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Congressional Guidance Needed on the Environmental Protection Agency's Responsibilities for Preparing Environmental Impact Statements. CED-78-104; B-170186. September 13, 1978. 29 pp. + 5 appendices (11 pp.).

Report to the Congress; by Elmer B. Staats, Comptroller General.

Issue Area: Environmental Protection Programs: National Environmental Policy Act of 1969 (2205).
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Authority: National Environmental Policy Act of 1969 (42 U.S.C. 4321). Federal Water Pollution Control Act, as amended (33 U.S.C. 1251). Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 791). Federal Water Pollution Control Act Amendments of 1972. Safe Drinking Water Act. Resource Conservation and Recovery Act of 1976. Housing and Community Development Act of 1974. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, as amended. Federal Environmental Pesticide Control Act of 1972. Marine Protection, Research, and Sanctuaries Act. Rivers and Harbors Appropriation Act of 1899. Refuse Act. 33 U.S.C. 403. 33 U.S.C. 1342. 42 U.S.C. 300. 42 U.S C. 2601. 42 U.S.C. 6901. 7 U.S.C. 136. 42 U.S.C. 5301. 39 Fed. Reg. 37419. =40 C.F.R. 162. Executive Order 11591. Executive Order 11514.

The Environmental Protection Agency (EPA) claims that the environmental impact statement (EIS) requirement of the National Environmental Policy Act generally does not apply to regulatory actions which the EPA proposes to protect or enhance the quality of the environment. EPA's position is based on the act's legislative history, a series of court cases, and its concern that a requirement to subject more actions to the EIS requirement would disrupt its operations. Findings/Conclusions: Although the EPA was established more than 7 years ago, the question of whether the EIS requirement applies to many of its actions has not been resolved. The statutory exemptions provided from the EIS requirement for actions taken by EPA under the Federal Water Pollution Control and the Clean Air Acts are inequitable to other Federal agencies. EPA's voluntary program for EIS preparation is inadequate because some actions that could benefit from the process are omitted. Application of the EIS requirement to more actions should not disrupt EPA's operations if provisions for preparation of EISs were incorporated into its normal procedures. Recommendations: The

Congress should: reevaluate the need for continuing the statutory exemptions from the EIS requirement now provided for actions under the Federal Water Pollution Control and Clean Air Acts; and clarify the agency's responsibilities for preparing environmental impact statements on major actions significantly affecting the environment which it takes under other environmental protection laws. (RRS)

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BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Congressional Guidance Needed On The Environmental Protection Agency's Responsibilities For Preparing Environmental Impact Statements

Most types of actions taken by the Environmental Protection Agency are not now subject to the National Environmental Policy Act's requirement that Federal agencies prepare environmental impact statements on major actions significantly affecting the environment. The Agency generally claims an exemption from the requirement, except for grants to construct publicly owned wastewater treatment facilities and permits issued to dischargers of pollutants into navigable waters. The Agency voluntarily prepares environmental impact statements on some additional actions.

This report recommends a reevaluation of the need for continuing the statutory exemptions from the environmental impact statement requirement for most types of air and water quality actions and a clarification of the Agency's responsibilities for preparing these statements on other actions.

CED-78-104

SEPTEMBER 13, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-170186

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the Environmental Protection Agency's position that its regulatory actions are generally exempted from section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321). Section 102(2)(C) requires Federal agencies prepare environmental impact statements on actions that significantly affect the environment. The report also summarizes the events leading to the Congress enacting specific exemptions from the environmental impact statement requirement for most types of air and water quality actions taken by the Environmental Protection Agency.

We made this review to provide the Congress with information for considering whether the Environmental Protection Agency is complying with the intent of the National Environmental Policy Act's environmental impact statement requirement and whether the statutory exemptions from that requirement for most types of air and water quality actions should be reevaluated.

We made this review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), the Accounting and Auditing Act of 1950 (31 U.S.C. 67), and the Legislative Reorganization Act of 1970 (31 U.S.C. 1152).

We are sending copies of this report today to the Director, Office of Management and Budget; the Chairman, Council on Environmental Quality; and the Administrator, Environmental Protection Agency.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

CONGRESSIONAL GUIDANCE NEEDED ON THE ENVIRONMENTAL PROTECTION AGENCY'S RESPONSIBILITIES FOR PREPARING ENVIRONMENTAL IMPACT STATEMENTS

D I G E S T

The Environmental Protection Agency generally claims an exemption from the National Environmental Policy Act of 1969's requirement for environmental impact statements on major Federal actions that significantly affect the environment. The Agency bases its position on the act's legislative history, a concern that such a requirement would disrupt its operation, and a series of court cases. (See pp. 6 and 12.)

The Congress has provided specific statutory exemptions from the requirement for actions taken by the Agency under the Federal Water Pollution Control Act, except for grants to construct publicly owned wastewater treatment facilities and permits issued to new source dischargers into navigable waters, and all actions taken under the Clean Air Act. (See pp. 9 to 11 and p. 18.)

The Agency has issued procedures for the preparation of environmental impact statements on those actions which it considers clearly subject to the requirement. The Agency also established procedures for voluntarily preparing environmental impact statements on some of its most important regulatory actions, including some taken under the Clean Air Act. (See pp. 1, 17, 18, and 38.)

From its inception through December 31, 1977, the Agency had completed 114 environmental impact statements. About 90 percent were prepared on grants for construction of wastewater treatment facilities and areawide waste treatment management plans authorized by the Federal

Water Pollution Control Act. Most of the remaining statements related to regulatory actions included in the voluntary program. (See pp. 19 and 20.)

Some Agency actions that might benefit from the environmental process are not specifically subject to the requirement by statute and are not included in the Agency's voluntary program. For example, the Agency does not prepare environmental impact statements on performance standards which it establishes under the Federal Water Pollution Control Act to control pollutants that may be discharged by new sources in navigable waters. However, the Agency voluntarily prepares environmental impact statements on similar standards established under the Clean Air Act. (See pp. 21 to 26.)

GAO believes that the Agency's limited statutory exemptions from the environmental impact statement requirement are inequitable to other Federal agencies, the voluntary program is inadequate and could be revoked at any time, and the court cases cited by the Agency are inconclusive as to the requirement's general applicability to its actions. Further, application of the requirement to more actions should not disrupt the Agency's operations if provisions for preparation of environmental impact statements are incorporated into its normal procedures for taking actions.

Accordingly, GAO believes that consideration should be given to subjecting more actions taken by the Agency to the determination of whether they are major actions that significantly affect the environment, and to requiring the Agency to prepare an environmental impact statement on any action meeting that criteria. (See p. 26).

AGENCY COMMENTS

The Environmental Protection Agency said that it is not necessary or appropriate to prepare an environmental impact statement to deal with National Environmental Policy Act concerns or to fulfill its commitment to the act's goals because

- --the courts have consistently upheld its contention that the procedures for completing regulatory actions require the functional equivalent of an environmental impact statement,
- --the Agency voluntarily publishes environmental impact statements on its major regulatory actions, and
- --the Agency, in recent years, has received little or no criticism of its voluntary environmental impact statement policy from environmental groups, industry, or the Congress and only infrequent complaints from other Federal agencies.

GAO believes that these reasons do not support the Agency's position. (See pp. 26 to 28.)

The Council on Environmental Quality recommended that the Agency conduct a study to provide the public, Federal officials, and other interested groups with the information necessary to assess its compliance with the National Environmental Policy Act's mandate. An Environmental Protection Agency task force performed such a study in 1973 and concluded that it should maintain the position that it was not legally required to prepare impact statements on its regulatory actions.

In July 1978, the Agency told the Council that an ongoing audit and possible subsequent studies of its environmental impact statement activities should, at least in part, satisfy the Council's request for a study of the Agency's compliance with the National Environmental Policy Act.

The extent to which the efforts may eventually result in changes in the Agency's environmental impact statement policies and procedures are uncertain. In any case, GAO believes that congressional guidance is needed on the Agency's responsibilities for preparing environmental impact statements on its actions. Because of the Agency's past opposition to subjecting more of its regulatory actions to mandatory preparation of environmental impact statements, GAO is not making any recommendations to the Agency at this time. (See pp. 28 and 29.)

RECOMMENDATIONS TO THE CONGRESS

To make sure that the Agency properly considers environmental factors before taking any major action, GAO recommends that the Congress

--Reevaluate the need for continuing the statutory exemptions from the environmental impact statement requirement now provided to the Agency for actions taken under the Federal Water Pollution Control and Clean Air Acts.

