from the beginning of the project through the completed EIS process.

Rural electric cooperatives have direct responsibility and total liability for all management decisions in developing a project and for the operation and management of the project.

Yet, under the proposed CEQ regulations, REA prepares the EIS on a cooperative's project in which REA has no direct responsibility other than guaranteeing or insuring a loan. Cooperatives have no standing during the NEPA proceedings, cannot participate in the internal review of the NEPA proceedings and if REA is sued for an inadequate EIS, the cooperative has no legal standing in the courts to protect its interest, unless the court permits it to intervene.

LIMITATIONS ON ACTIONS DURING NEPA PROCESS

The proposed CEQ regulations say that "no action concerning the proposal shall be taken which would . . . have an adverse environmental impact" or "limit the choice of reasonable alternatives" until the final EIS is approved.

It would be difficult to conjure up a regulatory regime which could have a more chilling effect upon the development of electric generating facilities than this provision.

To keep power plant development schedules and costs within manageable limits, utilities must be allowed the option to purchase sites, water, and fuel and key plant components before completion of the EIS with front end assurance of project completion.

The regulations state that REA must serve notice on all potential borrowers that they may not make significant commitments on a specific plant location, plant type, water resources, fuel resources, transmission line location, or to place advance orders for such long lead time equipment as boilers, until the final EIS has been approved. There will be added further extensive periods of delay at the threshold to the already interminable delays that the litigation spawning proclivities of NEPA have generated.

Therefore, until REA issues the record of its decision to adopt a project proposal, the regulations prohibit REA and the cooperative from taking major action concerning the project which would either have an adverse environmental impact or limit the choice of reasonable alternatives.

If REA is considering an application from a cooperative and is aware that the applicant is planning to take an action within the agency's jurisdiction that would have the effects referred to, the agency is required promptly to notify the applicant that the agency will take "appropriate action" to insure that the objectives and procedures of NEPA are achieved. And while a programmatic impact statement is being prepared, an agency may not undertake a major federal action in the interim unless such action is justified independently of the program, will not prejudice the ultimate decision on the program, and is itself accompanied by an edequate EIS.

The fact is, that it takes about two years from the time a boiler is orderd until the structural components can be delivered to the site. Each boiler must be built specifically to meet the requirements of a given project based upon the fuel to be used and operational elevation. Under the proposed regulations, it appears that ordering a boiler, which would be construed to limit alternatives, would not be possible until the EIS is approved even though a reasonable resource option as contained in the EIS is being actively pursued.

Additionally, the selection and purchase of a site would seem to limit the alternatives. If that is the case, then a site could not be purchased before the completion of the EIS process. At the same time, the regulations call for site specific analyses, which cannot be completed without a site. In this respect, the proposed regulations have a built in dilemma with no apparent way out. At best, the proposed regulations would add significantly to the lead-time and financing required to bring a power plant into operation by complicating the site selection and purchase process. More realistically, this dilemma probably will prevent any power plant or transmission project from even getting to the development stage.

REQUIRED ALTERNATIVE STUDIES

At the heart of the CEQ regulations is the requirement that a wide range of alternatives be explored and that most of those alternatives should be studied in great depth and keep open as viable options for long periods of time.

The possible alternatives are almost limitless!!

NOTE—Mr. Chairman, this aspect of the testimony is the issue I want to verbally address before you and the Committee today. I feel the complexity of the issue requires my doing so and I respectfully request that the transcript of my verbal presentation, be included at a later date, as part of this testimony, especially this section.

Please refer to the chart located at the end of this testimony. The chart is to the best of my knowledge, an outline of REA's EIS process under the proposed CEQ regulations as presented to our Committee on November 17, 1978. It details the various steps which will be mandatorily followed by all Rural Electric Cooperatives who seek to add generating capacity to their respective systems. It also illustrates the projected time intervals for each step of the process.

CEQ regulations would require a "lead agency" like REA to:

Rigorously explore and objectively evaluate all reasonable alternatives, and for the alternatives which were eliminated from detailed study discuss the reasons for such elimination; (What "reasonable" means is anybody's guess?)

Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate the comparative merits; (What "substantial" means is anybody's guess and how do you make a monetary commitment to a limitless amount of studies?)

Include reasonable alternatives not within the jurisdiction of the lead agency; (Who determines reasonable alternatives not within the jurisdiction of the lead agency? Can anyone in America propose these indefinitely?)

Include the no action alternative; (To what extent and for what purpose?)

Identify the environmentally preferable alternative (or alternatives if two or more are equally preferable) and the reasons for identifying it. If the alternate identified is for no action, the agency shall also identify the alternative other than no action that is environmentally preferable and the reasons for identifying it;

Identify the agency's preferred alternative or alternatives if one or more exist in the draft statement and identify such alternatives in the final statement unless another law prohibits the expression of such preference; and

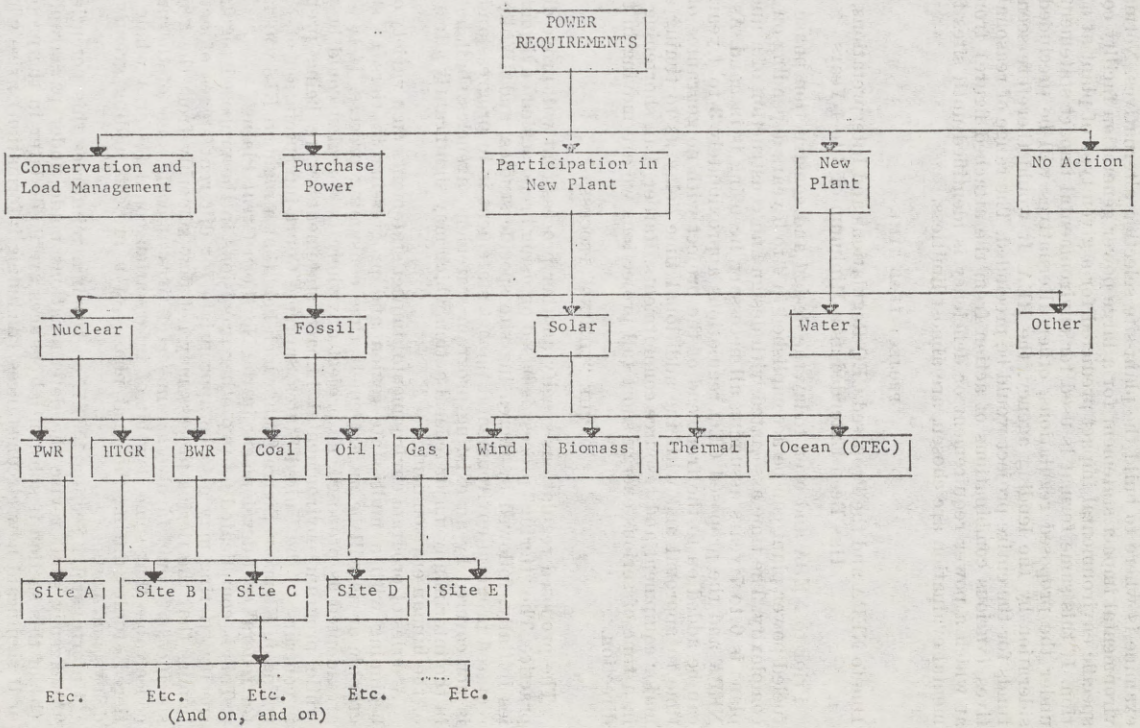
Include appropriate mitigation measures not already included in the proposed action or alternatives.

In the past, environmental impact statements have included detailed alternative siting sections. However, such things as no action, nuclear power sources, conservation, load management, wind and solar power, geothermal energy and magnetohydrodynamics should be eliminated from detailed consideration at early stages in project analyses, based on existing knowledge of their relative merits. While we encourage, and many cooperatives are currently participating in, a wide variety of alternative energy and conservation programs, it is our belief that the EIS process is not the proper vehicle for alternative energy experimentation. Additionally, we do not believe that projects using proven technologies to meet established needs should be delayed while alternative technologies are in the theoretical or experimental stages of development. To require investigations of speculative alternatives comparable in scope to the study of the preferred alternative would be both unproductive and add substantially to the bulk and complexity of the EIS, contrary to the aims of these regulations. Also, such high risk activity would come with an enormous price tag. REA will not approve or allow costs to be expended for high risk activity.

Figure I, (below) indicates in a very general way, alternatives that may be opened to a generation and transmission cooperative to satisfy a power requirement of deficiency identified by the cooperative. It would appear that a literal interpretation of the requirements of the subject regulations would involve the preparation of an environmental impact statement by REA for each of the following alternatives, in sequence. (1) Primary method of satisfying power requirements, i.e., conservation and load management, purchase power, participation in a new plant, construct a new plant, or take no action. (2) Having decided that par-

FIGURE I

A hypothetical description of the infinite proliferation of alternatives to be considered prior to the planning and development of a specific power plant



ticipation in a new plant or construction of a new plant is the appropriate alternative to choose, next an environmental impact statement would be necessary for the type of plant or fuel to be constructed, i.e., nuclear, fossil, solar, water, or other. These are additional alternatives under the nuclear or fossil option dealing with the specific type of plant to be considered. (3) Finally, presupposing a nuclear or fossil plant is the alternative chosen, the final set of alternatives-to examine is where to build the plant-site selection alternatives. Normally, an environmental impact statement for a large power generation facility considers the specific environmental impact predicted for a given type of plant at a given location. If this same format is used for environmental impact statements prepared under the proposed regulations, other alternatives will be precluded from consideration by the lending agency, the REA. It would therefore seem that loan funds for the entire project would be precluded. The range of reasonable alternatives (various combinations of action from the attached figure) from the point at which a power requirement or deficiency is identified until sites for environmental evaluation are chosen, are almost limitless.

PROJECT LEAD TIME

Due to NEPA and the Proposed CEQ Regulations and Interpretations, Lead Time Has Been Extended as a Minimum of 3 to 4 Years

Prior to NEPA and even today the design and construction phase of a fossil-fueled power plant can be accomplished in 4 to 5 years depending on its size and complexity. The time associated with design and construction of a nuclear power plant is 6 to 7 years assuming all necessary licensing is in hand. As a result of NEPA and the proposed CEQ regulations approximately 3 to 4 years minimum can be added on to the front end of the project with no guarantee of maximum time to approval and with the additional time delay as to timing approval to major equipment and resource commitments. Rather than shortening the process in a time of serious energy short fall projections we are moving in the opposite direction.

THE "TIERING" PROCESS

The proposed regulations specify another process that will prove disastrous in practice. The "tiering" process is based on using broad scaled environmental studies initially, followed by increasing site specific studies, and "While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major federal action which may significantly affect the quality of the human environment. . . ."

A series of program environmental impact statements on a variety of programs beginning with a multi-state region and progressing in tiers to smaller geographic areas will be an extremely time consuming process. If the regulations are adopted as proposed, no project anywhere in a region could be undertaken while program environmental impact statements were being prepared. This is contrary to the United States Supreme Court interpretation of NEPA in its ruling on Kleppe v. Sierra Club, which held that a regional EIS was not required for federal coal development in the Northern Great Plains.

