

NATIONAL ENVIRONMENTAL POLICY ACT

JOINT HEARINGS
BEFORE THE
COMMITTEE ON PUBLIC WORKS
AND THE
COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE
NINETY-SECOND CONGRESS
SECOND SESSION
ON
THE OPERATION OF THE NATIONAL ENVIRONMENTAL
POLICY ACT OF 1969

MARCH 1, 7, 8, AND 9, 1972

SERIAL NO. 92-H32

Printed for the use of the
Committees on Public Works and Interior and Insular Affairs



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1972

76-2480

5641-11

which none of us currently dream of, as necessary elements to meet the resource problem of the United States, and the rest of the world.

Senator BAKER. Mr. Chairman, thank you for a very excellent statement, and for a very, very useful colloquy with the committee, and we very gratefully appreciate your participation, and we thank you for that.

If there are no further questions of the chairman, we will take a 5-minute recess while we see what we are going to do with the rest of the day.

(Whereupon, the hearing was in recess.)

AFTER RECESS

Senator BAKER. The committee will come to order.

Our next witness is Mr. Roger C. Cramton, chairman of the Administrative Conference of the United States.

Mr. Cramton, we welcome you to these hearings, and you may proceed as you wish with your statement.

STATEMENT OF ROGER C. CRAMTON, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY RICHARD BERG, RESEARCH DIRECTOR

Mr. CRAMTON. Mr. Chairman, members of the two committees, I would like first to introduce my associate, Richard Berg, research director of the Administrative Conference, and to ask permission to have my prepared statement included in the record of these proceedings.

Senator BAKER. Without objection, the statement will be received and included in the record.

(The statement appears on p. 411.)

Mr. CRAMTON. I am grateful for the opportunity to testify at this important hearing, at which a vital subject—the consideration of environmental values in the decisionmaking process of Federal administrative agencies—is under consideration. This is an important subject, both to me personally and also to the Administrative Conference of the United States.

The Administrative Conference, as you know, is an independent Federal agency that is devoted to the improvement of the procedures by which the Federal Government carries out its activities. One of the areas to which we are giving a very considerable amount of study is the handling of environmental issues in powerplant licensing and the reliance on trial-type hearings in the decisionmaking process in Federal administrative agencies.

I am expressing my personal views today as chairman, and as a person presumably knowledgeable on administrative procedures, because the Conference itself has not taken, and probably will not take, a formal position on the implementation and effectiveness of NEPA.

I would like to touch upon time points, each dealing with the effectiveness of NEPA and its consequences for administrative decision-making.

First, what benefits has NEPA conferred on us? Second, what uncertainties perhaps cry out for clarification, and, third, what dangers have emerged?

NEPA in my view is a dramatic success story of the orderly change in governmental institutions. I do not have to tell you that there is widespread skepticism concerning the responsiveness of the Government to changing needs and conditions. Any success story on the part of the Government needs to be chronicled and retold, and NEPA, in my view, is an important success story.

Why has NEPA been a success story? In nudging and pushing Federal agencies toward a more constructive and rational position in balancing environmental considerations with other values, NEPA has been effective in part because it constitutes the first broad congressional statement of a reordering of national priorities in the environmental field. It tells agencies that they must consider environmental values along with other relevant values in their decisionmaking.

We all know that there is a tendency of each agency to become absorbed in its own mission, in its own special constituency, that tends to limit its perspective and its breadth of view. NEPA pushes in the other direction, requiring agencies to take a broader view, a wider perspective.

Second, NEPA requires a public airing of issues, some of which have been foreclosed from public view and comment. Take, for example, the important decisions involved in the use and management of public property, the proprietary functions of the Federal Government. The statutes governing these functions for the most part do not require detailed procedures or public participation, and NEPA has opened up for the first time to public gaze and scrutiny some very important decisions of Government, such as storage and transportation of germ gas, underground testing of nuclear devices, and the like. In my view, this has been all to the good.

Third, agencies have been forced to expose the bases of their decisions. They not only must receive outside comments, but they must take them seriously, respond and reply to them, and explain the results they reach. The outcome in my view is likely to be more thoughtful, more informed decisionmaking by Federal agencies.

Finally, the citizen's suit provides a handy mechanism to enforce the NEPA requirements, and the courts have been sensitive and eager to enforce NEPA. This in turn has meant the agencies must take NEPA seriously. The requirement is a real one, not mere exhortation.

When these four ingredients or elements of which I have spoken are combined, an explanation is provided for the fact that NEPA has produced a great deal of change in large governmental organizations that tend to resist change. Dramatic change has occurred in the policies and perspectives of a number of Federal agencies, and examples are mentioned in my prepared statement.

Moreover, even greater change is likely to occur in the future—the sure, steady change that is the result of building into the decisionmaking process new inputs and new people. I would like to emphasize this point. By requiring agencies to develop an in-house expertise in environmental disciplines, NEPA has infused new people and new perspectives into the bureaucracy. The process of change thus tends to be self-perpetuating.

We all know that individual agencies tend to develop what might be referred to as belief patterns. They are concerned with particular missions. Their employees, often of a common background and with a common training, over time tend to see the agency's mission and the world through the same set of glasses, the same set of shared attitudes. There are many examples. A civil engineer who has spent 30 years in the Bureau of Roads, laying down highways in our relentless pursuit to spend the funds accumulated in the highway trust fund, acquires a certain view of the world. If you want to change that view, the view of an agency composed of people like that, you need the introduction of both outside comments, and, particularly, new personnel into the agency—people with biological sophistication or environmental science background who have more concern about some other values that perhaps which have not been fully reflected in the highway design and construction decisional process in the past.