--Clarify the Agency's responsibilities for preparing environmental impact statements on major actions significantly affecting the environment which it takes pursuant to other environmental protection laws. (See p. 29.)

Contents

ABBREVIATIONS

CEQ	Council on Environmental Quality
EIS	environmental impact statement
EPA	Environmental Protection Agency
GAO	General Accounting Office
NEPA	National Environmental Policy Act of 1969

CHAPTER 1

INTRODUCTION

Section 102 (2)(C) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) requires all Federal agencies to include an environmental impact statement (EIS) in every recommendation or report on proposals for legislation and other major Federal actions that significantly affect the quality of the human environment. In enacting NEPA, the Congress recognized that each Federal agency needed to prepare an EIS to provide detailed information on the environmental impacts for consideration, along with economic and technical factors, before taking any major Federal action.

EISs should (1) explain to Federal and State agencies, decisionmakers, and the public the potential environmental effects of proposed actions, (2) explore alternatives that could avoid or minimize adverse impacts, and (3) evaluate both long- and short-range implications of proposed actions. As part of the EIS process, the agencies must consult with, and obtain the comments from, Federal, State, or local agencies which have jurisdiction over, or special expertise on, any environmental impact involved.

Under NEPA each agency determines its own procedures for implementing the EIS requirement. The Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.), specifically requires the Environmental Protection Agency (EPA) to prepare an EIS concerning the construction of publicly owned wastewater treatment facilities and permits to new source dischargers into navigable waters. EPA issued procedures on April 14, 1975, for identifying and preparing EISs on some actions, including grants for construction of publicly owned wastewater treatment facilities. On January 11, 1977, EPA issued procedures for preparing EISs on permits issued to new source dischargers into navigable waters. EPA also voluntarily prepares EISs on other regulatory actions.

ROLE OF THE COUNCIL ON ENVIRONMENTAL QUALITY

NEPA established the Council on Environmental Quality (CEQ). Executive Order 11514, March 5, 1970, states, in part, that CEQ is responsible for (1) recommending to the President policies on environmental quality and seeking resolution of significant environmental issues, (2) coordinating Federal programs relating to environmental quality,

and (3) issuing guidelines to Federal agencies for preparation of EISs. CEQ issued revised guidelines for preparation of EISs on August 1, 1973.

On May 24, 1977, the President issued Executive Order 11991 which revised Executive Order 11514 to authorize CEQ to issue regulations making the EIS process more useful to decisionmakers and to the public and reducing the paperwork involved. The purpose of his action was to emphasize the need to focus on real environmental issues and alternatives. CEQ must also include in the regulations procedures for the preparation of EISs early in the agencies' decisionmaking process. This revision is important because the regulations will be binding on the Federal agencies, whereas CEQ was previously only authorized to issue advisory guidelines. As of February 1978, CEQ was developing these regulations.

EPA MISSION AND ORGANIZATION

EPA's mission is to protect and enhance the environment by implementing environmental protection laws enacted by the Congress. This is generally carried out through regulatory actions designed to control and abate pollution in the areas of air, water, solid waste, pesticides, noise, and radiation. These activities are primarily decentralized and administered by 10 regional offices, numerous laboratories, and other facilities which provide support and assistance.

EPA's major environmental protection acts are shown in appendix III. These acts authorize EPA to conduct a wide range of programs.

Research and development efforts--conducted through grants, contracts, and agreements with universities, industries, private commercial firms, nonprofit organizations, State and local governments, Federal agencies, and EPA laboratories and field locations--are directed towards producing the scientific knowledge and the tools for regulating, preventing, and abating pollution.

Abatement and control efforts involve developing environmental standards, monitoring and surveillance of pollution conditions, planning, and making grants to State, regional and local pollution control programs. Much of the enforcement effort is in support of or in cooperation with State and local programs, such as the enforcement of air quality standards, navigable and interstate water quality standards, and issuance of permits to new or existing sources for discharges into navigable waters. Enforcement

also includes such actions as the issuance of notices of violation, abatement orders, and the recall and seizures of pesticides.

EPA makes grants to municipal, State, and interstate agencies to assist in financing the planning, design, and construction of publicly owned wastewater treatment facilities. For fiscal year 1978, EPA's budget authority for these grants is $4.5 billion--about 82 percent of EPA's anticipated total budget authority of $5.5 billion.

The Office of Federal Activities within the Office of the Administrator, EPA, is responsible for (1) promulgating regulations and issuing guidelines for both assessing the environmental impact of the agency's proposed actions and preparing EISs, when appropriate and (2) conducting evaluations of headquarters' and field offices' compliance with the regulations and guidelines.

In EPA's regional offices, responsibility for determining the need to prepare EISs and for preparing them, when appropriate, is assigned to either the personnel directly responsible for administering the programs under which the proposal is made or to personnel responsible solely for all NEPA related activities in that particular region. In other EPA field and headquarters offices, EISs are generally prepared by responsible program personnel.

To minimize use of its funds and personnel, EPA uses methods whereby an EIS is prepared by a contractor selected by EPA and grant or permit applicants and paid for by the applicants. However, most EISs must be prepared under contracts funded by EPA.

RESOURCES DEVOTED TO EIS PREPARATION

EPA devotes minimal resources to EIS preparation. EPA has acknowledged that current compliance with NEPA's EIS requirement, as measured by the number of EISs prepared, is below that of other Federal agencies with comparable programs. EPA's budget documents show that it devoted 148 staff-years of effort and expended about $8.9 million to prepare EISs in fiscal year 1977. EPA's estimates that it will devote 152 staff-years and $14.9 million to this activity in fiscal year 1978.

Zero-base-budgeting documents prepared by EPA to support its fiscal year 1979 budget included a request for 148 staff-years and $14.1 million in its submission to the Office of Management and Budget for use in EIS preparation during that year. EPA stated in the submission that the consequences of not approving the requested level of resources for this activity would be:

--Delay of some projects because of litigation for less than full compliance with legislative mandates.

--Inadequate environmental reviews on some actions resulting in poor environmental decisions.

--Some criticism from other Federal agencies and the public.

Nevertheless, the Office of Management and Budget approved only 133 staff-years and $12.7 million to be included by EPA for this activity in its fiscal year 1979 budget requests to the Congress. This included $2.9 million for 104 staff-years for EPA regional offices and 29 staff-years for its headquarters. EPA would spend the remaining $9.8 million for consultants' preparation of EISs. Compared to EPA's fiscal year 1978 estimate, the fiscal year 1979 request represents a 15-percent decrease in funding and a 12-percent decrease in staff-years for this activity. Most of the resources would be used to prepare EISs on those actions subject to mandatory EIS preparation. Under the zero-base-budgeting process, it is difficult for the voluntary program for preparation of EISs on regulatory actions to compete for limited resources with other programs.

SCOPE OF REVIEW

We reviewed NEPA, the Federal Water Pollution Control Act, and the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 791 et seq.) and related matters including the policies and procedures established by EPA for mandatory and voluntary preparation of these statements.

We examined certain provisions of environmental acts administered by EPA to (1) compare the consistency with which similar regulatory actions are subject to preparation

of EISs and (2) identify additional actions not now subject to either mandatory or voluntary preparation of EISs which would appear to benefit from their preparation.

We interviewed EPA officials at its headquarters and at its Air Quality Planning and Standards Program Office, Research Triangle Park, North Carolina, who were responsible for establishing selected environmental standards, criteria, and regulations and voluntarily preparing EISs on these actions. We also interviewed EPA headquarters officials who provide guidance and monitor EPA program offices' EIS preparation activities and CEQ officials who serve as liaison with EPA.

CHAPTER 2

CONGRESSIONAL GUIDANCE NEEDED ON THE ENVIRONMENTAL PROTECTION AGENCY'S RESPONSIBILITIES FOR PREPARING ENVIRONMENTAL IMPACT STATEMENTS

The Environmental Protection Agency 1/ claims that the environmental impact statement requirement of the National Environmental Policy Act generally does not apply to regulatory actions which it proposes to protect or enhance the quality of the environment. EPA based that position on NEPA's legislative history, a series of court cases, and its concern that a requirement to subject more actions to the EIS requirement would disrupt its operations.

The Congress has provided specific statutory exemptions from the EIS requirement for most types of actions proposed under the Federal Water Pollution Control Act and all actions proposed under the Clean Air Act, as amended (42 U.S.C. 7401 et seq.). These exempted actions are some of the most important proposed by EPA.