This is complicated by two other provisions in the proposed regulations, that specify "tiering may also be appropriate for different stages of actions." This implies that the tiering process may not flow smoothly from the general to the specific, but could involve a number of tiers at each stage of the process. It is conceivable that some new bit of information could foster a whole new set of tiered studies during the final phases of a project, adding greatly to project delays and costs.

Unfortunately, Section 1501.7, on scoping, reinforces this potential problem: "An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action or if significant new circumstances (including information) arise which bear on the proposal or its impacts."

The truly unfortunate aspect of this is that this sentence negates the benefits of the scoping concept, which is designed to identify and deal with significant problems early in the process. If scoping is to be effective at all, it is necessary to identify applicable governmental policies, guidelines, and regulations at the outset of projects, and not subject projects to "revised determinations" every time there is a change in government policy or concept in alternative application. With lead times on coal-fired generating plants currently at 9–10 years (and lengthening steadily) it is imperative that any scoping process establish ground rules that will not change during the development of the project.

While both the tiering and scoping processes could prove valuable, the regulations, as proposed, will not allow these processes to work as they are intended to.

TIME LIMITS AND REQUIRED SCHEDULES

It is imperative that maximum time limits be established so that long range planning can be effectively accomplished and projects can be carried out according to required schedules. The proposed CEQ regulations do not address this.

While the purpose of the proposed regulations is to produce a more timely EIS process, references to timing in the regulations do not support this. While there are some minimum time limits for such things as review periods, maximum time limits on government action are not set. Time limits are left to the discretion of the lead agency. Also added to this is the loop hole agencies have devised for themselves by kicking submitted documents back to the utility because of real or imagined insufficiencies and when that is done the review clock may be set back to the beginning and restarted.

AGENCY CAPABILITY TO COMPLY

We are also concerned that Section 1507.2 is unrealistic. This section indicates that "each agency be capable (in terms of personnel and other resources) of complying with requirements. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability, at minimum, to evaluate what others do for it. We are sure there are any number of federal agencies that would be pleased to have adequate resources to attend hundreds of scoping meetings and, at the same time, manage dozens of projects as lead agency. Nevertheless, it is doubtful that this will be the case, and some agencies, like REA, may well be hard-pressed to cope with a fraction of the workload that could result from these regulations. In general comments on the proposed CEQ regulations, REA states:

"Our review of Section 1507.2, Agency Capability to Comply, continues to concern us. REA may be in noncompliance with the proposed regulations through no fault of its own. More specifically this section states "Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below." It is unclear whether each agency must have included in its staff personnel with expertise in each recognized environmental discipline. If this is the requirement, most agencies will probably have to greatly increase their staff capability. Also, the second sentence of this section maintains that an agency may use outside resources for this compliance. There is still a requirement that the using agency itself have sufficient capability to evaluate what others have done for it. Therefore, it is unclear whether each agency must employ sufficient staff to provide expertise in each environmental field. We do not believe that NEPA or Executive Order 11991 specifically provide CEQ with the authority to regulate the agency capability as outlined in Section 1507.2.

"In addition to requiring increased staffs for the preparation of EIS's, agencies will now be required under Sections 1505.2 and 1505.3 to prepare and implement a monitoring program for all projects requiring the preparation of an EIS where mitigation is adopted. As currently written, the lead agency in these projects will be required to monitor compliance with its own mitigation measures as well as those mitigating measures or enforcement responsibilities that any cooperating agency has required. In order to effectively carry out such a requirement, REA would have to obtain additional personnel. We do not know whether Congress and OMB will provide sufficient resources to meet this requirement."

FUNDING PUBLIC INPUT

In his suggestion prefatory to the regulations themselves, CEQ Chairman Charles Warren states that "the Council has been urged to . . . provide funds to responsible groups for public comments when important viewpoints would not otherwise be presented." If this provision is implemented, any number of "responsible" organizations will have the opportunity to obtain tax dollars to challenge a proposed project. This is particularly alarming at a time when recent court decisions are holding such groups financially responsible for at least the legal costs of their unsuccessful actions. With a financial boost from the government, intervention by "responsible" groups will surely increase. It has been our experience that alternative viewpoints on projects have been adequately presented without government subsidy. We can envision no form of subsidized funding that would produce information of benefit to the public that would not have been presented otherwise. The most likely result would be to finance a new class of professional EIS commentators at the taxpayers' expense.

CONCLUSIONS

The cooperatives today, as they have in the past, are demonstrating their leadership role in protecting the environment and as utilities meet, if not exceed, the requirements of existing state and federal rules and regulations. Although the intent of CEQ is to streamline the NEPA regulatory process and allow for a timely development of energy resources, we believe that CEQ does not possess legislative authority to promulgate regulations. We feel this is a serious matter that needs immediate congressional consideration.

Also the intent of NEPA's mandate is procedural. From a legal point of view we believe the proposed CEQ regulations improperly change standards for agency decision-making. This is another serious matter that needs congressional consideration.

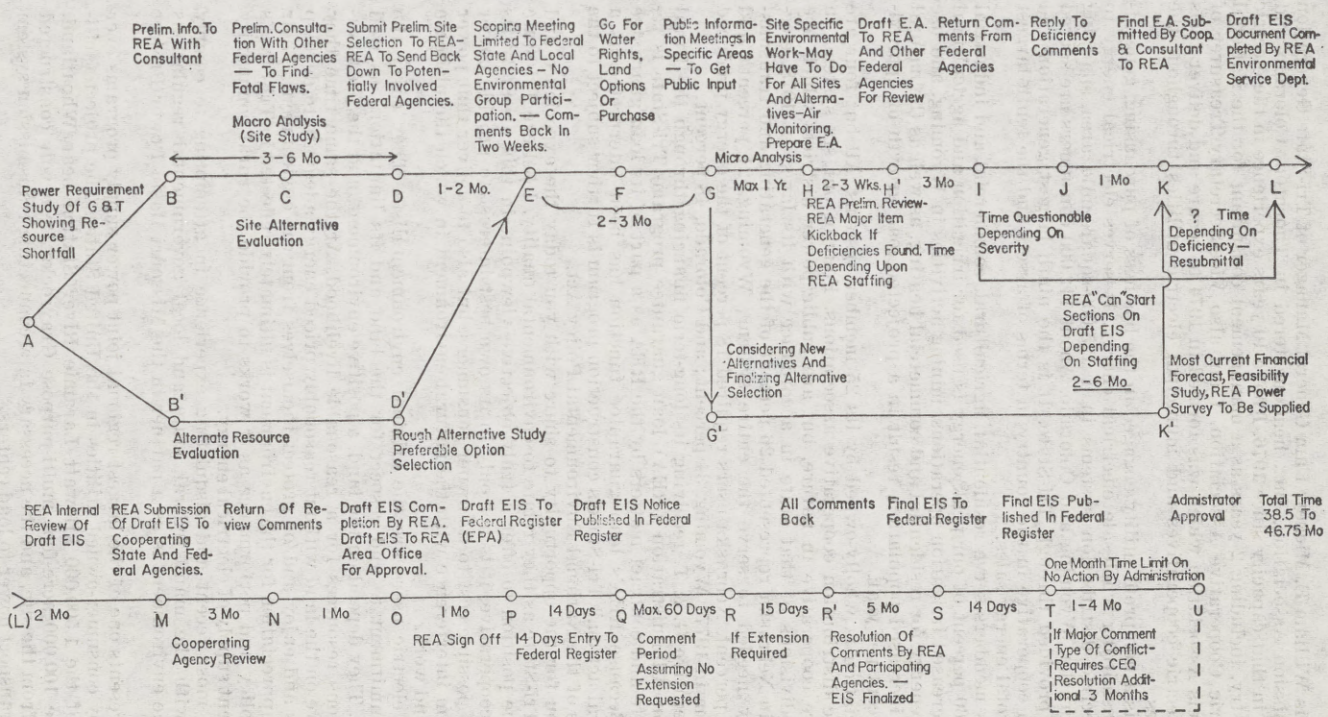
Notwithstanding legal issues, the proposed regulations will place additional and more stringent restrictions in the path of any logical resource development and will increase potential for additional litigation. This will cause extensive delay resulting in significant increases in cost to the ultimate consumer while not insuring that environmentally the best interest of the public will be met.

In view of the existing energy crisis that this country now faces, it is imperative that any proposed regulations should alleviate the restrictions which are now in effect whether they be State or Federal. To the contrary, the proposed CEQ regulations would severely limit if not destroy the cooperatives ability to meet the energy needs of its consumers and in many instances severely restrict any development activities of any utility company.

It is the considered opinion of the NRECA/CFC Power Supply Study Committee that rural electric cooperatives need an immediate remedy from the proposed CEQ regulations, that provides equality under the law and paths of logical and economical resource development.

We further state that a "band-aid" will not work. A new approach is mandatory, rather than specific deletions, additions or revisions, because the changes needed to meet the needs of REA and the rural power systems will result in unsatisfactory regulations for other Federal agencies. It is our recommendation, therefore, that the final regulations exempt REA and that a procedure be established to draft new regulations to meet rural electric needs. These should be in keeping with the purposes of the proposed regulations but tailored to meet the special needs of REA and rural power systems.

Mr. Chairman, your Committee and the Congress in reality are the last resource the rural electrification program has to alleviate the impending adverse effects that the proposed regulations will impose on us. To fight in the courts would be after the fact and we might not have enough time left to initiate such action and bring it to a conclusion. We hope that your Committee agrees with the importance and urgency of our plight and will lend your support and strength in overcoming these inequities.



REA PRESENTATION AND OUTLINE OF EIS PROCESS

AS PRESENTED NOV. PLUS UPDATES SINCE TIME STUDY COMMITTEE MEETING ON SEQ. REAS.

STATEMENT OF WILLIAM E. MICKEY, GENERAL MANAGER, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., THORNTON, COLO.

My name is William E. Mickey. I am General Manager of Tri-State Generation and Transmission Association, Inc., headquartered in Thornton, Colorado and have served in that capacity since 1976. I have 10 years experience in the electric utility industry, including 2 years as a management consultant for the National Rural Electric Cooperative Association. I am also Vice-Secretary-Treasurer of Western Fuels Association which was formed in 1974 to secure and deliver fuels for rural electric cooperatives and municipal electric utilities throughout the United States.

Tri-State is a non-profit utility engaged in the business of purchasing, generating and transmitting wholesale electrical energy. It serves electrical energy to 25 rural electric distribution systems in a 125,000-square-mile area spanning parts of Nebraska, Wyoming and Colorado. About 112,000 consumers are served with power provided through Tri-State. It is the ninth largest generation and transmission cooperative in the country in terms of assets and the tenth largest in terms of total energy sales.

Tri-State's members serve residential, agricultural, commercial and industrial users. Over 60 percent of our peak energy is used for irrigation and agricultural purposes. Increased irrigation operations, mining activities in Wyoming, and use of electrical energy for residential and commercial heating, as well as the natural demands of increased population, result in a projected load growth of approximately 9 percent per year.