The result of infusing new attitudes and skills cannot help but be all to the good.

Here I would like to make a transition. I have been talking about the positive aspects of NEPA. Now, I want to throw out a few words of caution.

Success is not without its dangers, and only the naive or zealous would perceive NEPA as being without a negative side at all.

There are two kinds of negative side effects, one involves the current uncertainties in the meaning and application of NEPA which hopefully will be temporary. To what governmental actions does NEPA apply? What does it require of governmental decisionmakers?

Hopefully, these questions will be clarified as soon as possible, so that agencies will know the ground rules that they have to meet, and not just be hit over the head after the fact in the reviewing courts.

Then there is danger at both extremes, if we move away from a moderate and reasonable interpretation of the act. On the one hand, there is a danger that from the point of view of some agencies, NEPA can become a wooden, formal, mechanical requirement, in which you grind out a lot of pieces of paper—a new kind of bureaucratic gamesmanship in which the writing of environmental impact statements becomes an esoteric art form, like producing advertising copy—but has no meaning in terms of the decisionmaking process in the life of the agency.

That is one extreme danger. The danger on the other hand is that too zealous an imposition of a procedural straitjacket, or too broad, too heroic a notion of what decisionmakers have to go through to make individual decisions, will cripple or impair the Federal decision-making process.

I notice from the hearing schedule that a number of my friends in the environmental area are testifying tomorrow, and I will leave it to them to develop the danger of wooden, mechanical, or formal compliance on the part of agencies. I will move to the other side of uncertainty in the meaning and application of NEPA, and some possible dangers if NEPA is conceived of as imposing too heroic a decision-making process.

My prepared statement discusses a number of uncertainties in the application of the NEPA requirements.

What substantive effect does NEPA have in the areas in which governmental agencies regulate otherwise private affairs? Take such matters as Securities and Exchange Commission regulations of proxy statement, or issuance of "no-action" letters, or Internal Revenue Service rulings on tax questions that come up in connection with the corporate expansion. Must the SEC or the IRS consider the social desirability in terms of the environment of the underlying activity in which the private person wants to engage in? My own answer would be "No." To do so would be chaotic or unwise.

Senator BAKER. Would it be because you think it would be chaotic and unwise, or because of what NEPA says?

Mr. CRAMTON. NEPA does not deal with it at all.

Senator BAKER. Except in terms of environmental impact.

Mr. CRAMTON. It purports to deal generally with all decisions of Government. It does not narrow in on any. But Congress has given very specific guides as to what situation a taxpayer is entitled to a ruling and the like, and his motives and other aspects of his behavior have not been subject to tax consequences. If Congress wants tax consequences to be involved, I think it should say so, and say so somewhat more explicitly.

Senator BAKER. I think you make another point, that significant impact may be some impact, and, therefore, arguably might come under requirements of 102.

Mr. CRAMTON. It is likely to have a fairly marginal impact, except as the repeated actions of a number of private persons tend to move in the same direction. If they do, as in land development, public regulation needs to step in, but perhaps it needs to step in more specifically.

Senator BAKER. I understand your observation, that this would be an example of an arguably extreme interpretation of the act, not the probable interpretation of it.

Mr. CRAMTON. Well, it is a danger. There is some uncertainty now that needs to be clarified, and if it is resolved in terms of extremely broad applicability, I think it will create a whole host of problems that will result in even more litigation.

Senator BAKER. The point came up in the previous hearings about the actions of the judiciary.

Would that be in the same category?

Mr. CRAMTON. I think not. I think the coverage of this act would probably be interpreted in accordance with the definition of "agency" in the Administrative Procedure Act, which excludes the legislature and the judiciary. Thus I would say, with respect to a court order involving school busing, that an environmental impact statement would not be needed if made by the court, but if the ICC made the same order it would have to make an environmental impact statement.

Senator BAKER. I understand it is all of the agencies.

Mr. CRAMTON. Yes, but that will be interpreted as administrative agencies, not the judiciary.

Senator BAKER. Especially since the judiciary will interpret it.

Mr. CRAMTON. That is right.

It is my view that the NEPA procedure is fairly easily applied to decisions that are proprietary in character, or that are made by means

of notice-and-comment rulemaking. There will be some transition problems in determining whether NEPA applies and what does it require of agencies. But once those questions are clarified, it seems to me that the kind of decision involved in Secretary Morton's oil leasing action fits into the environmental impact-statement procedure fairly well. The agency merely has to give notice of the proposed action, spell out the environmental effects, hold a period open for receiving comments, and then have a period which takes into account the comments.

It is in regard to actions that must be made after a trial-type hearing that the NEPA requirement seems to me to cause the most concern. This is partly because the bare statutory language about the environmental statement accompanying the agency's proposal through the existing review processes, fails to reflect the variety and complexity of trial proceedings. If you read the judicial decisions, some seem to me too exacting in their requirements.

NEPA speaks of the agency's "existing review processes." That seems to me to imply that NEPA was not intended to change the decisional or review process, but merely to require consideration of environmental values. I would agree with Mr. Gooch's answer this morning on the *Greene County* case that some discretion, in fact a large degree of discretion, ought to be accorded different agencies as to how they meet that requirement of ventilating the environmental issues, thoroughly considering them and deciding them.

NEPA is not a straitjacket. It needs not be responded to by every agency in exactly the same way. There are questions of who prepares the statement, which seems to me a question of notice prior to hearing of environmental issues. There is a question whether the staff bears the burden in the hearing, or can the burden be put in some instances on private parties. Can the hearing examiner be left to develop the statement of consideration of environmental issues?