In EPA's view, only certain grant and permit actions of the Federal Water Pollution Control Act are legally subject to the EIS requirement. The major environmental protection acts administered by EPA and the provision made for preparation of EISs on actions proposed under them are shown in appendix III.

Some Members of Congress, CEQ, and others believe that EPA should be required to prepare EISs on more actions that significantly affect the environment. In response to these concerns, EPA volunteered in 1974 to prepare EISs on some

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1/EPA was established as an independent agency pursuant to Reorganization Plan No. 3 of 1970, effective December 2, 1970, by consolidating a number of agencies involved in environmental protection activities, including the Federal Water Quality Administration of the Department of the Interior and the National Air Pollution Control Administration of the Department of Health, Education, and Welfare.

of its most important regulatory actions taken under various environmental laws, including some taken under the Clean Air Act.

Although the types of actions which EPA considers regulatory are not always clear, it has included those which it believes to be most important relating to the establishment of some standards, criteria, regulations, and other actions such as the cancellation of a pesticide's registration. (See app. IV.) However, EPA continues to act on other matters without determining the need to prepare an EIS because of its insistence that there is no clear requirement to do so and the statutory exemptions provided for some actions.

DIFFERING VIEWS ON APPLICABILITY OF REQUIREMENT TRACEABLE TO EARLY EVENTS

The initial guidelines issued in April 1970 by CEQ to Federal agencies on the preparation of EISs indicated that EPA was not required to prepare these statements on its regulatory actions. However, NEPA contains no such explicit or implied exemption for EPA, and, in late 1971, a lower court ruled that EPA was not exempt from preparing statements on regulatory actions.

In December 1969 (about one year before EPA was established), when the Congress was considering the approval of the conference report on the bill being proposed as NEPA, Senator Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs (primary sponsor of NEPA) and Senator Edmund S. Muskie, Chairman of the Subcommittee on Air and Water Pollution, Committee on Public Works, 1/ discussed whether the proposed legislation was intended to apply to Federal agencies whose primary missions related to the protection and improvement of the environment. Senator Jackson stated that:

> "Many existing agencies * * * already have important responsibilities in the area of environmental

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1/ This is now the Subcommittee on Environment Pollution, Senate Committee on Environment and Public Works.

control. The provisions of section 102 * * * are not designed to result in any change in the manner in which they carry out their environmental protection authority."

Senator Muskie then stated:

"It is clear then, and this is the clear understanding of the Senator from Washington and his colleagues, and of those of us who serve on the Public Works Committee, that the agencies having authority in the environmental improvement field will continue to operate under their legislative mandates as previously established and that those legislative mandates are not changed in any way * * * ."

However, this understanding was not formalized by a statement in the conference report or in the section-by-section analysis of the bill as reported by the conference committee. Senator Gordon L. Allott, ranking minority member of the Senate Committee on Interior and Insular Affairs and of the Conference Committee stated:

"* * * while the explanatory statement relative to the interpretation of the conference report language, as provided by the chairman [Senator Muskie], are useful, they have not been reviewed, agreed upon, and signed by the other Senate conferees. Only the conference report itself was signed by all the Senate conferees, and therefore, only it was agreed upon and is binding."

The House of Representatives action on the conference report also did not indicate any debate or acceptance of an exemption from the EIS requirement for environmental control agencies.

On April 30, 1970, CEQ issued interim guidelines to the agencies for preparation of EISs which stated that, because of the act's legislative history, regulatory activities of the Federal Water Quality and the National Air Pollution Control Administrations (predecessors of EPA) were not deemed actions which required the preparation of EISs. Final guidelines issued by CEQ on April 23, 1971, also provided the exemption for EPA.

In December 1971, the District Court for the District of Columbia ruled in the case of Kalur v. Resor, 335 F. Supp. 1 (1971), that EISs were required for permits issued by the Corps of Engineers for discharges into navigable waters under section 13 of the Rivers and Harbors Appropriation Act of 1899--commonly known as the Refuse Act (33 U.S.C. 403 et seq.).1/ EPA provided advice to the Corps on the issuance of the permits. The court ruled that "There is no exception * * * [from the EIS requirement] carved out for those agencies that may be viewed as environmental improvement agencies."

FIRST STATUTORY EXEMPTION FROM IMPACT STATEMENT REQUIREMENT PROVIDED TO EPA

In response to the lower court decision in the Kalur case, EPA sought legislative relief from having to prepare EISs on a large backlog of applications for water quality discharge permits. Congressman John D. Dingell, Chairman, Subcommittee on Fisheries and Wildlife Conservation, House Committee on Merchant Marine and Fisheries--which has oversight responsibility for implementation of NEPA--introduced H.R. 14103 on March 27, 1972. The bill would have suspended the EIS requirement for water quality discharge permits issued before January 1, 1976--a period thought to be sufficient to clear up most of the backlog of about 20,000 pending permit applications from existing sources. The bill would not have applied to applications received for plants whose construction commenced after April 1, 1972, and no permit could have been effective beyond December 31, 1977, unless it complied with NEPA.

In hearings held on May 2, 1972, EPA's Assistant Administrator for Enforcement and General Counsel testified in favor of the bill, because EPA believed that it would have allowed for more rapid implementation of the permit program than might have been possible through judicial appeal of the Kalur decision. The Assistant Administrator stated that acceptance of that decision would have resulted in EISs having had to be prepared on a large number of the estimated

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1/ Section 402 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1342), enacted on October 18, 1972, transferred this responsibility to EPA. The amendments were being developed by the Congress when the case was decided.

20,000 pending permits. This, in his view, could have caused serious delays in the effective abatement of water pollution. The Assistant Administrator added that the Kalur decision was being appealed in the hope that the courts would ultimately confirm EPA's interpretation of NEPA's applicability to its activities.

It appears that Chairman Dingell stayed action on H.R. 14103 pending congressional consideration of the proposed legislation to amend the Federal Water Pollution Control Act. Section 511(c) was added to the proposed legislation during conference. It exempted from NEPA's EIS requirement most types of actions to be taken by EPA under the act, including the issuance of permits to existing sources. The act stated that only (1) grants to assist in constructing publicly owned treatment works and (2) permits issued by EPA to new sources would be subject to the preparation of EISs.

The Committee on Conference stated in its report (No. 92-1236, Sept. 28, 1972), that

> "If the actions of the Administrator under this Act were subject to the requirements of NEPA, administration of the Act would be greatly impeded."

The enactment of this legislation in October 1972 eliminated the need for EPA to obtain judicial relief from the Kalur decision, and the Justice Department never completed its appeal. The legislation provided EPA the first clear statutory exemption from NEPA for any of its actions.

Several Members of Congress opposed the amendment to the bill and its potential weakening of NEPA's effect on Federal actions. Senator James L. Buckley stated, for example, that he was

> "* * * tremendously concerned over the insertion in the bill [during conference] of a totally novel provision which appeared nowhere in either the Senate or House version.
>
> "* * * the exemption goes well beyond facilitating the issuance of the backlog of permits on existing facilities; it would also exempt from the section 102(2)(C) requirement of NEPA the quite different

activity involved in establishing general standards and guidelines relating to the broadest range of water quality matters."

* * * * *

"The exemption presently contained in Section 511(c)(1) is a bad precedent. I regret that it cannot be deleted." (Underscoring supplied.)

Acknowledging that NEPA's legislative history was ambiguous, Senator Jackson stated that:

"* * * after having an opportunity to review the application of Section 102(2)(C) of NEPA to the many activities and programs conducted by all of the Federal agencies, it is my firm judgment that no exemptions should be granted to any Federal agency where the action proposed is a 'major Federal action significantly affecting the quality of the human environment'."

* * * * *

"* * * concern over the potential administrative burdens of NEPA is shared by all other Federal agencies and officials * * *. To exempt important Federal programs from essential legislative mandates simply because they increase the administrative burden of such programs is not good public policy." (Underscoring supplied.)

Those who opposed the exemption for EPA, apparently voted for the conference report on the proposed legislation rather than attempt to eliminate the language which could have delayed its enactment.

On August 1, 1973, CEQ issued revised guidelines to Federal agencies for preparation of EISs. The general exemption provided to EPA for its regulatory actions was eliminated. This was done after uncertainty was raised by the 1971 Kalur decision and the specific exemption granted to EPA from having to prepare EISs on most types of actions to be taken under the Federal Water Pollution Control Act. The revised guidelines stated that the EIS requirement applies to all Federal agencies and that each agency should interpret the provisions of NEPA as a supplement to its existing authority and ensure full compliance with that act's provisions.