The Association is wholly-owned by its 25 member systems. All but four are rural electric distribution cooperative associations. Four of our six systems in Nebraska are cooperative in nature, but are public power districts which are political subdivisions of that state in accordance with its laws. In 1978, electrical users in Nebraska represented 26 percent of the generating and transmission capacity needed to serve the entire system; Wyoming, 21 percent; and Colorado, 53 percent. Nebraska users required 18 percent of the energy produced for the system in 1977; Wyoming, 34 percent; and Colorado, 48 percent.

As a cooperative G. & T. receiving its long-term financing through the Rural Electrification Administration (REA) loan guarantee program, Tri-State is reviewed in rate and contract matters by the REA as a part of its loan guarantee procedure. Because REA's loan guarantee function has been interpreted as a "major federal action," Tri-State's construction program is further subject to the requirements of the National Environmental Policy Act.

I thank you for the opportunity to share with you today the experience and concerns of Tri-State as they relate to environmental quality. I believe Tri-State is in a unique position to offer a truly objective viewpoint in this area. By its nature as a cooperative, it is not only in its own best interest to provide power at the lowest possible cost to its owner consumers, but also to deliver that power with minimum interference with the natural environment in which the ultimate owners live and work.

The rural electric users are the original environmentalists. They carry the strongest commitment to and respect for the land and its limitations as well as its wealth. They depend on the land, a positive environment, and the preservation of precious resources for a reasonable livelihood. At the same time they cannot survive on the land without reasonably priced energy adequate to develop the resources and enjoy and/or protect themselves from the environment. Their concern and appreciation for the environment is ultimately reflected in Tri-State's continuing policy and performance as it works to provide the rural community with a sufficient supply of electrical energy.

Tri-State's most recent and disquieting experience in attempting to comply responsibly with the many federal, state and local governmental regulations relating to the environment is as a partner in the Missouri Basin Power Project (MBPP).

MBPP represents one of the largest regional joint power supply programs ever undertaken by consumer-owned utilities in the United States. The project facilities consist of the 1,500,000 kilowatt Laramie River Station near Wheatland, Wyoming, the 100,000 acre-foot multi-purpose Grayrocks Reservoir constructed downstream from the site, and the necessary interconnecting transmission system facilities to transport power to load centers.

From the early stages of the development of the Laramie River Station, environmental concerns have been foremost in the planning connected with its

construction and operation. The MBPP sponsors and the Missouri Basin Systems Group adopted an open planning process two years before a plant site was chosen for the Laramie River Station. They pledged themselves to work closely with citizens groups in planning for the social, economic and environmental impacts associated with construction and operation of the MBPP power facilities and to work closely and cooperatively with regional, state and local agencies.

As part of the open planning process, the MBPP sponsors worked with and sought the advice of representatives of citizen environmental groups from early inception of the project. An environmental analysis, leading to the environmental impact statement, was prepared over a three-year period at a cost of 1.2 million dollars.

The Laramie River Station will be one of the most highly efficient, least polluting, coal-fired generating stations technically feasible when it goes on-line delivering commercial power. In 1977 it was projected that about 30 percent of the total cost of the plant, or close to 330 million dollars will be spent on sophisticated environmental controls for protection of land, air and water.

In spite of these efforts. a Federal District Court decision was handed down on Monday, October 2, 1978, halting federal guarantees of financing for this 1.6 billion dollar project. The Missouri Basin Power Project was challenged pursuant to the provisions of the National Environmental Policy Act (NEPA) and related provisions of the Endangered Species Act. A final resolution of this and related controversies, if achievable, may still be in the distant future.

It is with the knowledge of this experience that I view the Proposed Regulations for implementing Procedural Provisions of the National Environmental Policy Act (NEPA) as published in the Federal Register on Friday, June 9, 1978 by the Council on Environmental Quality (CEQ). I understand that final regulations were published Wednesday, November 29, 1978. I have not had the opportunity to review the final regulations, but if they are of the same or similar import as those initially proposed, the substance of my comment will not differ.

The CEQ regulations are characterized by the Council as providing "Federal Agencies with uniform procedures for implementing the law. The regulations supposedly accomplish three principal aims: to reduce paperwork, to reduce delays, and to produce better decisions." In my view, however, the implementation of these regulations has the potential effect of introducing significant delays, requiring unnecessary duplication and increasing costs. Additionally, in some cases, the regulations would eliminate alternatives which would otherwise be available to a generating and transmission cooperative such as Tri-State.

I will direct my comments to five major concerns and reiterate that to the extent the final requirements have an effect similar to those initially proposed, my objections are continuing:

(1) The requirement to designate the "environmentally preferable alternative"; (2) The requirement that "no action" be taken to limit alternatives prior to the final issuance of a record of decision; (3) The absence throughout of any requirement for positive action on the part of agencies; (4) The constructive denial of the opportunity for the resolution of early disputes; and (5) The general net effect of necessarily increased lead time.

I would like first to address the requirements relating to the "environmentally preferable alternative." As I read the provisions, they establish a duty to designate the "environmentally preferable alternative." Further, there is the directive that it will be the one pursued in the absence of overriding national policy.

I share a concern with other power suppliers who have previously filed their objections. I believe that this is another in a continuing series of examples of regulatory bodies usurping the legislative prerogatives by imposing substantive requirements in excess of, and in conflict with, the original intent of the law.

The National Environmental Policy Act contemplates a consideration of economic and technical factors as well as environmental impact. It leaves the administrative agency a degree of discretion to weigh the various concerns and reach a balanced and equitable decision. The judicial experience has been the application of NEPA as a procedural statute which simply requires that agencies fully consider the environmental effects of their actions.

Under the proposed regulations, section 1500.2(f) is a directive to federal agencies to "Use all practicable means . . . to restore and enhance the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." Section 1502.14(a) requires the rigor-

ous exploration and objective evaluation of "all reasonable alternatives" to a proposed action. Section 1502.14(e) would require the identification of the "environmentally preferable alternative." Finally, section 1505.2(b) provides that if an alternative other than that designated pursuant to section 1502.14(e) is selected by the agency it must explain ". . . the reasons why other specific considerations of national policy overrode those alternatives."

The resulting effect of this line of regulations is the development of a substantive standard promulgated under a purely procedural authority. Substantive and overriding weight is assigned to the environmental aspect. The Council on Environmental Quality has exceeded its authority in this regard.

Oversight hearings such as this one are essential if Congress is to recognize and act to prevent the regulatory process from exceeding the bounds of authority to the detriment of the citizen. We recommend that all appropriate measures be applied in this situation to overrule the excessive requirements imposed by CEQ.

In order to understand the impact of such requirements on a generation and transmission cooperative, it should be understood that (in broad terms) the G&T has available to it four alternatives to meet its existing and future power requirement.

These are: (1) No action; (2) Purchase of power from generation facilities owned and controlled by others; (3) Participation in construction of new generation facilities with others, and (4) Construction of its own generating facilities.

It does not require the performance of a major environmental analysis to conclude that Alternative 1., the "no action" alternative, is the "environmentally preferable alternative" considering only the effects of land disturbance, water use, consumption of fuel and other features which will be associated with various forms of power generation.

It is probable that the "no action" alternative will be chosen by some of the decision makers participating on behalf of cooperating agencies. The "no action" alternative is, however, unacceptable to Tri-State as pursuit of this alternative would ultimately result in failure to supply the electrical needs of its members.

If some reasonableness is injected into the evaluation process, the agencies might agree to designation of "purchase of power" as the preferred alternative. This alternative only masks the inevitable effect. The supplier will in turn necessarily impact the environment in its own effort to produce the energy we purchase.

The construction of new facilities either independently or with others is certainly preferred by Tri-State to the "no action" alternative and in many cases would be advantageous or necessary to meet its obligation to its members. I anticipate that the possibility of a consensus on the "preferability" of independently developing new generation or doing so in conjunction with others is extremely remote. Without consensus the process cannot be finalized. The applicant's only recourse is to convince some agency to appeal to the Council. As I will explain later, this avenue holds little promise of satisfaction. Tri-State as an REA borrower is left in a regulatory limbo for an indefinite and theoretically infinite period of time. In a dynamic economy faced with ever-increasing demands for electrical energy, Tri-State is effectively precluded from the opportunity to make viable management decisions.

In the event CEQ is permitted this unprecedented degree of authority I believe it is vital that the rules be amended. The "environmentally preferable" language should be amended by the substitution of the word "acceptable" for "preferable." This would allow some degree of flexibility and constitute a directive more reasonably consistent with the intent of NEPA. In the alternative, the addition of a provision recognizing that the loan function of REA is consistent with and a reflection of national policy would provide the mechanism to move the evaluative process forward to a conclusion.

My second major concern centers on the prohibition against any action or commitment of any resources prejudicing the decision prior to the final EIS. Section 1506.1 provides that "Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would (1) have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives." This includes the commitment of resources which would prejudice selection or alternatives according to Section 1502.2(f). Agencies are directed to take affirmative action to insure that the objectives and procedures of NEPA are achieved. I see the result of these provisions as prohibiting the REA borrower from participation in a joint venture with any non-REA utility; introducing restrictions which could inhibit the preparation of the EIS document; and, preventing the REA

borrower from taking the necessary steps required to protect and keep available some of the reasonable alternatives which are otherwise environmentally and economically desirable.

During the process of identifying reasonable alternatives, an REA borrower would routinely consider the possibility of constructing facilities jointly with neighboring utilities—both other REA borrowers and non-REA borrowers. If the cooperative and one or more of its neighbors need additional power within a common time frame, a joint venture project may be a reasonable alternative. In any joint action program all sponsors of the project will justifiably expect all other sponsors to pay their own share of any costs incurred at the time they occur. Since the commitment of any funds by an REA borrower could, and probably would, be construed as a "major federal action" it may not be possible for the cooperative to fund its fair share of the cost until the final EIS is prepared. Certainly, they could not enter into any agreements or contracts committing them to ownership of any portion of the energy or capacity from the project until the EIS is complete. It is inconceivable that a second utility would underwrite the planning and development of a project of sufficient size to accommodate the requirements of the REA borrower on the uncertain possibility it will ultimately be allowed to participate in the project. Through this provision, we see the potential of elimination of the option of Tri-State or any other G&T cooperative to participate with non-REA utilities in joint construction of facilities.

For our own projects, we see this "no action which prejudices decisions" requirement as a significant complication in the preparation of the environmental impact statement. If we consider construction of our own generation as an alternative—whether we consider coal-fired, nuclear, geothermal, wind, solar, or any other form of electric power generation—we are obligated to assess the impact of the entire project on the human environment. The entire project would include the acquisition and commitment of fuel and water, the construction and operation of the plant, and the construction and operation of the transmission system required to deliver the power to the distribution network.

For example, if we wish to consider the construction of a coal-fired plant in the Powder River Basin of Wyoming, our EIS would be expected to address the effects of our project on the human environment. It would be necessary to describe the impacts on air quality as a result of stack gas emissions. This impact is not predictable unless the quality of the coal is known. Since we are prohibited from entering into contracts for a coal supply before the completion of the EIS, we can only assume some average coal quality which may or may not be comparable with what is available to us when we are ultimately allowed to sign the necessary contracts to assure coal supply. The EIS document would also be expected to address the potential site-specific impacts of the project on the flora and fauna of the existing site environment. The collection of this specific scientific data is only possible through unrestricted access to the site property. This access frequently is not obtainable without some option or purchase agreement with the current landowner—which, under these regulations, is forbidden.