There is also a question of whether or not NEPA should be viewed as requiring mandatory hearings in situations which are otherwise uncontested. I think not, that it would be a mistake. These are very serious uncertainties in the application of the NEPA requirement to trial-type proceedings. My view is that the time, the manner, and the scope of consideration of environmental issues must involve a large degree of agency discretion.

The agency must give consideration to the environmental issues; they must develop them, but the manner, time, and scope should be discretionary in large part.

Let me turn in the last few minutes to some remarks about some dangers if NEPA is interpreted as requiring too heroic a decisionmaking process.

There is danger in the notion that all alternatives that are reasonably available must be considered, particularly as it is applied to trial-type hearings. The *NRDC* case, as you know, holds that the environmental statement must consider alternatives that are beyond the agency's power to act upon. Secretary Morton must consider the oil import quota program in engaging in an offshore oil-leasing action.

I have already said that, except for the problem of knowing what he has to include in his statement, and having some clarity about that, I do not think that would pose too much of a problem in the future. The

danger is that statements about the oil import quota program are going to be drafted by one agency, and then adopted by other agencies without really being seriously considered.

Senator BAKER. Just a minute.

You mean, Mr. Cramton, you mean that you do not expect in the future, that the Department of Interior will have much problem in making the balancing judgment of oil import quota policy, and offshore leasing?

Mr. CRAMTON. I did not say that. I think they may have great difficulty in making that balancing judgment, if in fact it is an open issue, but the question as to the mere procedural requirement of having a statement which discusses all alternatives that are reasonably available—assuming we can decide what that subjective term “reasonably available” means—will not be too bothersome.

Senator BAKER. It will not be too bothersome to discuss it, but will it be too bothersome to make a balancing judgment? For instance, will the Secretary of Interior or the State Department, decide how this affects our relations with oil producing countries?

Mr. CRAMTON. I think to the extent it forces him into areas which are beyond his expertise and beyond his agency, as to how he makes the judgments, it is an unrealistic requirement.

Senator BAKER. Is that the thrust of the *Outer Shelf* case?

Mr. CRAMTON. Yes, it surely requires that the Secretary of Interior consider issues which are in the statement, even though those issues are beyond his power. He has to consider issues that he cannot act upon, except by doing nothing, and to a certain extent this may create some pressure toward what might be referred to as “government by impasse.” No agency can do anything, if it properly takes into account the issues that Congress has delegated to another agency, or even to another level of government, local or State.

Senator BAKER. There is no requirement of NEPA to that effect, there is no requirement that we delegate a particular function to a particular agency.

Mr. CRAMTON. That is right.

Senator BAKER. There is no requirement in the law, that forbids Interior to look into the international impact of changing of the oil import quota system in the United States at any given moment.

Mr. CRAMTON. You are anticipating the next point in my oral summary of my prepared statement, Senator.

Senator BAKER. Then I will wait with great patience.

Mr. CRAMTON. No, there is no reason why you should. I was going to say that every decisionmaker is under a necessity, it seems to me, to cut his problems down to manageable size.

We cannot reconsider our life style every morning when we face the day. That road is the road to insanity. We cannot reexamine first principles in every case. We cannot in fact canvass all alternatives and the implications of all alternatives in a sequence of individual cases. If NEPA is interpreted to mean that, NEPA requires the impossible, and the impossible cannot be done.

There is an old French saying, “The best is the enemy of the good.” Here I would again argue for a degree of moderation and compromise and reasonableness. Administrators must act in the absence of a full knowledge of the implications and consequences of all possible alter-

natives to their action, and that is particularly true where Congress has in fact limited an agency in its jurisdiction, in what it can consider, or where our federal system has put some problems like fossil fuel plant matters in the States or where land-use problems are handled primarily by local communities, and the like.

There is nothing in NEPA which purports to reshuffle an agency's power or jurisdiction, or which requires a change in its decisionmaking process, other than that the agency consider environmental values.

If there is confusion or uncertainty of national policy in such fields as energy or transportation, NEPA cannot cure that uncertainty or confusion. If there is a problem created by the diffusion of authority among Federal agencies or between Federal and State and local agencies, the lack of a centralized agency to resolve those problems is not being to be cured by NEPA. To interpret NEPA as requiring agencies essentially to do nothing, until Congress restructures or rethinks this basic process cannot be contemplated and will not be permitted.

That is what I refer to as "government by impasse." NEPA, it does seem to me, imposes a special responsibility on the President and the Congress to rethink some of these basic questions, such as the coordination of national policies in areas like energy and transportation and public-land use, in which environmental questions are going to raise the most serious problems.

Now, there is one other aspect, particularly in the *Cabert Cliffs* case that worries me. This is the emphasis on individualized case-by-case balancing, that supposedly results in the optimally beneficial decision, to quote Judge Wright's opinion. If all that language means is that the decisionmakers must consider the broadest alternatives in doing the best job they can, massing the most information they can, and consider it all, all to the good. But if it means the result has to be totally rational, that each agency has to make every governmental decision in accord with the strict dictates of the scientific method, then again it is requiring the impossible.

Some actions must be made and ought to be made in terms of nothing larger than political compromise between the affected interests. We are a democracy. There is a political process going on, there are public and private interest groups that are speaking out, there are elected representatives of the people, and there are administrators who have been delegated certain responsibilities.