EPA'S FEBRUARY 1973 TASK FORCE STUDY ON EIS APPLICABILITY TO ITS REGULATORY ACTIONS

In testimony on March 9, 1972, before the Senate Committees on Public Works and on Interior and Insular Affairs on the operation of NEPA, the Administrator of EPA defended EPA's position that its regulatory actions were exempt from the EIS requirement. Although acknowledging that EPA's procedures for assessing the environmental impact of certain actions were not in compliance with established EIS procedures, the Administrator felt the procedures were fully in the spirit of NEPA and that it would be redundant to require preparation of EISs. The Administrator added that before any change could be made, EPA's position would have to be carefully analyzed. Accordingly, on April 5, 1972, he established an internal task force for that purpose.

The task force examined the benefits and disadvantages that would be associated with the preparation of these statements on certain actions taken under EPA's air, pesticides, solid waste, and radiation programs. The study was completed in February 1973. Its basic conclusions were that EPA (1) should maintain the position that it was not legally required to prepare EISs on regulatory actions and (2) seek judicial confirmation of the position.

The benefits which the task force concluded could result from EPA preparing EISs on appropriate regulatory actions were:

--Providing a better basis for more informed comments on the proposals by other Federal and State agencies, the public, industry, and others, rather than depending on comments from a few industry and independent technical experts.

--Better documenting, for internal and external use, the basis and rationale for taking an action.

--Improving the agency's decisionmaking process on proposals by assuring the consideration of a wider range of environmental impacts and alternatives.

The task force concluded, however, that the application of the EIS requirement would disrupt program operations and that the benefits to be gained from preparing the statements would not outweigh the disadvantages. The task force justified its conclusions on the basis of the folowing factors.

--Environmental protection laws mandate that certain regulatory actions be taken within such short time frames that enough time is not available to prepare EISs.

--Court challenges of (1) the failure to prepare EISs or (2) the adequacy of an EIS on a proposed action could impede its efforts to protect the quality of the environment.

--A tremendous administrative burden could be placed on the agency and additional staffing could be required.

As the task force pointed out, the environmental protection laws often require actions be taken within established time frames. This is also true for many actions taken by other Federal agencies. Further, despite having cited this as a major reason for not being able to prepare EISs on certain of its regulatory actions, we noted that EPA has volunteered to prepare EISs on the establishment of standards of performance for new sources of air pollutants which are required by the Clean Air Act. Before its amendment on August 7, 1977, section 111 of that act required EPA to issue these standards for a category of new sources within 210 days after its announcement of its intention to establish such standards.

An EPA official said EPA decided to prepare EISs on its proposals to establish standards of performance for new sources of air pollutants as a result of a United States appeals court decision--Portland Cement Association v. William D. Ruckelshaus, Administrator, EPA, 486 F.2d 375 (1973). This case was decided before the Energy Supply and Environmental Coordination Act exempted all actions taken by EPA under the Clean Air Act from the EIS requirement. The Association challenged EPA's promulgation of standards for new or modified portland cement plants on the basis that EPA had not complied with NEPA in that it had failed to file an EIS in connection with the promulgation of the standard.

The court stated that it would not rule on EPA's broad claim that it was exempted from preparing EISs on its regulatory actions. The court believed that section 111 of the Clean Air Act required the functional equivalent of an EIS by EPA in promulgating the standards and ruled that EPA, therefore, was not obligated to file a formal EIS on that type action. However, the court pointed out that the Association had raised questions on the possible adverse environmental impacts associated with the proposed standard that had not been adequately considered by EPA in its process used to develop the standard and instructed EPA to respond to them. EPA decided that these types of questions could best be dealt with by preparing EISs.

EPA's action in connection with the establishment of new source performance standards under the Clean Air Act shows that in that instance it believed the exemption provided by the Energy Supply and Environmental Coordination Act neither expressly prohibited nor made impossible its compliance with NEPA's EIS requirement. Provisions of other environmental protection laws do not appear to impose stricter time frames on EPA and, in our view, it could incorporate the preparation of EISs in its decisionmaking process for appropriate regulatory actions taken under other laws not now included in its voluntary EIS procedures.

EPA appears to have little reason to be overly concerned that actions to improve the quality of the environment might be delayed because of court challenges on the lack of an EIS or on an inadequate one being prepared. In a March 1976 study entitled "Environmental Impact Statements--An Analysis of Six Years' Experience by Seventy Federal Agencies," CEQ indicated that agencies had been challenged on the propriety of their decisions concerning the need for a statement in less than one percent of those decisions. CEQ also concluded that the adequacy of no more than 5 percent of the agencies' EISs had been challenged in court.

During the 5 1/2 year period ended June 30, 1975, EPA had been challenged only 14 times for not having prepared an EIS on a proposed action and no more than 10 times for an inadequate EIS. These cases related primarily to actions taken under the Clean Air Act before the exemption provided from the requirement by the Energy Supply and Environmental Coordination Act of 1974 and grants made for construction of wastewater treatment facilities under the Federal Water Pollution Control Act.

EPA's argument that subjecting all of the large volume of regulatory actions which it takes to NEPA's EIS requirement would impose a tremendous administrative burden is not a valid reason for noncompliance. The extent of the workload that would be imposed on an agency is not a criterion under either NEPA or CEQ guidelines for determining whether an agency's actions should be subject to the EIS requirement. CEQ guidelines state that each agency should review its actions and, in consultation with CEQ, develop specific criteria and methods for identifying those that are and are not likely to require an EIS.

With respect to its regulatory actions, EPA had identified for inclusion in its voluntary EIS preparation program only those actions which it considers to be most important. If as EPA contends, it fully assesses the environmental impacts of its regulatory actions as a part of the development process, the formal preparation of EISs should not impose a tremendous administrative burden. In any case, the availability of a formal EIS should justify any additional effort because of its usefulness to the public, agency officials, and others involved in the decisionmaking process.

LEGAL OPINIONS ON ISSUE

In a June 1973 response to a request from the Chairman, Subcommittee on Fisheries and Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries, we stated that:

> "When interpreting a statute, primary attention must be given to the plain words thereof. Section 102(2)(C) of NEPA requires, with respect to major Federal actions significantly affecting the quality of the human environment, that 'all agencies of the Federal Government' shall prepare environmental impact statements. EPA is, of course, a Federal agency and absent strong indications in the legislative history to the contrary, it would appear that EPA would be subject to NEPA's requirements."
>
> * * * * *
>
> "* * * it appears to us that there is nothing in NEPA's legislative history which would require countermanding the conclusion derived from the plain words of the Act that all Federal agencies,

including EPA, are required, in the appropriate circumstances, to file environmental impact statements."

As to the effects of section 511(c) of the Federal Water Pollution Control Act's effect on the issue, we stated that:

"* * * [Neither] the provisions of section 511(c) of Public Law 92-500, [n]or its legislative history * * * require a different conclusion. Rather, it appears that that section was intended both to make it clear that Federal agencies could not use their NEPA responsibilities to interfere with, or dilute, the water quality standards set forth in and under the 1972 FWPCA Amendments and other water quality control acts and to provide a limited exemption [for EPA] to NEPA's environmental impact statement requirements.* * *"

However, we pointed out to the Chairman that "* * * the final determination of EPA's responsibilities under NEPA * * * [was] in the hands of the judiciary." More than 4 years later, however, we note that generally the court cases have dealt with the adequacy of EPA's procedures for considering environmental factors on an individual action in lieu of being required to prepare a formal statement. The broader issue of whether EPA is generally exempted from the EIS requirement has not been decided by the courts.

LEGISLATIVE EVENTS LEADING TO EPA's VOLUNTARY IMPACT STATEMENT PROGRAM

Several events from mid-1973 to early 1974 influenced EPA to alter its position and adopt a policy of voluntarily preparing EISs on its regulatory actions.

In its report on the fiscal year 1974 appropriations bill for the agriculture-environmental and consumer protection programs (No. 93-275, June 12, 1973), the House Committee on Appropriations provided $5 million to be used by EPA in preparing EISs on all actions that met NEPA's EIS criteria, except where specifically prohibited by law. The Committee provided these funds because it felt EPA was not placing enough emphasis on assessing environmental impacts of some regulatory actions. The Committee noted

that more questions were being asked about whether actions to eliminate pollution had been taken without sufficient consideration of the overall impact on the environment, and that many actions had actually proven to be detrimental to the environment. For example, the Committee stated that some actions taken to reduce air pollution had greatly increased water and solid waste pollution.