It is also distinctly possible that strict compliance with these proposed regulations foreclose alternatives which are necessary to the satisfactory completion of an electrical generation project. In many cases, alternatives involving purchase of power from other utilities, participation with others in joint projects, as well as self generation requires that we take positive steps to keep alternatives available. A specific example can be found in the requirement to have an ample supply of water for plant operation. In many western states, the acquisition of the right to divert and consume water is obtained subject to the Doctrine of Appropriative Rights, commonly referred to as the doctrine of first in time, first in right. Specific requirements for acquisition of water vary from state to state, but generally follow a common theme. In states where this doctrine is applied, any person or company desiring to obtain the right to direct and/or consume water must file an application to the appropriate state agency. The application must include the quantity of water required, the time of the requirement, a description of the beneficial use to be made of the water, and the specific site of diversion and use. The applicant is ordinarily required to show proof of ownership or other positive control over the site of diversion and use before the application will be processed. If we, the cooperatives, cannot take any action which could be interpreted as influencing the decision maker before the final EIS is published, we cannot even file an acceptable application for acquisition of water until the EIS is complete.

Prior to the completion of the EIS and while the G&T is still barred from affirmative action, the scoping process takes place. In that process and over time the public is made aware of all possible alternatives presumably including land sites and water and fuel sources. During that period (REA estimates four years) costs have increased through inflation and speculation. Resources have been directed to other uses. We are no longer assured of resource availability or, if available, that they can be obtained at reasonable cost. A decision to expend unreasonable amounts to purchase water rights which have been usurped by speculators, or land which has artificially inflated in value, sends rates soaring and ceases to be consistent with prudent business judgment.

We see no workable solution to these significant and serious problems short of full recognition in the regulations that intermediate decisions and actions are unavoidable if we are to comply with NEPA in the bulk power supply industry.

My third major concern is the absence of any requirement for positive action on the part of the agencies. One of the stated aims of the regulations is to reduce delay. Toward that end, the regulations stipulate that the agencies shall establish appropriate time limits for the environmental impact statement process. The complete omission of a requirement that the agencies take appropriate action within established time limits totally negates any benefit which could be gained through the establishment of these schedules.

The regulations clearly mandate a duty for participating agencies to comment. All federal agencies with jurisdiction by law or special expertise must comment on statements when an environmental impact is involved or when they are authorized to develop and enforce standards. The regulations do not recognize the impossible position in which we find ourselves when, for whatever reason, an agency fails to comment.

For example, we at Tri-State continuously monitor our present loads and resources and project our future power requirements with the objective of obtaining additional power at the time the need exists. We must furnish additional power on a timely basis or face the grim consequences of having demands for electric power which we cannot meet. We are faced with relatively fixed time constraints established by a point in time where our existing resources will no longer meet our members' needs. We must be in a position to identify additional sources of power which we can acquire or construct at a reasonable price before the members' needs exceed our existing resources.

Failure of a federal agency, for whatever reason, to furnish its comments within a reasonable time frame frustrates the necessary and orderly development of a major power production. There is no authority to enforce compliance with time limits. There is no penalty for failure to comply. There is no provision which would permit the proposed action to continue unless comments are received from all of these agencies. The proponent of a proposed action is left without assurance that any program for providing the additional required energy will be able to progress with any degree of confidence in its ultimate success; without recourse to object; and without opportunity to effect a resolution independently.

In a fourth instance I am concerned that the opportunity for the resolution of early disputes has been constructively denied. The stated aim to reduce delays seems to be negated by provisions of the regulations which provide for referral of disputes between government agencies to the CEQ. Necessary steps in the preparation of the referral document assume the completion of the draft EIS. Completion of that draft, however, cannot be accomplished without the resolution of early disputes. Further, the Council's role upon receipt of the referral is permissive, not mandatory. Closure of the process has no set time frame and in fact is not required. It is conceivable that a resolution can be avoided or postponed indefinitely.

What the regulations do not recognize is that each agency is involved in the project because of its special position because of a particular jurisdiction, expertise or authority which is unique to that agency. Furthermore, the regulations mandate that each of these agencies interpret the regulations and adopt their own procedures for implementation within the framework of their mission. Bitter experience has shown that there is disagreement even within individual agencies. The regional offices and major subdivisions are likely to have differing interpretations of the scope and intent of the Act, the regulations and even the agency guidelines.

As a result of independent agency interpretation of these regulations it is inconceivable that a common ground can be found for the lead agency and all

cooperating agencies to compare and evaluate alternatives. In other words, it is difficult to believe that all of these agencies, including the major subdivisions of the agencies will be able to unanimously agree on a choice of a preferred alternative. A dispute could become evident as early as the time of the initiation of the scoping process, when the agencies first discuss the available alternatives. I fully foresee the opportunity of a dispute so basic in its character that all parties involved will recognize the impossibility of identifying a mutually acceptable compromise. When such a polarization of position is created, there is no procedure which would provide an avenue for resolution until after the EIS has been completed in draft form. This not only insures a delay at least equal to the time required for the referral process, but also makes it necessary for the agencies involved in the dispute to continue to prepare their portion of the EIS in an adversary relationship. This does not enhance the possibility of timely completion of tasks. The proponent of the project faces further uncertainty as to the outcome of the proposed action because the decision of the Council may or may not be consistent with the finding of the lead agency.

It should be further emphasized that any one agency could significantly delay, modify or effectively terminate any project depending upon its attitude toward the proposed action. If that agency elects to withhold comment until an adversary agency adopts its position, reasonable or unreasonable, the process comes to a halt and the proponent of the project is left in an untenable position with no recourse. Under these circumstances, the G&T is left with one option. It can begin the process over with every probability that the same thing will happen. So long as this possibility exists, we see no hope that a bulk power supplier such as ourselves can provide for a future energy supply.

Some mechanism must be provided which allows and encourages positive interaction between agencies and gives the proponent the opportunity to answer the significant objections at the earliest possible time.

My prior comments lead to a fifth concern. Throughout those comments, delay has been the common theme. In my opinion the implementation of these regulations will result in significantly increased lead time from conception of a proposed action until administrative approval is obtained. Hand in hand with the increased lead time is the increased cost of these projects ultimately borne by the rural consumer.

As a result of direct discussions with representatives of the Rural Electrification Administration, it is my understanding that REA currently estimates that it could require as much as four years—or longer, depending on the availability of staff and budget within the lead and cooperating agencies—to move from inception of a power supply alternative to the approval of the Administrator of that project. For four years we will be pursuing all reasonable alternatives to meet a power supply requirement, and during that period, we cannot commit any resources or take action to protect any of those alternatives because it could prejudice the decision maker before the EIS is published. In the case of joint action projects and contracts purchases, I doubt that many options would remain open to us for four years while we do nothing to show good faith; consequently, I see little chance that these alternatives will be available to us in the future.

The regulations would also prohibit the execution of contracts for long lead-time equipment components of the plant, such as steam generator and steam turbine, until after the approval of the proposed action by the Administrator. Because the lead time required for vendor engineering and fabrication of these plant equipment components is near eighteen months, and because the design parameters and engineering criteria of many other plant systems cannot be defined until the vendor engineering on these components is complete; orders for these systems are preferably placed at as early a date as practical. Under these regulations, the earliest date to place the orders would be after final approval of the project as they could be construed as the commitment of resources or limiting of alternatives before the lead agency has issued a record of decision. The net result of the prohibition against commitment of resources prior to issuance of a record of decision is a direct eighteen-month increase in the lead time required to complete the planning and construction of a coal-fired steam-electric generating plant.

The regulatory commitment to reduce paperwork in the EIS process is an admirable objective and one with which no one could disagree. The procedures which the regulations establish to achieve this goal, however, lead us not toward any improvement in the current situation, but rather into more and more litiga-

tion. The regulations state that the agencies shall, among other things, prepare analytic rather than encyclopedic impact statements and only briefly discuss issues other than the significant ones. History has proven that even the most voluminous environmental documents cannot satisfy all elements of the government and public sector that the significant environmental effects have been adequately addressed. This is evident by the constantly growing number of lawsuits being filed against projects asserting inadequacy in the EIS. It is difficult for me to believe that any project supported by an environmental impact statement prepared in less detail than those being prepared at this time has any hope of proceeding to completion without the time consuming and costly experience of litigation.

The regulations require that the environmental impact statement for a proposed action consider not only the direct and indirect impacts of the proposed action, but also the cumulative impacts. "Cumulative Impact" is defined as: ". . . the impact on the environment which results from the incremental impact of the action when added to other past, present and foreseeable future actions regardless . . ." of who undertakes these other actions. If Tri-State considers the construction of a coal-fired plant in the Powder River Basin of Wyoming, our EIS must address all past, present and "reasonably foreseeable" future coal mining, power generation, coal gasification, coal transportation, and any other factor determined to be appropriate by any government agency or commentator from the private sector. The net effect is once again time spent in costly, unnecessary, and unproductive effort evidenced by additional mounds of paper which these rules are intended to reduce.

I have previously noted that all federal agencies with jurisdiction by law or with special expertise are required to comment during the preparation of an EIS. Experience has shown that an agency will frequently comment on subjects outside its jurisdiction or area of expertise. Unnecessary questions and unfounded objections have been raised from incomplete or incorrect information. Nevertheless, an agency's comments will carry the authority of its assumed expertise. Time and effort must be expended to explain a point or prove a condition to everyone's satisfaction. The absence of any requirement in the regulations define appropriate agency comment will result in yet more unnecessary delay.

The overall increase in regulatory lead time indicates that under the most optimistic schedule it would require 9 years to take a proposed project from initial concept to completion. That assumes the project proceeds smoothly through the entire process. It is impossible to forecast the pessimistic schedule. The number of disputes which might arise between government agencies and the length of inadvertently or intentionally extended comment periods are variables which cannot be estimated.

In establishing its goals for these regulations, the Council chose the admirable one of reducing delays. Through the procedural requirements developed in the regulations, however, they have created the opposite condition for the REA cooperative. The Council, in the introduction to the proposed rules, asserts that "The lead agency is responsible for the professional integrity of reports, and care should be taken to keep any possible bias from data prepared by applicants out of the environmental analysis." The Council should be no less accountable for the professional integrity of its regulations and should take action to insure that the regulations comply with their asserted goals.

In conclusion, I believe that these regulations do not recognize the actions which a G&T cooperative must take on a timely basis to supply its members with adequate electric power. Throughout, the proposed regulations negate the essential and necessary character of the power supply industry in general and the REA borrower specifically. They effectively foreclose prudent business decisions necessary on behalf of the consumer. The bulk power supply industry is highly dynamic. Options that are available today may well not be available tomorrow. In order to fulfill our obligations to members and consumers, we must be in a position to evaluate alternatives as they become available and act upon our evaluation of these alternatives in a timely manner. We must be able to continue to pursue those which appear favorable and to discard those which do not—for economic, timing, environmental or other reasons in accordance with prudent business practices.