Many of the decisions they make are going to be made on the basis of an intuition that the result will be marginally better than inaction. It may rest on accommodation. It cannot purport to be a totally rational plan, based on comprehensive operations analysis, and to require that it be so not only requires the impossible, but I think is inconsistent with the basic democratic nature of our institutions.

Let me give a specific example in the highway area. The trust fund is still accumulating some \$6 billion or so dollars a year. Congress has provided that that money can only be spent on highways. Until Congress changes that, one must expect that the agencies that administer those funds will do what Congress has told them to do—spend the money on highways. That is what they are required to do. It would be lawless for them to do anything else.

All NEPA means is that agencies must go through the environmental-impact procedure, and they must consider in making their

decisions about the locations of the highway, the quality of the highways, esthetics, environmental factors. It does not mean the highways will not be built. I think it will have desirable effects on their locations and the like.

People talk of NEPA as if it will shift priorities to fewer highways, fewer automobiles; they have not faced up to the real question.

The governing policies are those Congress has stated, and until Congress changes those policies, the agencies must comply with the congressional mandate.

Senator BAKER. That is not quite right.

Is it not so under NEPA they clearly can stop building a highway?

Mr. CRAMPTON. I think not. They are required to spend the trust fund, and they are required to spend it for highways. If a particular segment should or should not be built through a park, they can say we will not build that segment, we will spend \$30 million more and build it around.

Senator BAKER. They could say, we will not build that segment, we will not build anything.

Mr. CRAMPTON. I think that would be lawless behavior on the part of the agency, which has been told by Congress that it is to spend the money for that purpose.

Senator BAKER. Well, certainly the Roads Subcommittee of Public Works, on which I serve will consider that point later, but it is my interpretation of the Highway Act that the money can only be spent for these purposes, but when read together with NEPA, there would be no requirement that that money be spent for a particular segment of highway.

Mr. CRAMPTON. The fund could just be allowed to accumulate? I perhaps should give more detailed study to that act and its proper interpretation. I do not purport to be giving a definitive legal opinion as to what that statute means. The Senator undoubtedly is better informed on that question than I am.

Senator BAKER. But you are saying you visualize NEPA as in no way abrogating the responsibility of a line agency, of a mission agency, to fulfill its function, notwithstanding that the agency under NEPA the courts may decide that a particular course of action has a better alternative.

Mr. CRAMPTON. It is not the function of the reviewing courts to decide, what is the better alternative. That function has been delegated to agencies, and there should be a limited scope of review. If NEPA is used by reviewing courts as a crutch to reverse and remand agency decisions that the judges do not like, then the judges are behaving improperly.

Congress has told the AEC, for example, to license nuclear reactors. It has told it to promote the peaceful use of atomic energy. The AEC has no jurisdiction over the oil-import quota, over fossil fuel or electric transmission lines. Yet it must develop an environmental impact statement that considers and discusses those alternatives.

I think in fact the result is probably foreordained, because the more specific requirement on AEC is that it promote the peaceful use of atomic energy, and, providing the plant is safe and providing we do have a fuel shortage, unless you create a new energy agency that has some broader authority, the AEC must go ahead and license facilities

that meet standards consistent with what they consider to be proper environmental values.

Should the AEC say, "Even though society needs fuel and even though we are supposed to promote the peaceful uses of atomic energy, we are going to stop licensing plants, because we think the risks outweigh the need for fuel," I suppose they could do that, but I would think in the light of the statutory requirements, it is not only unlikely, but it perhaps would be a dereliction of their duty.

Senator BAKER. I really cannot follow that, Mr. Cramton.

It seems to me that if the selection of the lead agency, which is responsible for making the overall balancing of judgment, predetermines the outcome, then the section of NEPA which requires consideration of alternatives to the proposed action is meaningless.

Mr. CRAMPTON. It is not totally meaningless. It may have very dramatic effects on the design of a particular plant. It may have dramatic effects on requirements built in in terms of thermal pollution, in terms of a number of esthetic and environmental values, and it may affect the cost, it may affect the economics of the plant.

I suppose if the environmental requirements are too high, it might dry up the stream of applications. However, I am inclined to think that as a practical matter, the more specific requirements of the agency's basic statute and the agency's concern with the mission Congress has given it—in the case of AEC, promoting the peaceful use of atomic energy—will in fact always predominate as long as we have a fuel shortage. That means that to the extent NEPA has an effect, it is on the details of the plant rather than on the fundamental question of do we have plants at all.

I don't think you can expect the AEC or other agencies under NEPA to say we will be better off without a plant. I think if that sort of decision is to be made, Congress will have to do it. You need some fundamental and specific ordering of priorities in specific instances.

Senator BAKER. It seems to me and I will not pursue the subject, because I am afraid there is a gap between your meaning and my understanding—that what you are saying is that NEPA becomes a mechanism for embellishing and extending administrative procedures, but that it will not change the ultimate result of the given proposal.

Mr. CRAMPTON. I think to a degree that is right on the fundamental questions. That is why I say NEPA, if it will be meaningful over the long haul, requires reconsideration and rethinking and coordination by the President, by those in the major executive departments, and by the Congress, of these fundamental questions of what is our national energy policy, and what fuel sources should be relied upon for meeting what is said to be the need.

In that, the White House and the President can play a role by giving out energy messages. The Congress can do something by providing more explicit statutory policies, and if things get bad enough, I suppose we could create a super energy agency that would have authority to deal with the entire field.

I think we are all fooling ourselves if we really think the Civil Aeronautics Board is going to stop its essentially promotional activities on behalf of local service air carriers—in bringing air service to small communities around the country—because these actions have

negative consequences on rail passenger transportation and causes environmental problems. I just think that is wishful thinking.