Although the Senate Committee on Appropriations bill provided that EPA be allowed to prepare less detailed environmental explanations rather than EISs, the House and Senate conferees in their September 20, 1973, report on the appropriations bill agreed that EPA should be required to prepare EISs on all of its major actions having a significant impact on the environment.

On February 13, 1974, the Chairman of the Subcommittee on Fisheries and Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries, introduced a bill to amend NEPA to specify those actions on which EPA would be required to prepare EISs. The Chairman believed that the issue had never been resolved and that EPA should be required to comply with NEPA's EIS requirement just as other agencies must comply. He added that other Members of Congress and the courts supported his position.

Under the proposed legislation, EPA would have been required to prepare EISs on its actions, except some related to enforcement. For example, EPA would not have been required to prepare an EIS on the issuance, denial, amendment, or suspension of any permit, license, registration, or certificate of conformity if a statement had previously been prepared on the standards or criteria under which such actions were to be taken.

Although the Chairman hoped to hold hearings on the bill, none were ever held. Less than 2 months after its introduction, the Administrator of EPA announced that EPA would voluntarily prepare EISs on some regulatory actions.

EPA officially adopted its policy of voluntarily preparing EISs on it regulatory actions in May 1974. Because of his concern for the decision--especially its effect on delaying actions required by the Clean Air Act--the Chairman, Subcommittee on Environmental Pollution, Senate Committee on Environment and Public Works, held hearings on April 10, 1974. There were indications of support both for and against EPA's proposed voluntary

program to prepare EISs from other members of the Subcommittee.

The Administrator of EPA stated at these hearings:

> "the kind of comprehensive analysis called for by our proposal can make a positive contribution to EPA's decisionmaking * * * [and] will in no way weaken or dilute the implementation of * * * authorities to be carried out by EPA."

He said that EPA's decision was influenced not only by the actions of the House Committee on Appropriations but also by a substantial body of opinion, including some at CEQ, that for some time had favored EPA preparing EISs on it actions.

The Administrator added that EPA had not sought a legislative clarification of the EIS requirement for its regulatory actions because "legislation would necessarily subject us to a specific statutory requirement." He said that EPA preferred to comply with NEPA according to its own interpretations and to voluntarily prepare EISs under a policy that could be revised or possibly revoked at some later date.

In response to EPA's announcement of its voluntary EIS program, the Chairman, Senate Subcommittee on Environmental Pollution sought and obtained the conference committee's acceptance of an amendment to the bill, enacted on June 22, 1974, as the Energy Supply and Environmental Coordination Act, that provided an exemption from the EIS requirement for all actions taken by EPA under the Clean Air Act.

EPA issued its procedures for voluntary preparation of EISs on certain regulatory actions on October 21, 1974. Those actions are shown in appendix IV.

With respect to the Subcommittee Chairman's concern, we believe that EIS preparation need not cause unreasonable delays to agencies' actions. In a report to the Chairman, Senate Committee on Environment and Public Works (CED-77-99, Aug. 9, 1977) we concluded that EISs seldom cause long delays in public works construction projects. We noted, however, that EISs could be more useful to agency decisionmakers if prepared during the planning stage. Similarly, we believe that EPA could prepare EISs on regulatory actions without causing long delays if started early in their planning stage.

According to CEQ, other Federal agencies have resisted preparing EISs on their own actions because of EPA's position that some of its actions are exempt from the requirement.

In December 1975, CEQ asked EPA if it would consent to preparing EISs on additional major actions: (1) standard reregistrations of pesticides, (2) reregistrations of canceled or suspended pesticides, (3) issuance of ocean dumping permits, (4) development of solid waste guidelines, and (5) recommendations to the Federal Aviation Administration on airport and aircraft noise regulations.

In an October 1, 1976, letter, EPA told CEQ that it would prepare EISs on the reregistration of formerly canceled or suspended pesticides and on the future development of major solid waste guidelines, but not on the standard reregistration of pesticides or the issuance of ocean dumping permits because they generally were noncontroversial and the large number of such actions would prohibit it. EPA also said that its recommendations for airport and aircraft noise regulations were not being used as the principal basis for the regulations promulgated by the Federal Aviation Administration and it would not be prudent to use resources to prepare EISs on those actions.

Since EPA's issuance of its October 1974 procedures for voluntary preparation of EISs on its most important regulatory actions, the Congress has enacted several laws that give EPA additional regulatory authority--the Safe Drinking Water Act (42 U.S.C. 300 f et seq.) on December 16, 1974, the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) on October 11, 1976, and the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.) on October 21, 1976.

As of February 1978, EPA was considering revisions to its voluntary procedures to prepare EISs on those actions suggested by CEQ with which it agreed and on certain actions to be taken under the recently enacted environmental protection laws.

NUMBER OF PREPARED EISs

From its establishment in late 1970 through December 31, 1977, EPA had filed 169 draft EISs and 114 final EISs. About 90 percent of the final EISs were prepared on actions relating to grants made for the

construction of publicly owned wastewater treatment facilities and areawide waste treatment management plans authorized by the Federal Water Pollution Control Act. EPA had voluntarily prepared 20 draft and 8 final EISs on regulatory actions. The numbers of EISs prepared or planned by EPA on its actions for fiscal years 1976 through 1978 are shown in the following table.

	Fiscal years		
	1976 (note a)	1977	1978 (Estimated)
Actions subject to NEPA's EIS requirement by law			
Wastewater treatment facilities construction grant projects (note b):			
Draft EISs	37	28	86
Final EISs	27	19	71
Negative declarations	1,389	1,462	1,683
New source permits for discharge of pollutants in Nation's waters:			
Draft EISs	1	6	12
Final EISs	1	2	10
Negative declarations	0	56	64
Actions subject to NEPA's EIS requirement under voluntary procedures			
Regulatory actions taken under various environmental protection laws:			
Draft EISs	11	4	25
Final EISs	1	7	12

a/Includes transition period July 1, 1976, through September 30, 1976.

b/Includes statements on areawide waste treatment management planning grants awarded under section 208 of the Federal Water Pollution Control Act.

We could not readily determine the percentage of actions on which EPA has prepared EISs in any given fiscal year. EPA appeared to have prepared EISs on most of the 14 types of regulatory actions, including major modifications or revisions, taken under the five environmental

protection laws covered by its voluntary procedures. However, EPA takes many other actions that are not included in the program. For example, our review showed three types of actions proposed by EPA which would appear to benefit from the EIS process, but which are not specifically subject to the requirement by statute and are not included in EPA's voluntary program. These actions relate to:

--The establishment of performance standards to control the amount of pollutants that may be discharged by new sources into navigable waters (section 306 of the Federal Water Pollution Control Act).

--The issuance of permits by States to new sources for discharges into navigable waters pursuant to programs approved by EPA (section 402 of the Federal Water Pollution Control Act).

--The registration or reregistration of pesticides identified by EPA as potentially having unreasonable adverse effects on the environment (section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act).

Establishment of new source performance standards under the Federal Water Pollution Control Act

The Federal Water Pollution Control and the Clean Air Acts contain similar provisions for establishing standards of performance for new sources with regard to the level of pollutants that may be discharged or released, respectively, into navigable waters and into the air. Section 511(c)(1) of the Federal Water Pollution Control Act exempts these actions--as they apply to new source discharges of pollutants into navigable waters--from the EIS process. Section 7 of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793) similarly exempts the establishment of standards for new stationary sources of air pollutants.

In spite of the exemption allowed by law, as noted earlier, EPA has determined that the establishment of standards for new stationary sources of air pollutants is one of "its most significant regulatory actions" and included a provision in its October 1974 voluntary program for preparing EISs on them. However, EPA did not

include any Federal Water Pollution Control Act actions in the voluntary program because of the exemption provided under section 511(c)(1). It seems somewhat inconsistent to recognize that benefits can be realized from voluntarily preparing EISs on the establishment of standards under the air program but not under the water program.

The direct benefits of preparing EISs are not always obvicus. However, EPA officials responsible for establishing performance standards for new sources of air pollutants told us that the EIS process had helped them make better decisions. For example, they said that the preparation of an EIS on a proposed standard resulted in a more environmentally acceptable alternative for removing particulates from lime plants' emissions being selected than the method originally proposed. The careful examination of the relative environmental effects of alternative methods as required by the EIS process showed the eventually selected technology would have less effect on water quality and generate less residue which would consequently require less land for disposal.