The implementation of these regulations will severely limit the ability of the G&T cooperative to fulfill its mission to supply adequate electric energy to its members at reasonable rates and has the strong potential of jeopardizing the future existence of the cooperative system.

EXECUTIVE OFFICE OF THE PRESIDENT,
COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, D.C., December 26, 1978.

Hon. EDWARD ZORINSKY,
Chairman, Subcommittee on Agricultural Credit and Rural Electrification, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In your letter of December 13, 1978, you request that the Council respond to several questions regarding our new regulations implementing the National Environmental Policy Act. Our response to these questions is attached to this letter and will supplement our testimony before the Subcommittee on Agricultural Credit and Rural Electrification on December 6, 1978.

We have appreciated this opportunity to explain how our new regulations will apply to the Rural Electrification Administration. As I indicated to you at the hearing, I will personally keep you informed of the progress in developing REA's procedures. In the meantime, please do not hesitate to contact us if we can be of further assistance.

Sincerely,

CHARLES WARREN,
Chairman.

Attachment.

RESPONSE TO QUESTIONS CONCERNING THE REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

Question 1. The proposed regulations do not adequately address the matter of conflicts with state procedures covering development of power supply projects in such areas as plant siting and water rights. How are these conflicts to be resolved particularly in such cases where state law requires identification, procurement and dedication of a site and related supporting project needs such as water rights for a particular power plant prior to issuance of necessary permits?

Answer. This and other questions are premised on assumptions relating to the "proposed" regulations. The revised regulations are now, of course, final and incorporate more than 340 changes from earlier proposals. Section 1506.2 of the regulations directs Federal agencies to cooperate with State and local agencies to the fullest extent possible in the environmental review process. This cooperation shall include such things as joint planning processes, joint environmental research and studies, joint public hearings, joint environmental assessments, and joint environmental impact statements. The regulations thus provide a number of ways to reconcile the requirements of Federal, State and local law. Section 1506.1 regarding limitations on actions during the NEPA process states that "Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration."

In the event that a conflict between NEPA and the requirements of State law does arise, however, Constitutional principles of preemption law would govern its resolution.

Question 2. Implementation of the CEQ regulations would seem to impose greatly increased staff work on the affected agencies. What assurance is there that such staff increases and attendant funding will be provided by the agencies, including REA and other federal groups, to enable the agencies to carry out their responsibilities under the regulations?

Answer. The assumption of the first sentence of the question is not one we share. On the contrary, the regulations contain numerous provisions to reduce the amount of time and energy required to conduct environmental reviews. These provisions were described in detail in the Council's testimony before the Subcommittee on December 6, 1978. Moreover, the regulations do not represent a radical departure from existing requirements and in many cases simply codify what is already being done by many Federal agencies. Were an agency to be deficient in its compliance with the legal requirements, particularly sec. 102 (2) (A) of the Act, needs for additional resources would be assessed in accordance with established budgetary procedures.

Question 3. As a power plant project requires a successive series of decisions by both Federal and non-federal entities will an Environmental Impact Statement be required at each decision point?

Answer. No. One action requires one EIS. Section 1506.3 provides for the adoption by one or more Federal agencies of an adequate environmental impact statement prepared by another. Subsection (b) provides further that where the action covered by the original impact statement and the proposed action are substantially the same the adopting agency may simply recirculate the EIS as a final statement. These provisions are designed to ensure that only one adequate environmental impact statement will be required for each proposal (including power plant projects) under NEPA. Discretion is left with agencies on such matters as supplements.

Question 4. It would appear under CEQ definition of major federal actions significantly affecting the environment that an Environmental Impact Statement would be required (1508.18) for relatively minor construction projects funded by REA such as low voltage transmission line construction or telephone lines. Will these projects which were formerly excluded from an EIS now require an EIS?

Answer. We do not believe that these regulations impose requirements in the situation described in the question additional to those presently imposed by the statute, the guidelines, and the case law. Indeed, the regulations provide a degree of protection for agencies' decisions as to what categories of actions do not significantly affect the environment not provided by the 1973 guidelines. The regulations provide that agencies shall designate categories of actions which do not individually or cumulatively have a significant effect on the human environment. Sections 1507.3(b)(2)(ii), 1508.4. These "categorical exclusions" may then bypass the environmental review process. The Council has advised the REA that low-voltage transmission and telephone lines constructed under the rural electrification program may qualify for categorical exclusions under the regulations except in extraordinary circumstances. Section 1507.3(b) of the regulations requires Federal agencies to address this issue in implementing procedures adopted under the regulations.

Question 5. Are the regulations applicable to independent agencies, e.g., Environmental Protection Agency, Nuclear Regulatory Commission?

Answer. NEPA itself, the guidelines now in effect (40 CFR Part 1500) and the new regulations apply to independent regulatory agencies except where the latter two directly conflict with specific statutory requirements established by an agency's enabling legislation. See Executive Order 11991, sec. 2(g); NEPA regulations, secs. 1500.3, 1500.6, 1507.1, 1507.3. There are in addition numerous specific provisions in the regulations responsive to the concerns of such agencies. The Environmental Protection Agency is not an independent regulatory agency.

Question 6. In joint nuclear participation projects, involving rural electric systems and private power companies, where the Nuclear Regulatory Commission has already completed an Environmental Impact Statement, would it be necessary for REA to also prepare a separate EIS under the regulations, or would one EIS be sufficient?

Answer. No. The REA could adopt the NRC's EIS and would not need independently to prepare a separate statement for the nuclear power project provided that the environmental impact statement prepared by the NRC meets the standards for an adequate statement under the regulations. Section 1506.3(a).

Question 7. In cases where a cooperative purchases a small interest in a power project owned by another utility, would the CEQ regulations require a NEPA proceeding to act on the loan? What does CEQ consider a "small interest"?

Answer. Where a rural cooperative purchases an interest in a project which is already in operation and there are no significant incremental effects on the environment which may result from cooperative participation in the project, the REA would not be required to prepare an environmental impact statement under the regulations. The responsibilities of the REA where the power project has not been completed or is not in operation are currently the subject of discussions between the Council and the REA. What is critical here is not the provisions of the regulations but the provisions of the law and whether a given Federal action is or is not a major action significantly affecting the quality of the human environment.

LAW OFFICES OF DEBEVOISE & LIBERMAN,
Washington, D.C., August 11, 1978.

NICHOLAS C. YOST,
General Counsel,
Council on Environmental Quality,
Washington, D.C.
(Attention: NEPA Comments).

DEAR MR. YOST: On June 9, 1978, the Council on Environmental Quality published for comment (43 Fed. Reg. 25230) proposed regulations to implement the procedural provisions of the National Environmental Policy Act (40 C.F.R. Parts 1501–1508). We submit the following comments on behalf of Duke Power Company, General Public Utilities Corporation (including its operating subsidiaries, Jersey Central Power & Light Company, Pennsylvania Electric Company, and Metropolitan Edison Company) and Washington Public Power Supply System.

Although the proposed regulations are in some respects laudable, to the extent they may accomplish their avowed purpose of reducing the procedural tangles and paperwork burdens that have grown under NEPA, we strongly object to the substantive changes in the administration of NEPA which the proposed regulations would effect. As discussed more fully below, the main point of objection is that the proposed regulations would require a change in the decision making of federal agencies, making environmental considerations the principal decision criterion. The transformation of NEPA's procedural mandate to the paramount mount substantive standard for federal agency decisions is not authorized by NEPA, and cannot be supported in these regulations.

We do support the stated objectives of the proposed regulations. There appears to be nearly universal consensus that NEPA procedures have become so burdensome as to impede effective administration. The time and the paperwork required to satisfy NEPA must be reduced. Many of the procedural reforms proposed in the regulations, as well as more effective integration of NEPA reviews into the decision-making process, should not only help reduce delays in agency administration but also improve the quality of decisions reached. To these we would add one further objective. To the maximum extent possible, duplication in the NEPA process should be eliminated and finality in administrative proceedings and decisions encouraged. Recommendations to support this objective, and our specific comments on the proposed regulations, are set out below.

1. CEQ does not possess legislative authority to promulgate regulations

Since the passage of NEPA, CEQ has maintained guidelines for the administration of the NEPA process, particularly the preparation of environmental impact statements. The guidelines have been revised frequently as the implementation and interpretation of NEPA have evolved. Although only advisory, the guidelines have served as a touchstone for administrative and judicial interpretation of NEPA.

In accordance with Executive Order 11991, CEQ has proposed to issue regulations to supplant the guidelines. The apparent objective of the Presidential directive is to effect across-the-board reforms, and to establish uniformity, in NEPA procedures. Additionally, it is to extend procedural guidelines beyond the subject of environmental impact statements. By their terms (Section 1507.1), the regulations are to apply to "All agencies of the Federal Government. . . ." In the absence of any statement to the contrary, it must be assumed that the agencies to be bound include not only the elements of the executive branch, but all independent administrative entities and elements of the legislative and judicial branches of the federal government as are subject to NEPA.

Notwithstanding the desirability of reform, NEPA does not contain express authority for regulations. Nor should such authority be implied as necessary for CEQ to carry out its functions. As an advisory body, CEQ may accomplish its statutorily mandated objectives by issuing guidelines.

"[The] Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA. . . ." [*Greene County Planning Board* v. *F.P.C.*, 455 F. 2d 412, 421 (2d Cir. 1972)].

See also *Nucleus of Chicago Homeowners Assn.* v. *Lynn*, 524 F. 2d 225 (7th Cir. 1975), cert. denied 424 U.S. 967 (1976); *Sierra Club* v. *Calloway*, 499 F. 2d 982 (5th Cir. 1974). Cf. *Warm Springs Dam Task Force* v. *Gribble*, 565 F. 2d 549 (9th Cir. 1977). See also *Natural Resources Defense Council* v. *Hughes*, 437

F. Supp. 981 (D.C.D.C. 1977); *Texas Comm. on Natural Resources* v. *Bergland*, 433 F.Supp. 1235 (E.D. Tex. 1977); *Save the Courthouse Comm.* v. *Lynn*, 408 F.Supp. 1323 (S.D.N.Y. 1975). The Environmental Quality Improvement Act (42 U.S.C. § 4371 et seq.) and Section 309 of the Clean Air Act (42 U.S.C. § 7609) are procedural in nature and provide support for CEQ, but do not add any authority to support the regulations as proposed.

Should the support for the regulations be that the President can direct (or delegate direction of) the activities of his departments, then corresponding limitations on the applicability of the regulations should be delineated. Certainly regulations resting on the executive authority of the President would not apply to the legislative or judicial branches, nor to the independent regulatory commissions such as the Securities and Exchange Commission or the Nuclear Regulatory Commission.