Nothing that Congress has said requires that. The CAB's governing statutes tell it to promote civil aviation. NEPA adds a directive to promote civil aviation in accordance with environmental values. That means they have to consider the exhaust problem, they have to consider design questions in the location of airports, and the like. It does not mean no airplanes, or rail transportation instead of airlines.

If fundamental questions like that are to be raised, Congress must do so much more directly.

Senator BAKER. Of course my next question is, have the courts been called on to speak on this particular subject, that is the entire relationship of NEPA and the generic act that created the several line agencies?

Mr. CRAMPTON. No, and I do not really know quite how they could, without exceeding the limited function of judicial review.

The point they have considered so far in connection with the Interstate Commerce Commission, is that it has to make an environmental impact statement that considers other modes of transport. Or in Secretary Morton's case, the *NRDC* case, that he has to consider alternatives, even though they are beyond his authority.

The agency has at least to go through the form of saying that it balanced the objectives of its program and mission against the environmental considerations, and conclude that in its view the public need for the service that this application would render are the weightier. That is the result agencies will usually reach.

Senator BAKER. That is like the justice of peace in Tennessee who tried a lawsuit for 3 days, and said, "I will now take this case under advisement, until next Tuesday, at which time I will decide in favor of the plaintiff."

Mr. CRAMPTON. That is too negative a view. There are extremes here, and you can go to the extreme of viewing NEPA as just a negative effort that runs up redtape. I am trying to take a middle path. I am saying it does not change the world, and it will have some negative consequences, but the ICC, the CAB, the EPC, in making these case-by-case determinations, or in their general policies, do have to consider the environmental values in terms of the particular design, particular location, and so on. The Bureau of Roads is restrained in terms of putting an interstate highway through a park or over a scenic mountain or something like that, and so the shaping, the design of the particular matters that are within their authority may be dramatically influenced and affected, and all in the light direction. And that is not an insignificant accomplishment.

I reject the extreme positions either that NEPA accomplishes everything, or that it accomplishes nothing.

Senator BAKER. I agree that Government by impasse, as you very aptly put it, is sometimes the most significant accomplishment of an act, and sometimes a useful one, but you advance a position which I am sure some would not find new and different, but which I find different from my conception of the relationship between NEPA and other agencies and functions, so suffice it to say, I will have to think about that for a while, and I will not burden this record anymore

with my own edification, but if Senator Buckley has any questions on this point, I think we might cover them at this time.

Senator BUCKLEY. I would say I share the chairman of the committee's puzzlement.

I just cannot conceive of NEPA having a purpose other than causing an agency to weigh factors with the possibility that it might reach the conclusion that the economic and social costs exceed the economic and social benefits to be derived from the project under consideration.

I can understand the human unlikelihood that this would occur on too many occasions, but nevertheless, it seems to me, I was not a Member of Congress at the time this act was enacted, but it seems to me it is impossible, it would not from time to time, result in a decision not to proceed.

Mr. CRAMPTON. I am sure it would from time to time. I think the difference between the views expressed is a shading, and maybe more of a semantic quarrel, or more of an expectation of the realities of human behavior in agencies that do have a mission. It should be remembered that other congressional committees are pushing agencies to pursue their specific missions, and Congress is appropriating large sums of money for those missions to be carried out.

An agency responds, when it is given millions of dollars for a facility, on which some committee of Congress has pushed it very strongly, and it has made a commitment to the Congress it would build the facility. It seems to me that in that context, NEPA may shape the exact design, costs, arrangements, location of the facility, but really NEPA will not determine whether it is built. So I think the differences between us may be slight, and it may be more in the area of expectations about the realities of how this will function—

Senator BUCKLEY. I just hope that my understanding is more accurate than yours.

Mr. CRAMPTON. Well, if I might make just a brief answer to that, it does seem to me there is some virtue in letting more specific statutory requirements have somewhat greater priority with agencies, that as specific language usually controls over the more general. If Congress supports an agency program and has appropriated funds for that purpose—telling an agency to promote aviation—my view, if I were appointed to the Civil Aeronautics Board, is that it would be a dereliction of duty not to promote civil aeronautics.

Maybe if I have a horrendous situation of destruction to wildlife, I would say here the environmental values clearly outweigh any virtue to the public in terms of a better air transportation. But those situations are not likely to occur. The hard cases are those in which the advantages in terms of improved air transportation, are relatively clear and relatively large, and the question is, do they outweigh some opposing environmental concerns?

Now, I want to minimize the environmental damage, and so the project will be framed to do so. But to say the CAB should not go ahead, I think, is unrealistic.

Senator BAKER. I do not want to pursue this any further.

I think we have a difference of opinion here, and I think it is useful to have it in the record.

Senator BAKER. Mr. Cramton, would you proceed with the summary of your statement?

Mr. CRAMTON. I am really through, except for just reiterating that, although NEPA to my mind has been a constructive and effective instrument of social change in the Federal administrative process, it cannot be viewed as a total panacea for all problems. It cannot straighten out the confusion and semi-chaos of national policy in fields of energy and transportation, where I think Congress has a heavy responsibility to try to create some order. NEA cannot itself provide those new organizational structures, new ideas, new policies, that will balance the conflicting interests and make the appropriate trade-off.

Fundamentally, those are political decisions. There was some talk earlier about whether a scientific and systematic cost benefit analysis would solve the problem. It will always help to have more information. It may help to quantify aspects of that information. We may ultimately have armies of economists, statisticians, system analysts who consider the alternatives and try to develop information on them. But once you determine as accurately as you can, what the effects will be on fish and wildlife, and what benefits will be gained by the project, it is fundamentally a political judgment about what is the social good, what is the best outcome, and on that, you people, the politicians, it seems to me, have the final decisions.