The Federal Water Pollution Control Act listed 28 industrial categories for which performance standards were to be established within about 19 months after its amendment on October 18, 1972. The act also required that EPA add new industrial categories to the list, as appropriate, and revise established standards as technology and alternatives for controlling the discharge of pollutants changed. Standards for new industrial categories and revisions of existing standards were also to be promulgated within about 19 months after their inclusion on a published list. EPA had promulgated standards for the 28 industrial categories originally listed in the act and for many subsequently identified categories.

The Clean Air Act did not identify specific categories of industries for which standards had to be established. The act did, however, require EPA to publish within 90 days after December 31, 1970 (and from time to time thereafter to revise), a list of categories of stationary sources for which standards would be established. The act required that within 120 days after the inclusion of a category of stationary sources in the list, EPA publish proposed new source performance standards and afford interested parties an opportunity to provide written comments. After considering any comments received, EPA was required to promulgate the standards within 90 days after their issuance as

proposals. In summary, the Clean Air Act required EPA to issue standards of performance for a particular category of new sources within 210 days after announcing its intention to establish a standard.

In order to meet this time frame, EPA officials told us that they did not announce a category of new sources on which a standard was to be established until the economic, technical, and environmental studies required as a part of the development process to support the proposal had progressed to a stage where they could reasonably be expected to be completed within the time limit imposed by the act. This allowed the preparation of the EIS to be completed so that it could accompany each proposed standard through the agency's decisionmaking process.

Similar procedures for establishing or revising new source performance standards under the Federal Water Pollution Control Act would offer greater assurance to EPA's decisionmakers that environmental concerns are adequately considered.

Permits issued by States to new source dischargers under the Federal Water Pollution Control Act

EPA has taken the position that section 511(c)(1) of the Federal Water Pollution Control Act does not allow it to impose the EIS requirement on the issuance of permits to new sources for discharges into navigable waters when done by States under approved programs. Section 402 of the act authorizes EPA to issue permits to new sources on the condition that any discharge will meet the standards of performance established under section 306 of the act. EPA must prepare EISs on its issuance of such permits that are determined to meet NEPA's EIS criteria.

If EPA determines that a State is capable of administering a permit program, it may authorize that State to issue permits to new and existing sources within its jurisdiction. Each permit issued by a State under its approved program is subject to conditions which EPA determines are necessary to carry out the provisions of the act and no permit may be issued by a State if EPA objects. As of March 1, 1978, EPA had approved the plans of 29 States and 1 territory.

EPA estimated that once the program is fully implemented about 2,000 permits may be issued nationwide each year to new sources--1,000 by EPA and 1,000 by States having approved programs. EPA also estimated that about 15 percent, or 150, of the new source permits which it issues each year will be to major dischargers and may require preparation of EISs. A comparable number of the permits issued by States would not be subject to a determination of whether preparation of an EIS would be appropriate.

In its January 11, 1977, Federal Register announcement of regulations for preparation of EISs on permits which it issues to new sources, EPA stated that its review of a State-issued permit and EPA's authority to veto its issuance should not be considered part of the permit issuance process. EPA added that while it is authorized to object to the issuance of a permit by a State and the State cannot issue a permit until the objection is satisfied, EPA cannot issue a permit so long as the State has an approved program. EPA concluded that even though its role in a State permit proceeding could be viewed as a "major Federal action", that action is not the issuance of a permit to a new source, and therefore, section 511(c)(1) exempts it from the requirement to prepare an EIS in such a situation.

This attitude shows a lack of commitment, in our view, to compliance with NEPA's intent. The situation is similar to one created by title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 et seq.) which provided for a new, single program of community development block grants to replace the Department of Housing and Urban Development's categorical grant programs for community development activities. However, the act transferred to State and local governments the decisions of how and where the community development funds should be used and also the responsibility for evaluating projects' environmental impacts.

The act authorized the Secretary of Housing and Urban Development to issue regulations for the release of funds for particular community development projects to applicants who assume the responsibilities for environmental review, decisionmaking, and action pursuant to NEPA that would apply to the Secretary.

If the States did not issue these permits, EPA would be responsible. The actions could have a significant effect on the environment and some provision for subjecting them to

NEPA requirements would appear to be beneficial. One way of doing this would be to require EPA to establish procedures for use by States for identifying and preparing, with EPA's assistance, EISs on major permit issuances that have potential significant environmental impact.

Pesticides potentially having unreasonable adverse environmental impacts

EPA has resisted having to prepare EISs on its standard registrations and reregistrations (every 5 years) of pesticides. The basic legal authority for regulating pesticides is the Federal Insecticide, Fungicide, and Rodenticide Act of 1947, as amended by the Federal Environmental Pesticide Control Act of 1972, as amended, (7 U.S.C. 136 et seq.). There is no specific exemption from NEPA's EIS requirement for actions taken by EPA under these acts.

Some registrations or reregistrations of pesticides have greater potential environmental impact than others. EPA has a process for identifying such pesticides and refers to it as "rebuttual presumption against registration." Pesticides are chosen for this process if they meet or exceed certain criteria set forth in EPA's regulations for "Registration, Reregistration and Classification Procedures," 40 C.F.R. 162 (1977).

Under this process the Administrator of EPA may issue a notice of intent, as provided in 40 C.F.R. 162.11 (1977) to (1) deny a registration, (2) cancel a registration, or (3) hold a hearing to determine whether the registration should be canceled or denied. EPA may voluntarily prepare an EIS on proposed denials or cancellations of registrations.

The applicant or registrant of a pesticide to be affected by the notice may be given up to 105 days to submit evidence in rebuttal of the action being proposed by the Administrator. If the applicant or registrant, in the opinion of program officials, rebuts the basis on which the notice to deny or cancel a registration was issued and the pesticide otherwise complies with the requirements of the act, the request for registration or reregistration may be further processed. There is no provision for the circulation of an EIS on these decisions.

An EPA official told us that the program office is competent to make the decision that the evidence presented demonstrates that the registration or reregistration will

not have an unreasonable adverse effect on the environment. This position fails to recognize the basic purpose of NEPA's EIS requirement--to fully identify and discuss publicly the potential environmental impacts associated with a proposal before reaching a decision. If an action has been identified as potentially having an unreasonable adverse effect on the environment, it would appear to be a prime candidate for preparation of an EIS. A decision to allow registration or reregistration of such a pesticide would seem to benefit at least as much from the preparation of EIS as the denial or cancellation of another pesticide.

CONCLUSIONS

Although more than 7 years have elapsed since EPA's establishment, the question of whether NEPA's EIS requirement applies to many of its actions has not been resolved.

We believe that the statutory exemptions provided from the EIS requirement for actions taken by EPA under the Federal Water Pollution Control and the Clean Air Acts are inequitable to other Federal agencies. EPA's voluntary program for EIS preparation is inadequate because some actions that could benefit from the process are omitted, and EPA could revoke or revise the program at any time. Further, application of the EIS requirement to more actions should not disrupt EPA's operations if provisions for preparation of EISs are incorporated into its normal procedures for taking actions.

Accordingly, we believe that consideration should be given to subjecting more actions taken by EPA to the determination of whether they are major actions significantly affecting the environment, and to requiring EPA to prepare an EIS on any action meeting that criteria.

AGENCY COMMENTS AND OUR EVALUATION

EPA and CEQ provided written comments on our preliminary report. (See apps. I and II.)

EPA agreed with the report's position that, in taking regulatory actions, it must address such key NEPA concerns as alternative actions, long- and short-range impacts, and the involvement of the public and other government agencies. However, EPA stated that it is not necessary or appropriate to prepare a mandatory EIS to deal with these issues or to fulfill its commitment to NEPA's goals because:

--The courts have, in a series of cases, consistently upheld EPA's contention that its procedures for completing regulatory actions require the "functional equivalent" of an EIS.

--EPA has a policy of voluntarily publishing EISs on its major regulatory actions.

--EPA, in recent years, has received little or no criticism of its voluntary EIS policy from environmental groups, industry, or the Congress and only infrequent complaints from other Federal agencies.

EPA concluded that its policy of voluntarily preparing EISs on major regulatory actions should be continued and that a mandatory requirement to subject its actions to the EIS requirement would likely interfere with its basic mission of developing environmentally protective regulations.

We were generally aware of EPA's reasons for opposing a mandatory EIS requirement for more of its actions and considered them in preparing the draft of this report. Additional comments on EPA's written response follow.