2. The regulations would improperly change standards for agency decision-making

In addition to the procedural reforms, the focus of the proposed regulations is to require that environmental interests weigh more heavily in agency action subject to NEPA. Under Section 1502.14(a), an agency would be required to "rigorously explore and objectively evaluate all reasonable alternatives" to the proposed action. Section 1502.14(e) would require the identification of the "enviromentally preferable alternative . . . and the reasons for identifying it." Finally, Section 1505.2(b) would provide that if an alternative other than that designated pursuant to Section 1502.14(e) is selected by the agency it must explain "the reasons why other specific considerations of national policy overrode those alternatives." Section 1505.2(b) at least implies that only substantial and specific national policy considerations can justify selection of an alternative other than that which is most environmentally desirable. If thus promulgated, the regulations would transform NEPA's procedural mandate into a substantive environmental standard for decision-making.

It is clear, however, that NEPA does not provide such a substantive standard, and that elements of the regulations which attempt to incorporate one are improper. The absence of any such standard is best viewed from the perspective of the limited role of the federal courts in reviewing agency decisions subject to NEPA. In no case has a court even considered compelling reconsideration of agency decision on the grounds that it did not give adequate weight to environmental factors. Instead, the courts have been constrained to apply NEPA as a procedural statute which simply requires that agencies fully consider the environmental effects of their actions. Thus, the role of the courts has been to find whether the NEPA procedures were properly followed, and the NEPA data requirements factored into the decision-making process.

"Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environment consequences of its actions. See *Scenic Hudson Preservation Conference* v. *FPC*, 453 F. 2d 463, 481 (CA2 1971), cert. denied, 407 US 926, 32 L.Ed. 2d 813, 92 S Ct 2453 (1972). The only role for a court is to insure that that agency has taken a 'hard look' at environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Natural Resources Defense Council* v. *Morton*, 148 US App DC 5, 16, 458 F. 2d 827, 838 (1972). [*Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 (1976).]

See also *Vermont Yankee Nuclear Power Corp* v. *NRDC*, U.S.——, 55 L.Ed. 2d 460, 486 (1978). Otherwise stated, an agency is required to give serious weight to environmental factors in making discretionary decisions, *County of Suffolk* v. *Department of Interior*, —— F. 2d ——, 10 ERC 1513 (2d Cir. 1977), but courts will not interfere with the agency's action unless arbitrary and capricious. *Warm Springs Task Force* v. *Gribble*, *supra*. Cf., *Life of the Land* v. *Brineger*, 485 F. 2d 460 (9th Cir. 1973), cert. denied 416 U.S. 961 (1974).

Many factors other than environmental effects may properly be considered by an agency in reaching a decision, any one of which may be of greater weight than environmental impact in a particular case. Cost-benefit balances, which the proposed regulations would relegate to an ancillary consideration, have long been accepted as important tools in placing environmental effects in perspective. See *Calvert Cliffs Coordinating Comm.* v. *AEC*, 449 F. 2d 1109 (D.C. Cir. 1971). Costs, efficiency, technological restraints, and socio-economic factors are all considerations which may tilt the balance of agency decision making but which do not rise to the level of "national policy" considerations as contemplated by Section 1505.2(b).

The thrust of the proposed regulations to make environmental considerations the prime decision criterion in all cases recently was rejected in *Sierra Club* v. *Interstate Commerce Commission*, F.2d, 11 ERC 1241 (D.C. Cir. 1978). In reviewing the appropriateness of the ICC's selection of a new route, among four available alternatives, the court concluded that

"The difficult question is what method (or route) should be developed. The EPA, for example, considered that one of the potential routes was environmentally superior to the joint route [the route selected by the ICC]. Of course even if this were true, the Commission would not be compelled to select that route. Although an agency must consider all relevant factors, NEPA does not mandate a particular result." [Id. at —, 11 ERC at 1249.]

Or, as stated by the Supreme Court:

"NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural." [*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra* at —, 55 L.Ed. 2d at 488.]

The regulations, if finally promulgated, should be revised to remove any argument that a new and paramount substantive standard has been adopted. Section 1505.2(b) should be entirely revised, so that it requires only an explanation of the agency's decision with full disclosure of, and due regard to, the projected environmental effects of the action selected and its alternatives. For the same reasons, Section 1502.14(e) should be deleted, since it would require the selection of the "most environmentally desirable alternative", apparently without regard to NEPA Section 102(2)(B) directing agencies to give consideration in their decision making to environmental amenities and values "*along with economic and technical considerations*" (emphasis added). It would be sufficient to satisfy both the letter and spirit of NEPA were the regulations to require a detailed statement of alternatives and an explanation of the reasons (both environmental and environmentally related) supporting the alternative selected.

3. The scoping process should be redefined for federal permitting activities

As presently proposed, the regulations contemplate beginning the scoping process, including public notice and interagency participation, "as soon as practicable after its decision to prepare an environmental impact statement." Section 1501.7. As a practical matter, this seems more attuned to the process involved in the development of a federal project than the administration of federal permits and licenses. Section 1507.7 should be revised slightly to state that, with regard to federal actions involving the issuance of permits or licenses, an agency is not required to begin the scoping process until after an application has been received. It would be desirable to further provide that preapplication consultation with a permitting agency is encouraged, to ensure that an application is sufficient and to lay the ground work for effective use of the post-application scoping process.

The primary objective of the scoping process is to narrow the inquiry of the NEPA process to the key issues, so as to permit more intensive examination of important alternatives. To the extent possible, environmental impact statements, and the environmental studies upon which they are based, should not become a mere cataloging of all environmental data pertaining to the proposed action. Rather, the NEPA process should focus on analysis of data which is important, which could make a difference to the ultimate selection of alternatives. That much we support. However, in identifying issues for either further study or exclusion, two new problems are introduced. First, what mechanism will be used to resolve early disputes as to what is important and requires study and what is not? In a similar respect, how should the NEPA process handle issues which were not identified for study during early scoping but which are raised subsequently by an interested person or agency?

With respect to the first, we would suggest that impasses be referred to the CEQ under procedures similar to those provided by Part 1504. CEQ would resolve impasses among federal agencies. To the extent private parties agree, or as consistent with procedural rights, CEQ also may resolve disputes between agencies and private parties. Otherwise, CEQ would render its advice at an interested person's or agency's request.

The more important issue, however, is second. Given the history of proceedings under NEPA, it is entirely reasonable to anticipate that parties opposed to an agency action will search among the issues excluded from review in the scoping process to find one or more which should require more detailed analysis.

Indeed, a party given to obstruction could well "sandbag" a proceeding by not raising issues during the scoping process, with the expectation they will not be covered and can be raised later to block or delay a timely agency action. Not to come to grips with such delaying tactics and simply to adopt the scoping process as proposed would be contrary to one of the stated objectives of the regulations, reduction of administrative delay.

We would suggest that the decisions reached in the scoping process, particularly with respect to issues excluded, be deemed final. As such, "new" issues would not require study and review except upon a showing of exceptional circumstances not known or foreseeable at the time the scoping process was completed. Participants in the subsequent administrative review could thrash out the issues identified, but could not raise new issues except upon a showing of exceptional cause. Principles supporting such a limitation recently were recognized by the Supreme Court:[1]

"[Administrative] proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have the agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." [*Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra* at ——, 55 L.Ed.2d at 485.]

By so limiting the issues to be considered, the regulations would strongly promote both public and agency participation on the scoping process, and support the regulations' objectives of reducing administrative delay.

4. The proposed requirements for analysis of alternatives extend beyond the bounds of NEPA

Section 1502.14(c) and (b) of the proposed regulations would require that agencies "rigorously explore" and "devote substantial treatment to" each of the principal alternatives identified for the proposed action. Viewed in the context of other sections of the regulations, including Sections 1502.14(e) and 1505.2 (b), it is apparent that the CEQ envisages is a consideration of several alternatives to equal depth, with agency action predicated upon identification of the most environmentally preferable alternative. While "rigorous" and "substantial treatment" may be construed to refer to the quality of an analysis rather than the quantity of data reviewed, the implication of the proposed regulations is that the development of information on each alternative must be nearly as detailed as that necessary for complete agency review of the action proposed.

Any requirement to extend the study of alternatives to the scope described is wholly beyond the bounds of NEPA and is not supported by any decision of the courts. The premise for requiring such extentive analysis already has been shown to be without support in NEPA, as discussed in Section 2 above. In federal licensing, the action under review is essentially as proposed by a private person and takes into account a wide variety of private and public interests, including environmental concerns. NEPA no more mandates that private (or state or local) decision be based primarily on environmental interests than does it require such decisions by federal agencies. It follows, then that NEPA does not require federal agencies to substitute their judgments for those of private applicants as to which, all things considered, is the "best" alternative to pursue. Federal agencies are required only to measure the proposed private action against defined, substantive standards, with weight given to environmental effects, to determine whether it is acceptable or may be rendered better, within the bounds of cost-effectiveness. For example, where nuclear power plants are concerned, it should not be the NRC's function to select a site in the first instance or to decide which of several acceptable sizes should be developed first.

With this understanding of the requirements of agency review and NEPA procedures, it is apparent that the scope of of investigation of alternatives contemplated by the regulations is, as a rule, unnecessary and not supported by NEPA. What NEPA requires is a "detailed statement" of alternatives. This

[1] Support for a limitation as proposed could be found directly in doctrines limiting "plaintiffs" or intervenors to issues they have pleaded at the outset, and by analogy in cases recognizing the authority of administrative agencies to close the record of a case to new issues or new facts. See the discussion of the Court in *Vermont Yankee Nuclear Power Corp* v. *NRDC, supra at* ——, 55 L.Ed. 2d at 486, kuoting from *Interstate Commerce Comm.* v. *Jersey City*, 322 U.S. 503, 514–15 (1944).

may, or may not, involve rigorous analysis and detailed environmental studies. It depends upon the case, and the type of federal action proposed.

For example, consider again the siting of a new electric generating station. The proposed regulations seemingly would require that extended on-site field studies be conducted in detail (air modeling, terrestial monitoring and inventory, discharge modeling and aquatic impact analysis) for each alternative site available. Not only would such studies be horribly expensive, and time consuming, but they may not be of any significant difference to the ultimate decision. The site proposed would have been selected by a permit applicant with its operating and financial requirements in mind (including whether it already owns or could acquire the land), as well as environmental effects. While reasonably available alternative sites may exist, and, indeed, may be somewhat "better" in purely environmental terms, "coarse" data may show that they should be developed later, or do not offer any overall advantage, i.e. one which is cost effective. Where "coarse screening" rules out a site, "rigorous" environmental analysis should not be required.

We strongly suggest, therefore, that such descriptive terms as "rigorous" and "substantial treatment" be deleted, and that the focus of the regulations be returned to the statutory requirement that any environmental impact statement include a "detailed statement" of alternatives. To the extent that any analysis be "rigorous" or "detailed" the regulations should make clear that this refers to the quality of analysis and not the volume of data reviewed. The extent of information required of an applicant to complete an analysis of alternatives should be left to the discretion of the agencies, depending upon the circumstances of each federal licensing action.

5. Environmental impact statements need not be prepared in every case where federal actions are delegated to the states

In defining the concept of "major federal action" (Section-1508.17), the regulations propose that actions taken under federal programs delegated or transferred to the states remain subject to NEPA, and that the responsible federal agency continue to ensure the preparation of environmental impact statements where they would be required but for the delegation.