You can delegate certain things to agencies and give them some guides. If they do not do it the way you want, change the substantive laws so that they do it right.

Senator BAKER. Thank you very much.

I might at this point say that if these hearings are to consider changes or modification of NEPA, whether to strengthen or diminish the impact of NEPA, then it seems to me, the point you are making, probably reduces the urgency of such an undertaking, because taken as a whole, I understand your evaluation of this section to mean that NEPA means a great deal less than I thought it did.

Now, the staff has provided me with the difference in the language, between the bill passed in the Senate in July of 1969, and the bill as finally adopted, and that may or may not have some bearing on what affect NEPA has on the mandate of existing line agencies.

Section 103 of the act as it passed the Senate reads, "Policies and goals set forth in this act are supplementary but shall not be considered to repeal the existing mandates," which is quite different than the language finally adopted, which says "the policies and goals set forth in this act are supplementary to those set forth in the existing authorizations of Federal agencies."

The language stricken is "not to be considered to repeal," and the fact that the repeal language was dropped in the Senate version, it seems to me, would have some significant import.

The conference report, to complete the record on this section, dealing with section 103, declares that the policies and goals set forth in the bill was supplementary to those set forth in other statutes.

The effect of this section is to give recognition to the fact that the bill does not repeal existing law, and does not obviate the responsibilities of the Federal agencies.

I confess, I do not know what all that means, but I think it is important to include it in the record at this point.

Now, I have only one further question. As far as I know, the only active legislative proposal that affects NEPA is section 511(d) of the Federal Water Pollution Control amendments that passed the Senate last November.

That particular amendment would discharge any Federal licensing agency from looking behind NEPA's judgment as to water quality considerations, as required in *Calvert Cliffs*.

Since the Senate passed that amendment, it has generated a good deal of controversy. The sort of public hearings required under the public statute are not fully judicial proceedings, whereas some environmentalists have suggested the hearing record compiled in the process of setting water effluent standards by a State or by NEPA, should become part of AEC's NEPA judicial process, thereby opening it up to full APA procedures.

Do you have any comment on this proposal? I think it is likely to appear before the House and finally in conference, and it is the only active proposal I know of that would affect the actual language of NEPA.

MR. CRAMPTON. Well, I view the question of what procedure is utilized to develop general policies with respect to thermal pollution, let's say by nuclear plants or other industrial sources, is really a question of whether you want to proceed on an individual basis and consider each effluent source, or whether you want to take a stream, or an area as a whole and establish general standards that all must meet.

If you take the latter approach, then general rulemaking seems to me to be required, since the only rational approach is that you make general requirements for particular river basins or streams or bodies of water. Anybody who puts hot water or other effluent into that body of water must meet those standards.

The other approach is to leave it up to individualized case-by-case determination, but that poses all kinds of problems of consistency, of similarly situated people being treated dissimilarly, of imposing costs on nuclear power facilities which other people do not have to meet, or vice versa, and it may not be a rational way to deal with the broader problem.

Senator BAKER. Let me put the question in a little different way, and see if we have the same position.

Let's assume that section 511(d), the proposed amendment to the Federal Water Pollution Control Act, which was passed by the Senate, provides in effect that the lead agency as the responsible agency must make a balancing judgment including factors beyond their jurisdiction, such as water quality criteria, but that it need not go behind the determination of some other agency, such as a State, or EPA, and make a separate and parallel determination of the water impact, in that case. But environmentalists argue, if the lead agency is not permitted to go behind the water quality determination of EPA, that it forever cut off from considering judicially, administratively, or otherwise, the determination made by the States or EPA.

My question is whether you feel that the State or EPA determination with respect to water quality should be incorporated into the APA procedure, so it can be reviewed at some stage, if we are to assume the lead agency does not have to go behind that determination in making its balancing judgment.

Mr. CRAMPTON. Well, I do not think that trial-type hearings are the best way to develop general conclusions of policy about what standards particular industries or polluters ought to meet. It may be that rulemaking procedures before State agencies, in fact, allow much more public participation and submission of comments by a wide variety of groups than other procedures. Cross-examination, and a long elaborate trial dominated by lawyers, is not a particularly good way to go about decisionmaking of complex issues of general import.

I guess I am a little puzzled as to what the AEC is supposed to do in balancing all of these issues, where a State agency has set a standard applicable to everyone on a particular stream, basin, and so on, which considers the whole body of water and all of the inputs into it. Is it supposed to substitute its judgment for that of a State agency? What factors is it supposed to be considering? How can you balance the factor, if you cannot get behind it? One of my law teachers years ago used to say, How do you weigh a bushel of horse feathers against next Thursday?" I don't quite know what has to be balanced here.

Senator BAKER. Very good. Thank you very much.

Senator Buckley, do you have any other questions?

Senator BUCKLEY. Just one or two.

You mentioned earlier the desirability of developing the impact of NEPA on causing agencies to develop in-house expertise.

Do you have any feelings as to the limit of that expertise, that is required?

Should each agency develop its experts, in each of the fundamental fields?

Mr. CRAMTON. I think that depends on the volume of the agency's activity in the NEPA area, and what effects its actions will have on the environment.