We believe that the broad issue of whether EPA is legally required to prepare an EIS and whether it would be beneficial in taking regulatory actions has not been resolved by the courts. As EPA has stated, several United States appellate courts have ruled that EPA's procedures for taking an individual contested regulatory action provided the functional equivalent of an EIS. In several of those cases, however, the courts clearly qualified their opinions, stating that they were not willing to decide whether there was a broad exemption from the EIS requirement for all EPA regulatory actions. Further, following the Portland Cement Association case, EPA apparently recognized that its procedures for taking regulatory actions really were not the functional equivalent of preparing an EIS and included those actions in its voluntary EIS program. EPA officials responsible for administering that program told us that the preparation of EISs on those actions had been beneficial.

In spite of this, however, EPA has not included other regulatory actions which would appear to benefit from the EIS process in its voluntary program. For example, as discussed on pages 21 to 23, EPA has not agreed to voluntarily prepare EISs on similar regulatory actions taken under the Federal Water Pollution Control Act.

EPA's policy of voluntarily preparing EISs on its most important regulatory actions is not adequate to make it properly accountable for complying with the key NEPA concerns. Further, a voluntary program to prepare EISs could have difficulty competing for limited resources under the zero-base-budgeting concept now used by EPA in developing its budget. Because of this, EPA may revise or possibly revoke its voluntary program at any time, leaving it with no commitment to prepare EISs on regulatory actions. Even now there are inconsistencies and omissions in the types of actions covered by the voluntary program.

The opportunity for the public, industry, and other Federal agencies to legally challenge EPA's decisions not to prepare an EIS on a particular regulatory action and the adequacy of an EIS, when prepared, is important to ensuring proper accountability.

EPA's comments that it has received little or no criticism of its voluntary program does not imply universal acceptance of that program. The lack of criticism may be attributed to EPA's having established the impression that its efforts on regulatory actions is voluntary and not subject to challenge. EPA is responsible for assuring, with CEQ's assistance, that a requirement to prepare EISs on all major actions significantly affecting the environment does not unduly interfere with the accomplishment of its basic mission--developing environmentally protective regulations. A claim of a blanket exemption by EPA because its procedures for completing some types of actions were judged by appellate courts to result in the functional equivalent of an EIS does not satisfy this requirement.

In its comments, CEQ stated that our report discussed concerns that it had previously expressed about EPA's approach to complying with NEPA. CEQ added, however, that the report did not contain the detailed, substantive analysis necessary to support EPA's abandoning its current procedures and that additional information must be obtained before the need for such reform can be fully evaluated. CEQ recommended that EPA conduct a study to provide the public, Federal officials, and other interested groups with the information necessary to assess EPA's compliance with NEPA's mandate.

As discussed on pages 12 to 15, an EPA task force performed such a study in 1973. The task force concluded that EPA should maintain the position that it was not legally required to prepare EISs on regulatory actions and

that the benefits to be gained from their preparation would not outweigh the disadvantages. Our evaluation of the task force study indicated that EPA's concerns were not well founded. Further, we have shown that important environmental concerns may not be properly considered by EPA as a part of its normal procedures for taking actions.

In a July 7, 1978, letter, EPA told CEQ that it was auditing its three EIS programs--publicly owned wastewater facilities construction grants, permits to new source dischargers of pollutants into navigable waters, and major regulatory actions--to determine the effect of EISs on decisions and EIS preparation costs. EPA stated that it expected to identify ways to more effectively and efficiently comply with NEPA and the EIS requirement. EPA added that the audit should also provide information useful for determining the need for subsequent studies. EPA indicated that these efforts, at least in part, should satisfy CEQ's request for a study of its compliance with NEPA.

The extent to which EPA's audit or any subsequent studies may eventually result in changes to its EIS policies and procedures are uncertain. In any case, we believe that congressional guidance is needed on EPA's responsibilities for preparing EISs on its actions. Because of EPA's past opposition to subjecting more of its regulatory actions to mandatory preparation of EISs, we are not making any recommendations to EPA at this time.

RECOMMENDATIONS TO THE CONGRESS

To make sure that EPA properly considers environmental factors before taking any major action, we recommend that the Congress

--Reevaluate the need for continuing the statutory exemptions from the EIS requirement now provided to EPA for actions taken under the Federal Water Pollution Control and Clean Air Acts, as amended.

--Clarify EPA's responsibilities for preparing EISs on major actions significantly affecting the environment which it takes pursuant to other environmental laws.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

FEB 3 1978

SUBJECT: GAO Audit Report Recommendation on EPA's EIS Program

FROM: William Drayton
Assistant Administrator for Planning and Management

TO: Mr. Henry Eschwege
Director, Community and Economic Development Division
United States General Accounting Office
Washington, D. C. 20548

EPA has considered the [See GAO note on p. 35.] recent GAO Report on EPA's EIS program. This program includes separate EIS requirements tailored to the particular needs of the following EPA actions: (1) construction grants; (2) National Pollution Discharge Elimination System Permits (NPDES); and (3) major EPA regulatory actions. EIS's on the latter category are voluntarily prepared by EPA for selected regulatory actions. [See GAO note on p. 35.]

APPENDIX I

[See GAO note on p. 35.]

EPA agrees with the Report's position that in developing a regulation, the Agency must address such key NEPA concerns as alternative actions, long- and short-term impacts and the involvement of the public and other government agencies. However, we do not believe t t it is necessary or appropriate to utilize a mandatory EIS to deal with these issues or to fulfill our commitment to NEPA's goals. For the reasons given below, EPA believes that its Voluntary Regulatory EIS Program (39 FR 37419) should be continued and that a mandatory requirement to subject all Agency actions to the EIS requirement, pursuant to section 102(2)(c) of NEPA, would likely interfere with our basic mission of developing environmentally protective regulations.

We do not think that mandatory EIS's are necessary for three reasons. First, the courts have, in a series of cases, consistently upheld EPA's exemption from the formal EIS requirement of section 102(2)(c) of NEPA. Second, EPA already has a policy of voluntarily publishing EIS's on its major actions. Third, the Agency's regulation development procedures require the functional equivalent of an EIS. In the court cases mentioned above, EPA successfully argued that since EPA prepared the functional equivalent of an EIS on the subject action, a formal EIS was not mandatory.

Under EPA's Voluntary EIS Program, fourteen categories of major Agency actions currently require EIS's, and six additional actions will soon require EIS's. In recent years, EPA has received little or no criticism concerning its voluntary EIS policy from either environmental groups, industry, or the Congress. Complaints from other government agencies have been infrequent.

Unlike other agencies, EPA's primary responsibility in its actions is to consider their environmental impacts. Thus, EPA's normal regulation development process includes requirements to consider the issues addressed in an EIS. To add a further requirement for a mandatory EIS would provide a procedural tool which opponents of environmental protection could use to interfere with promulgation of effective regulations. The scope of this interference could reach serious proportions given that basically all of EPA's actions have environmental consequences. Such interference would have the effect, ironically, of undermining the basic intent of NEPA, i.e., to promote environmentally sound activities by government and industry.

We do not believe it is prudent to change from a voluntary to a mandatory Regulatory EIS Program, given the potential risks that would ensue and the dearth of significant benefits that might result from such a change. Though the Report identifies those benefits that contributed to the Agency's initial decision to prepare voluntary EIS's, it provides no documentation of additional benefits that would warrant the preparation of mandatory EIS's.

[See GAO note on p. 35.]

EXECUTIVE OFFICE OF THE PRESIDENT
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722 JACKSON PLACE, N. W.
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FEB 27 1978

Mr. Henry Eschwege
Director
Community and Economic Development Division
United States General Accounting Office
Washington, D.C. 20548

[See GAO note on p. 35.]

Our comments on the report are set forth below.

The GAO Report provides an historical account of EPA's performance under the National Environmental Policy Act. It describes the Council's early interpretations of the Act and traces developments in Congress and the courts which shaped EPA's response to the environmental impact statement requirement of Section 102(2)(C). The Report describes EPA's voluntary procedures for complying with NEPA and concludes that they are inadequate. [See GAO note on p. 35.]

In its comments on the draft report, EPA states that its current approach is sufficient under NEPA. It also asserts that full compliance with Section 102(2)(C) could impede the timely implementation of its regulatory programs.