Some cases indicate that certain state activities pursuant to delegated authority are so intertwined with continuing federal involvement or responsibilities that the appropriate federal agency should prepare an environmental impact statement on the state action. Whether or not those cases are correctly decided, they certainly do not represent a universal rule. Even absent specific exemption from NEPA many state actions pursuant to delegated authority are not so intertwined with continued federal activity as to require preparation of an environmental impact statement. A specific example of this is state issuance of an NPDES permit under authority delegated by EPA pursuant to Section 402(b) of the Federal Water Pollution Control Act (33 U.S.C. § 1342(b)). NEPA does not require the preparation of an impact statement for new sources under these circumstances as would a comparable EPA action. *Chesapeake Bay Foundation* v. *U.S.*, —F. Supp—, 11 ERC 1897 (E.D. Va. 1978). This type of exception should be recognized in the regulations.

6. The regulations should encourage the finality of an administrative decision reached under NEPA

As now structured, the regulations would effectively require repeated NEPA reviews by all federal agencies taking action with respect to a proposed project. For an electric generating station, separate NEPA reviews are possible with NRC, FERC, EPA, the Corps of Engineers, and others. And different decisions on identical facts are possible with each. This would obtain despite numerous opportunities for resolving conflicts provided by interagency participation and referral of disputes to CEQ (See Part 1504) during the lead agency's NEPA review.

The opportunity to use multiple forums encourages project opponents to "forum shop", foregoing or limiting participation at one stage with the expectation of a better reception, or better appeal possibilities, somewhere else. This, of course, leads to incomplete and fragmented review; split appeals to the courts on nearly identical issues of fact and law; additional paperwork; and delay.

To reduce these potentials for obstruction and delay, it is recommended that the regulations incorporate the doctrines of *res judicata* and collateral estoppel, to provide a greater degree of finality to lead agency decisions. First, participa-

tion in lead agency proceedings should be made mandatory for all federal agencies having a licensing responsibility over the proposed project or an interest or expertise relating to it. While the concept of "cooperating agencies" (Section 1501.6) appears to foster interagency coordination and support by permitting the lead agency to compel cooperation, its mandates are too narrow since "non-cooperating" agencies are not deemed to have participated fully in the NEPA process. As a consequence, they must retrace steps already taken by the lead agency. (Compare Sections 1506.3(a) and 1506.3(b)).

Second, decisions reached after full and complete NEPA balancing should be deemed final for all agencies identified as possessing interests in the decision. No useful purpose is served by relitigation, especially where disputes may already have been resolved by CEQ referral. Similarly, the decision should be final with respect to interested private parties and non-federal agencies. With adequate public notice, this would encourage early and complete participation in the lead agency's proceedings.

Third, the regulations should make clear that where multiple agency actions are involved (e.g. NRC issuance of a construction permit and, thereafter, an operating license) NEPA does not require that the second action be supported by an entirely new review and impact statement. The first review would be complete and sufficient except as to design changes and significant new information as may alter the agency's first decision, or with respect to issues previously left unresloved pending further study. Even where new facts and circumstances arise, the regulations should expressly limit further review to the new facts, and the new environmental impact statement should be presented only as a supplement to that prepared earlier.

Respectfully submitted,

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LEBOEUF, LAMB, LEIBY & MACRAE,
Washington, D.C., August 11, 1978.

Re Proposed regulations implementing procedural provisions of the National Environmental Policy Act of 1969.

NICHOLAS C. YOST, Esq.,
General Counsel,
Council on Environmental Quality,
Washington, D.C.
(Attention: NEPA Comments).

DEAR MR. YOST: By notice in the Federal Register of June 9, 1978, the Council on Environmental Quality ("CEQ" or "Council") published proposed regulations for public comment. 43 Fed. Reg. 25,230 (1978). Those regulations, purportedly binding on each federal agency, are designed to implement the procedural provisions of the National Environmental Policy Act of 1969 ("NEPA"). On behalf of The Detroit Edison Company, Exxon Nuclear Company, Inc., Niagara Mohawk Power Corporation, Omaha Public Power District, Public Service Company of Indiana, Inc., and Rochester Gas and Electric Corporation, we submit the following comments.

In our view, the major flaw in the Council's proposed regulations is jurisdictional. Neither the Council nor the President has the power to impose procedural regulations binding on the independent regulatory agencies, *e.g.*, the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission. Indeed, compliance by the independent regulatory agencies with the proposed regulations would be contrary to the letter and the spirit of their enabling statutes.

The Council is not empowered to impose procedural regulations binding on the independent regulatory agencies

The Council lacks statutory authority to either promulgate or require that the independent regulatory agencies comply with its procedural regulations. Subchapter II or NEPA, 42 U.S.C. §§ 4341–4347 (1970 & Supp. V 1975), establishes the Council and sets forth its duties and functions. Specifically, § 4344 directs CEQ to:

(1) Assist and advise the President in the preparation of the annual Environmental Quality Report, *see id.* § 4344(1);

(2) Safeguard NEPA's policy by understanding the conditions and trends in the quality of the environment and the programs and activities of the Federal Government, and by informing the President of findings and recommendations, *see id.* § 4344(2)–(3);

(3) Develop and recommend to the President certain national policies, *see id.* § 4344(4);

(4) Conduct certain technical activities, collect technical data, and report at least once each year to the President on the state and condition of the environment, *see id.* § 4344(5)–(7); and

(5) Perform certain activities regarding matters of policy and legislation as the President may request, *see id.* § 4344(8).

We exhaust the list of delegated authority only to demonstrate that the CEQ was intended to be a policy advisory agency possessing only incidental powers of investigation pertaining to natural environmental systems and the programs and activities of the Federal Government. Nowhere has Congress delegated any regulatory power over other agencies.

The legislative history of NEPA confirms CEQ's limited authority. In introducing S. 1075, the Senate predecessor to NEPA, Senator Jackson noted that the bill would authorize the CEQ "to periodically review all existing programs and activities carried out by Federal agencies, as well as the private sector, to document and anticipate imminent environmental alterations, and to make appropriate recommendations to the President. The Council would thus help the President evaluate the trends of new technologies and developments as they affect our total surroundings, and to develop broad *policies*, including those related to anticipatory research, to prevent future man-induced environmental changes which could have serious social and economic consequences," 115 Cong. Rec. S1781 (daily ed. Feb. 18, 1969) (emphasis added).

The Conference Report, H.R. Rep. No. 91–765, 91st Cong., 1st Sess. 11–12 (1969) similarly emphasizes CEQ's consultant role:

(3) To maintain a continuing review of Federal programs and activities as they may affect the policies declared in section 101 [of NEPA], and to keep the President informed on the degree to which those programs and activities may be consistent with those policies;

(4) To develop and to recommend policies to the President, on the basis of its activities, whereby the quality of our environment may be enhanced. . . .

(5) To make studies and recommendations relating to environmental considerations, as the President may direct;

* * * * * * *

Thus, neither NEPA itself nor its legislative history bestows any powers on the Council to promulgate binding regulations. This lack of authority has been repeatedly recognized by the courts. *See Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F.2d 421, 424, 426 (5th Cir. 1973); *Greene County Planning Board* v. *FPC*, 455 F.2d 412, 421 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

Further, NEPA contains no provision that requires the independent regulatory agencies to adopt CEQ regulations as their own. Section 102(2)(B) strongly suggests that the Federal agencies need do nothing more than consult with the CEQ on matters within the Council's special competence: "The Congress authorizes and directs that . . . all agencies of the Federal Government shall . . . identify and develop methods and procedures, *in consultation with* the Council on Environmental Quality . . . which will insure [appropriate consideration of environmental values]." 42 U.S.C. § 4332(a)(2)(1970) (emphasis supplied). Congress intended that the Council serve only as a consultant to the other agencies—not a regulator.

The President is not empowered to direct CEQ to impose procedural regulations on the independent regulatory agencies

NEPA contains no language even remotely indicating a delegation of legislative power from Congress to the President in this area. Rather, NEPA anticipates Presidential-Congressional cooperation by requiring the President to submit annually "an Environmental Quality Report which shall set forth . . . a review of the programs and activities (*including regulatory activities*) of the Federal Government . . . and *a program for remedying* the deficiencies of existing programs and activities, together with recommendations for legislation." 42 U.S.C.

§ 4341 (1970) (emphasis supplied). Simply put, the President must work through Congress—not act unilaterally by executive order—if he wishes to remedy what he perceives to be defects in the activities of the independent regulatory agencies.

The independent regulatory agencies are arms of Congress. Whether the term "independent" is taken to mean a location in the governmental system outside of the executive departments or the immunity of a commissioner from the President's discretionary removal power, the point is that the members of the independent agencies must be as non-partisan, impartial, and apolitical as possible to perform their statutory duties. *See Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). These agencies may not be made subject to requirements which jeopardize their independent status, whether by an executive order directly, or by another agency purporting to act under authority of an executive order.

President Carter has recognized that the attempted application to the independent regulatory agencies of at least one executive order—which itself had potentially lesser significance than that portion of Executive Order 11991 of interest here—had serious ramifications. *See* 43 Fed. Reg. 12,670 (1978) (summary and analysis of public comments on Executive Order 12044, "Improving Government Regulations"). In our views, CEQ should recognize this potential for confrontation with the Congress and exempt from its proposed regulations the independent regulatory agencies. If such is CEQ's attempt in the statement that Executive Order 12044 "and these NEPA regulations be read together and implemented consistently" (43 Fed. Reg. 25,230 (1978)), then CEQ should make this limitation, both statutorily and constitutionally required, more explicit.

CEQ should adopt a reading of section 2 of Executive Order 11991 that will avoid this confrontation issue. That section recognized that agencies are relieved from compliance with the regulations where a statutory conflict is present. As the independent regulatory agencies, absent additional legislation from Congress, may not be made subject to regulations jeopardizing their independent status, these agencies will be in "institutional noncompliance" with CEQ's proposed regulations from the outset. Thus, consistent with the President's views on confrontation expressed in Executive Order 12044, CEQ should interpret section 2 of Executive Order 11991 as a direction to limit the applicability of the proposed regulations to agencies other than the independent regulatory agencies.

In addition to the foregoing general comments on the proposed regulations, we offer the following comments on specific sections.

Environmental assessments—§§ 1501.3, 1501.4, 1508.9

The Council's proposed regulations apparently would require an agency in all cases except those covered by a categorical exclusion (§ 1508.4) to prepare an environmental assessment. § 1501.3. This assessment document is to be prepared with input from "environmental agencies and the public" (§ 1501.4(b)) (an invitation to delay and procedural challenges to the agency), and is to "facilitate preparation" of an environmental impact statement § 1508.9(3).