An agency like the Army Corps of Engineers will clearly have a large number of environmental actions, so that it will probably want to develop its own cadre of specialists, environmental experts, and the like. A smaller agency that has only an occasional call for particular talents might be better off drawing on the resources of a sister agency, such as Interior, Corps of Engineers, or EPA, which would have specialists that could contribute wisdom on the particular matter. I would not think a governmentwide decision on this could be made, but the major agencies that file a large number of environmental impact statements will I think be required to develop their in-house expertise.

Senator BUCKLEY. Would you feel the slightest of the agencies should require somebody to at least have the confidence to interpret the NEPA?

Mr. CRAMTON. They have to have at least somebody of sufficient sophistication so he can evaluate and understand the scientific inputs that other people make.

It may be that even for the purpose of adequately responding to the NEPA requirements, agencies will want to do what many have done in the civil rights area, that is, create a special office of high-level persons who report to agency heads and who have sufficient staff support to do a specific and effective job.

Senator BUCKLEY. In several places in your testimony, you refer I think to the dangers of excessive proceduralization.

Also I think you referred to what might be called the rule of common sense.

Do you feel that the court decisions will be to void the rule of common sense, and impose an excessive degree of procedure?

Mr. CRAMTON. I would surely hope not. The results of the cases thus far are hard for me to quarrel with, taking each case by itself. It is only as you draw the implications of the language in the opinions, in its application to situations not yet arisen, that I start having some concern and worry. My hope and expectation is that the judges will behave in a reasonable fashion in construction of the NEPA requirements.

It does seem to me that some thought might be given both to ease the transitional problems and also to get more uniformity in the interpretation and application of NEPA, through some delegation of rule-making authority to the Council on Environmental Quality to develop procedures for handling environmental statements. An express reference of that kind in the statute would mean that what I view as largely sensible positions worked out by the Council on Environmental Quality would be given more heed by district judges and other reviewing courts.

We have a problem now where litigation can arise anywhere in the country, with litigation a relatively slow and cumbersome process, of the possibility of inconsistent decisions and long periods of uncertainty. For example, as the general counsel of the FPC pointed out, the *Greene County* case really throws into jeopardy the Federal Power Commission's procedure for decisionmaking. It will have adverse effects on other agencies as well, if it is upheld and extended. What are they to do in the meantime? There are lots of uncertainties. These uncertainties ought to be clarified as soon as possible.

Senator BUCKLEY. You spoke earlier about bringing judgment to bear as to the relative importance of litigated issues, and not to overburden one where commonsense is no problem, on the other hand requiring greater degree of care where you have larger potential environmental impact.

Would you feel it is desirable, or not desirable in cases of the great complexity, to have a public hearing, after an environmental impact statement has been drafted, and before the agency in question makes its final decision on this?

Mr. CRAMTON. It would be required to do that by statute in many instances, particularly in the area in which independent regulatory agencies are active, but even if the agency is not required by statute or other legal requirements to hold a public hearing, a public hearing in many cases will be exceedingly useful.

By public hearing, I mean not a trial-type session, with witnesses, cross-examinations and technical rules of evidence, but a session like this, where issues are framed and arguments made on the issues. We all know that enlivens discussions of questions: It helps people to focus on the issues, to understand them and comprehend them and to grope their way toward a better decision. I think many agency heads or other decisionmakers ought to provide a legislative speechmaking public hearing in order to improve their decisionmaking process and to give affected people the feeling their ideas have really been seriously considered.

Senator BUCKLEY. Thank you. I do not want to belabor the point both Senator Baker and I went into earlier, but to be curious, in one situation particularly, how strong do you feel the Congressional mandate is in some of the mission areas?

The AEC is directed to promote the peaceful use of atomic energy.

Let us assume as a result of NEPA 102 examination, presentation of evidence, that serious doubt should be created as to whether the threshold of acceptable radioactivity is really safe, and that nevertheless it is that threshold which is economically achievable at the present time.

Under those set of circumstances, do you feel the AEC must proceed in licensing such grants?

Mr. CRAMTON. That is the issue the AEC has been struggling with from its very beginning and which is spelled out in great detail in its basic statute. It is not like the environment issue, that comes in from the outside by means of the general requirement in NEPA. The concern with radiological safety is one of the main elements of the Atomic Energy Act and is reflected all through it. AEC cannot license the facility unless it is satisfied that the plant will not have adverse radiological consequences, so they must consider this. While the AEC is supposed to promote the peaceful use of nuclear energy, it has to pay very, very careful attention, and must decide against the facility, if the risks are too high.

Senator BUCKLEY. You do not see NEPA, as you might see, extending that caution to other activities?

Mr. CRAMTON. Well, I can see that it can be viewed as such, and it surely requires consideration of that alternative.

I think as a practical matter it is unrealistic to expect an agency to all of a sudden close its doors, and say:

We will not operate as the Atomic Energy Commission, we will disband and tell Congress we do not need any money, because it is our conclusion these facilities should not be built.

Senator BAKER. Senator Buckley, would you yield?

If there is no objection from the committee, I will request the staff to obtain a transcript of the pertinent parts of our colloquy, that is, the colloquy between this witness and myself, and this witness and Senator Buckley, to prepare a summary statement on the area of the responsibility of the line agency under their legislative mandate as it may or may not be modified by NEPA, and submit that colloquy with the summary to Dr. Schlesinger of AEC, Mr. Train of the CEQ, Mr. Ruckelshaus with EPA, Secretary Morton of Interior, and Chairman Nassikas of the FPC, and solicit their comments on that point for this record.

Is there any objection to that proposal?

Senator BUCKLEY. Not from here.

Senator BAKER. Thank you.