EPA's program for complying with NEPA has two major components. First, the Agency has established "Procedures for the Voluntary Preparation of Environmental Impact Statements" on what it describes as its "most significant regulatory actions." See 39 Fed. Reg. 37419-422 (Oct. 21, 1974). In EPA's view, these procedures are not required by law but have been adopted

voluntarily for their "beneficial effects" on certain of its regulatory actions. Id. at 37419. To date, the Agency has made fourteen such actions subject to these procedures. 1/ EPA has indicated that six additional regulatory actions will be added to the list in the near future. The procedures followed for these actions are generally consistent with the Council's implementing guidelines and result in a document described as an EIS.

Second, for most of its other actions, the Agency apparently follows procedures which it contends require the "functional equivalent" of an environmental impact statement. 2/ This concept emerged from a series of legal decisions which exempted EPA from strict compliance with Section 102(2)(C) for some aspects of its decisionmaking. The functional equivalent process apparently applies to such actions as orders suspending or cancelling registrations of chemical toxicants under the Federal Insecticide, Fungicide and Rodenticide Act and the issuance of permits for ocean dumping under the Marine Protection, Research, and Sanctuaries Act.

The GAO report discusses concerns that CEQ has previously expressed about EPA's approach to complying with NEPA. The GAO report does not, however, contain the kind of detailed, substantive analysis which should form the basis of any recommendation that EPA abandon its current procedures. Important new information must be obtained before the need for such reform can be fully evaluated.

We believe EPA should conduct a study of how it complies with NEPA. Such a study would provide members of the public, Federal officials and other interested citizens and groups with the information necessary to assess EPA's compliance

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1/ These actions include, for example, the promulgation of national ambient air quality standards under Section 309 of the Clean Air Act, the establishment of new product noise emission standards under Section 6 of the Noise Control Act and the designation of sites for dumping under Section 102(C) of the Marine Protection, Research, and Sanctuaries Act. See 39 Fed. Reg. 37419-20 (Oct. 21, 1974).

2/ Section 511(c)(1) of the Federal Water Pollution Control Act of 1972 indicates that the funding of sewage treatment plants and the issuance of new source permits under that statute must be carried out in full compliance with the requirements of Section 102(2)(C). EPA has acknowledged this obligation and has promulgated regulations for the preparation of EISs on these actions.

APPENDIX II

with NEPA's mandate, as it has been tailored by Congress and the courts to the particular needs of the Agency.

In its comments on the draft report, EPA reiterated its longstanding concerns that broader compliance with NEPA would entail unacceptable administrative burdens and pose serious risks for the timely implementation of its regulatory programs. In 1973, the Agency prepared a report which purported to demonstrate how serious these problems might be. See Task Force Report, "Application of the National Environmental Policy Act to EPA's Environmental Regulatory Activities", United States Environmental Protection Agency, February 1973. One objective of the study we recommend be performed would be to determine if the findings of this report are still valid. Such a study would also examine EPA's compliance with NEPA for the waste water treatment facility construction program.

We appreciate this opportunity to comment on the draft report. We hope that our views will assist your further consideration of this issue.

Sincerely,

CHARLES WARREN
Chairman

cc: Carlton Edmundson

GAO note: Deleted comments pertain to matters omitted from or revised in the final report.

MAJOR ENVIRONMENTAL PROTECTION LAWS ADMINISTERED BY EPA

Law	Statutory reference	Date of enactment	Provision for preparation of EISs
The Clean Air Act, as amended	42 U.S.C. 7401 et seq.	12/31/70	All actions exempted by section 7(c)(1) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 793). Certain actions included by EPA in its voluntary program.
The Federal Water Pollution Control Act, as amended	33 U.S.C. 1251 et seq.	10/18/72	Except for actions relating to grants made to assist in construction of publicly owned wastewater treatment facilities and permits issued by EPA to new source dischargers into navigable waters, all other actions exempted by section 511(c) of the Federal Water Pollution Control Act (33 U.S.C. 1371). No actions included by EPA in its voluntary program.
The Federal Insecticide, Fungicide, and Rodenticide Act of 1947, as amended	7 U.S.C. 136 et seq.	6/25/47	No actions specifically exempted by statute. EPA has included some actions in its voluntary program.

APPENDIX III

Law	Statutory reference	Date of enactment	Provision for preparation of EISs
The Noise Control Act of 1972	42 U.S.C. 4901 et seq.	10/27/72	No actions specifically exempted by statute. EPA has included some actions in its voluntary program.
The Marine Protection, Research, and Sanctuaries Act of 1972	33 U.S.C. 1401 et seq.	10/23/72	No actions specifically exempted by statute. EPA has included some actions in its voluntary program.
The Atomic Energy Act of 1954	42 U.S.C. 2011 et seq.	8/30/54	No actions specifically exempted by statute. EPA has included radiation standards in its voluntary program.
The Safe Drinking Water Act of 1974	40 U.S.C. 300 f et seq.	12/16/74	No actions specifically exempted by statute. EPA is considering the inclusion of some actions in its voluntary program.
The Resource Conservation and Recovery Act of 1976	42 U.S.C. 6901 et seq.	10/21/76	No actions specifically exempted by statute. EPA is considering the inclusion of some actions in its voluntary program.
The Toxic Substances Control Act of 1976	15 U.S.C. 2601 et seq.	10/11/76	No actions specifically exempted. EPA is considering the inclusion of some actions in its voluntary program.

REGULATORY ACTIONS ON WHICH EPA HAS VOLUNTARILY AGREED TO PREPARE EISs

The Clean Air Act

National ambient air quality standards under section 109.

Regulations prescribing substantive criteria with major significance for the preparation, adoption, and submittal of implementation plans by States under section 110.

Standards of performance for new stationary sources under section 111.

National emission standards for hazardous air pollutants under section 112.

Motor vehicle emission standards under section 202, excluding light duty vehicle standards.

Regulations controlling the composition of fuel and fuel additives under section 211(c).

The Noise Control Act

New product noise emission standards under section 6.

Railroad noise emission standards under section 17.

Motor carrier noise emission standards under section 18.

Marine Protection, Research, and Sanctuaries Act

Criteria for the evaluation of permit applications under section 102(a).

Designation of sites for dumping under section 102(c).

Federal Insecticide, Fungicide, and Rodenticide Act

Cancellation of pesticide registration after an adjudicatory hearing under section 6(b).

Pesticide disposal regulations under section 19.

Atomic Energy Act

Generally applicable radiation standards under the act.

APPENDIX V

PRINCIPAL ENVIRONMENTAL PROTECTION AGENCY OFFICIALS RESPONSIBLE FOR ADMINISTERING ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
ADMINISTRATOR:		
Douglas M. Costle	Mar. 1977	Present
John R. Quarles, Jr. (acting)	Jan. 1977	Mar. 1977
Russell E. Train	Sept. 1973	Jan. 1977
John R. Quarles, Jr. (acting)	Aug. 1973	Sept. 1973
Robert W. Fri (acting)	Apr. 1973	Aug. 1973
William D. Ruckelshaus	Dec. 1970	Apr. 1973
DIRECTOR, OFFICE OF FEDERAL ACTIVITIES:		
Joseph M. McCabe (acting)	Feb. 1978	Present
Peter L. Cook (acting)	Oct. 1977	Jan. 1978
Rebecca W. Hanmer	Oct. 1975	Sept. 1977
Sheldon Meyers	Jan. 1972	Oct. 1975
ASSISTANT ADMINISTRATOR FOR PLANNING AND MANAGEMENT:		
William Drayton, Jr.	Aug. 1977	Present
Richard Redenius (acting)	Feb. 1977	July 1977
Alvin L. Alm	July 1973	Jan. 1977
Thomas E. Carroll	Dec. 1970	July 1973
ASSISTANT ADMINISTRATOR FOR WATER AND HAZARDOUS MATERIALS:		
Thomas C. Jorling	June 1977	Present
Dr. Andrew Breidenbach	Sept. 1975	June 1977
James L. Agee	Apr. 1974	Sept. 1975
Roger Strelow (acting) (note a)	Feb. 1974	Apr. 1974
Robert L. Sansom (note a)	Apr. 1972	Feb. 1974

ASSISTANT ADMINISTRATOR FOR AIR AND WASTE MANAGEMENT:		
David Hawkins	Sept. 1977	Present
Edward Tuerk (acting)	Jan. 1977	Aug. 1977
Roger Strelow	Apr. 1974	Jan. 1977
Charles Elkins (note b)	Oct. 1973	Apr. 1974
David Dominick (note b)	June 1971	Oct. 1973

a/ Before Apr. 22, 1974, the title of this position was Assistant Administrator for Air and Water Programs.

b/ Before Jan. 1974, the title of this position was Assistant Administrator for Categorical Programs.

(08759)