In our view, the requirement for such a formalized assessment adds yet another undesirable "tier" to the NEPA process. From the straightforward statutory requirement for a "detailed statement" (42 U.S.C. § 4332(2)(C)(1970)), agencies have developed the self- (and court-) imposed requirement for a negative declaration (or finding of no significant impact). *See e.g.*, 10 C.F.R. § 51.7; *compare* proposed § 1508.13. To require a formalized environmental assessment in those cases where an impact statement will eventually be prepared (*see* § 1508.9(3)) is needlessly duplicative and not conducive to reducing either paperwork or delay as the Council has intended. Rather, we suggest that the current practice of agencies who either 1) prepare an impact statement or 2) prepare a negative declaration (with supporting reasons) be retained.

Timing of impact statement preparation § 1502.5

The Council's proposed regulations provide that for agency adjudications, completion of the final environmental impact statement "shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study." § 1502.5(c). In our view, this requirement goes too far and is at odds with judicial opinions on this issue. First, there is no requirement in NEPA that public hearings even be held in connection with the preparation of an impact statement. *See Vermont Yankee Nuclear Power Corp* v. *NRDC*, 98 S.Ct. 1197, 1214 (1978); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275,

1286 (9th Cir. 1973); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656–57 (10th Cir. 1971). If hearings nevertheless are held by the agency as part of the adjudication process, NEPA requires only that the statement be prepared coincident with the agency taking its action—in many cases *after* hearings have been completed. *See Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures* (*S.C.R.A.P.*), 422 U.S. 289, 320–21 (1975). Thus, the Council's proposed regulations on both the requirements for and timing of hearings go well beyond judicial precedent.

Moreover, we find the reference in § 1502.5(c) to "final staff recommendation" to be ambiguous. At least with respect to the Nuclear Regulatory Commission's practice, there exists no "final staff recommendation" on environmental issues outside of the final environmental impact statement. Accordingly, CEQ should amend § 1502.5(c) to preclude what might be considered as a duplicative requirement to prepare a "final staff recommendation".

Proposed § 1502.5(b) is also in need of revision. First, the regulation directs that in the case of agency action (including, we assume, adjudication) on an application, "preliminary" assessments or statements "shall be commenced at the latest immediately after the application is received." The term "preliminary environmental impact statement" is nowhere defined in the regulations. More importantly, the critical point in time is that point when the statement is to be completed. As noted in *SCRAP II*, *supra*, in proceedings involving adjudications on applications, this point can follow completion of hearings.

Incomplete or unavailable information § 1502.22

Proposed § 1502.22(b) may be read to require the agency to use a worst case analysis in describing certain unknown adverse environmental impacts. This requirement, if so intended by CEQ, goes far beyond the requirement that environmental impact statements be limited by the rule of reason and that agencies employ only "reasonable forecasting". *Scientists' Institute for Public Information, Inc.* v. *AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). Use of a worst case analysis in the face of uncertainties would preclude agencies from using their expertise to consider and weigh the effects of uncertainties, and essentially halt a large number of projects. Accordingly, the Council should revise § 1502.22 to be consistent with judicial requirements that agencies merely disclose relevant uncertainties. *SIPI*, *supra* at 1092.

Response to comments § 1503.4

Section 1503.4 of the Council's proposed regulations requires specific responses to the comments received on the draft statement and prescribes five permissible modes of response. The last of these requirements—the duty to "[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response"—is an unwarranted and wholesale extension of the judicial doctrine of the duty to consider responsible opposing views. *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971). Requiring detailed responses to non-meritorious comments, including the duty to explain in what circumstances the comments might be valid, will delay the NEPA decision-making process and will fill final statements with useless rebuttal.

A perspective on how cumbersome the NEPA process would become under § 1503.4 is afforded by a brief comparison with the Administrative Procedure Act's requirements for informal rulemaking. After receipt and consideration of comments on a published proposed rule, the agency need only "incorporate in the rule[s] adopted a concise general statement of [its] basis and purpose." 5 U.S.C. § 553(c) (1976). There is no requirement that the agency include in its statement of consideration accompanying promulgation of the rule a point-by-point response to each comment received. In contrast, CEQ's proposal seems especially burdensome.

Record of decision § 1505.2

In our view, an especially egregious requirement is that contained in § 1505.2:

"At the same time of its decision . . . each agency shall prepare a concise public record of decision. The record . . . shall state:

(*a*) What the decision was.

(*b*) If an alternative other than [the environmentally preferable alternative] . . . has been selected, the reasons why other specific considerations of national policy overrode those alternatives.

(c) Whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not.

Section 1505.2 requires the production of a *fourth* document, the "record of decision", subsequent to preparation of the "environmental assessment", draft impact statement, and final impact statement. This requirement is unsupported and will delay the NEPA process. NEPA mentions only a single document, the *final* environmental statement. "The 'statement' referred to [in NEPA] is the one required to be included 'in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment' and is apparently the final impact statement, for no other kind of statement is mentioned in the statute." *SCRAP II*, *supra* at 320. Moreover, we are aware of no other authority that requires an independent decisional document be prepared in each case of agency action. This matter is governed by the agency's enabling statute—not an appropriate subject for CEQ amendment. Given CEQ's proposed requirement (§ 1506.1(a)) that agency action be stayed until this fourth document is prepared, the requirement for an independent "record of decision" will simply delay the NEPA process.

In the event that a judicial challenge is brought to the agency's action, the court will measure the action against "the record" then in existence before the agency. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). In NEPA cases, this record will consist of at least the statement, comments, and other independent documents existing within the agency. *See e.g., Upper West Fork River Watershed Association* v. *Corps of Engineers*, 414 F. Supp. 908, 914 (N.D.W.Va. 1976), *aff'd.*, 556 F.2d 576. There is thus no basis for CEQ's apparent assumption in proposing § 1505.2 that, as was the case in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419 (1971), there will be no decisional record for the court to review.

The decisional format proposed in § 1505.2 to be used by agencies—even those required by their own enabling statutes to reach decisions after "on the record" hearings—significantly distorts the NEPA decisionmaking process. Section 1505.2(b) appears to create a presumption that the environmentally superior alternative must be chosen. To the contrary, nothing in NEPA mandates that any preordained result be reached. *Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463, 481 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). Rather, the statute requires only that environmental considerations be factored into the calculus of agency decisionmaking. "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

Section 1505.2(b) also implies that the environmentally preferable alternative may only be rejected for reasons that rise to the importance of a national policy. We assume this provision stems from the language of NEPA, § 101(b). Yet that section expressly recognizes federal efforts to carry out the policy of NEPA include only those that are "practicable"—thus recognizing that alternatives can properly be rejected on the basis of excessive cost. Section 1505.2(b) should be amended accordingly.

Mitigation measures §§ 1505.2(c), 1505.3

Section 1505.2(c) implies that agencies impose mitigation measures. Section 1505.3 requires such measures be implemented. CEQ should provide that such measures must be liimted to those within the agency's jurisdiction, as NEPA has repeatedly been recognized not to expand such jurisdiction. *TVA* v. *Hill*, 46 U.S.L.W. 4673, 4682–83 n. 34 (June 15, 1978); *Gage* v. *AEC*, 479 F.2d 1214, 1220 u. 19 (D.C. Cit. 1973; *Kitchen* v. *FCC*, 464 F.2d 801 (D.C. Cir. 1972).

Joint public hearings with States § 1506.2(b)(3)

Section 1506.2 attempts to foster State and Federal NEPA cooperation. This goal is unobjectionable in the abstract. However, in implementing this objective, CEQ goes too far and apparently desires that joint public hearings be held in every case. § 1506.2(b)(3).

This approach is at odds with traditional doctrines of administrative law that delegate measured amounts of authority to agencies. Instead, CEQ would have agencies adopt a blanket procedure unless otherwise provided. Moreover, the requirement for joint hearings where Federal-State agency jurisdiction is partially overlapping, but not totally co-extensive, raises significant preemption questions that are not adequately recognized by the caveat to § 1506.2(b)(3) ("except

where otherwise provided by statute.") These questions can best be avoided by cease-by-cease decisions whether to engage in joint hearings.

Moreover, joint hearings are still in an experimental stage. Their success in actually conserving time and resources has not yet been established. Accordingly, we submit CEQ should leave the decision whether to engage in joint hearings to the individual agencies involved that are better suited to deterimne the feasibility of and the possible time savings resulting from joint hearings in each particular instance.

Public involvement § 1506.6

Section 1506.6(c) directs each agency to "[h]old . . . public hearings or public meetings whenever appropriate." The section then explains that it is appropriate to hold such hearings when there is "[s]ubstantial environmental controversy . . . [or] interest."

In our view, CEQ lacks authority to dictate to other agencies when hearings in connection with their NEPA decisionmaking must be held. Simply put, nothing in NEPA requires such hearings. *See Vermont Yankee, supra; Jicarilla Apache Tribe, supra; National Helium Corp., supra.* A mandatory hearing requirement will tend to delay the NEPA process without affording any guarantee that better decisions will result.

Major Fedcral action § 1508.17

Proposed § 1508.17 includes within the definition of "major federal action" a Federal program delegated to State governments. In such instances, CEQ apparently would have the Federal agency nevertheless either (1) prepare the statement itself for State actions undertaken pursuant to the delegation of authority, or (2) require the State to prepare the statement on such actions as a condition of the delegation.

The Council should amend proposed § 1508.17 to make clear that licensing actions by Agreement States pursuant to delegations of authority by the Nuclear Regulatory Commission (Atomic Energy Act, § 274, 42 U.S.C. § 2021 (1970)) are *not* major federal actions. "Where such an agreement is in effect, the Commission has no residual authority over licensing actions." *NRDC* v. *NRC*, No. 77–1570 (D.C. Cir. June 6, 1978) (order dismissing in part petition for review). Accordingly, such delegations to Agreement States are complete, and there is no federal NEPA responsibility coincident with nuclear licensing actions by such States.

The overbroad requirement that Federal agencies require as a condition of the deelgation State preparation of an impact statement represents a one-sided view of State-Federal cooperation and should be deleted. First, this requirement has no basis in NEPA. Second, the conditions of the delegation are ordinarily controlled by statute. *See e.g.*, 42 U.S.C. § 2021. Obviously, CEQ lacks authority to amend such statutes. Third, the Federally-imposed NEPA statement requirement is an unwarranted invasion of State sovereignty. States are quite free to adopt "little NEPA" laws should they so desire, and many have already done so. CEQ should defer to the individual State's decision on this issue, and not attempt to control State review of what have become State projects.

Agency funding of comments on impact statement

The Council has also asked for comments on the question whether agencies should provide funds to public interest groups to develop comments on an agency's impact statement. We oppose this suggestion for the following reasons.

First, there is substantial legal uncertainty whether agencies, *e.g.*, the Nuclear Regulatory Commission, have the statutory authority to fund intervenor particiation in adjudications and rulemakings. The same uncertainty applies to funding of commenters.

Second, we see little need for such funding. Draft impact statements are circulated widely and agencies are statutorily required "to obtain the comments of any Federal agency which has jurisdiction by law or *special expertise* with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C) (1970) (emphasis added). There is thus little reason to think that relevant views will be omitted. Moreover, the burden of commenting is minimal, and is just not substantial enough to support an argument that without funding, comments will cease.

Respectfully submitted,

LeBoeuf, Lamb, Leiby & MacRae.

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