(The letter sent to all of the above mentioned agencies and the responses thereto follow:)

U.S. SENATE,
COMMITTEE ON PUBLIC WORKS,
Washington, D.C., March 21, 1972.

HON. WILLIAM D. RUCKELSHAUS,
Environmental Protection Agency,
Washington, D.C.

DEAR MR. RUCKELSHAUS: During the recent hearings held jointly on the operation of the National Environmental Policy Act of 1969 (NEPA) by the Senate

examined and policies reconsidered. NEPA should not be viewed as requiring that the processes of government come to a standstill until all first principles are reexamined. NEPA is a constant pressure in the right direction, but it cannot in itself provide the organizational structures or the intelligence and judgment that are prerequisites for needed change.

**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., March 1972.**

**INFORMATION CONCERNING THE ADMINISTRATIVE CONFERENCE OF THE
UNITED STATES**

The Administrative Conference of the United States, a permanent, independent Federal agency, is engaged in the improvement of the procedures of Federal departments and agencies. The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers.

The Administrative Conference Act, 5 U.S.C. § 571-76, provides that the Administrative Conference shall consist of not more than 91 nor less than 75 members, of whom not more than 36 may be appointed from the private sector. The Chairman is appointed by the President for a five-year term, with Senate confirmation; he is the only member who serves on a full-time, compensated basis. All other members, including the members of the Council of the Conference, the governing board appointed by the President, contribute their services without compensation. In addition, the Conference is authorized to employ experts and consultants to research and report on particular subjects.

Since its activation in January 1968, the Administrative Conference has adopted 81 formal recommendations for improved procedures, some calling for legislation and the remainder calling for action on the part of the affected agencies. A number of additional recommendations will be considered at a forthcoming plenary session in June 1972. Many of the present recommendations have been implemented, and others are in the process of implementation. In addition, the Conference study of an issue has led in several instances to immediate acceptance of procedural improvements by affected agencies, without the necessity of a formal recommendation.

Recent recommendations deal with such important subjects as:

- Compliance by Federal agencies with the Freedom of Information Act.
- Broadened public participation in Federal administrative proceedings.
- Uniform procedures for the award of grants-in-aid, and compliance by grantees with conditions included in Federal grants-in-aid.
- Exercise of discretion by the Immigration and Naturalization Service in change-of-status cases.
- Procedures of the Food and Drug Administration for the formulation of food and drug standards.

Ten standing committees of the Conference and the staff of the Chairman's Office, with the assistance of approximately 80 highly qualified academic consultants, are engaged in a wide variety of studies at the present time.

Current studies include the following:

- FOC procedures for comparative broadcast licensing.
- The administration and coverage of the Federal Tort Claims Act.
- Devices for improved handling of citizen complaints against Federal administrative action.
- The role of the chairman in independent regulatory agencies.
- Admission and release procedures of the Veterans Administration with respect to mental patients.
- Department of the Interior procedures with respect to the leasing of Indian lands.
- Procedures for expediting complex and protracted administrative cases.
- The handling of disability benefit claims by the Social Security Administration and by other Federal agencies which administer disability programs.
- Summary administrative action pending formal administrative adjudication.
- Prosecutorial discretion in the enforcement of Federal regulatory crimes.
- The use of trial-type hearings to develop rules of general applicability.
- Conflict-of-interest problems in dealing with natural resources of Indian tribes.
- Money penalties as an administrative sanction.

Procedures of the Federal Parole Board for the grant and revocation of parole.

Informal handling of timber rights by the Department of the Interior and of grazing rights by the Department of Agriculture.

Licensing procedures of Federal banking regulatory agencies.

The use of trial-type hearings in atomic energy licensing and regulation.

Handling of environmental issues in the licensing of power plants.

Procedures and policies of the U.S. Forest Service.

Regulatory procedures of the Department of Agriculture involving crop allotments and acreage quotas.

Procedures available to losing bidders for Government contracts.

Procedures for the negotiation, settlement and suspension of protested rate filings.

Procedures for the development and use of statutorily-required statements of environmental effect.

The use of publicity as an administrative sanction.

Handling by Federal agencies of incompetents' funds.

Advice to the public from Federal administrative agencies.

Pre-induction judicial review of Selective Service System determinations.

"Adverse action" procedures for the discipline or removal of Federal employees.

Remedies for the resolution of property disputes between the United States and private persons.

A number of significant proposals have been made for the amendment and up-dating of the Administrative Procedure Act, which has now been in effect for 25 years. The Administrative Conference will devote a substantial portion of its efforts in 1972-73 to a systematic evaluation and review of proposed amendments of the APA. Systematic attention is also being given on a continuing basis to the development of minimum procedural standards applicable to the informal administrative process—the important but less visible activities of Government which significantly affect millions of Americans each year.

The offices of the Administrative Conference of the United States are located at 726 Jackson Place, N.W., Washington, D.C. 20508. The Chairman is Roger C. Cramton, formerly, Professor of Law, University of Michigan.

Senator BAKER. It is 12 o'clock, so we will recess, and continue the hearings at 1:30 this afternoon.

(Whereupon, at 12 noon the hearings were recessed.)

AFTER RECESS

Senator BAKER. The committee will come to order. The next witness is Mr. Frederick R. Anderson, editor in chief of the Environmental Law Reporter.

Mr. Anderson, welcome to the committee, and we look forward to receiving your testimony in whatever form you wish.

STATEMENT OF FREDERICK R. ANDERSON, EDITOR IN CHIEF, THE ENVIRONMENTAL LAW REPORTER

Mr. ANDERSON. Mr. Chairman, it is a pleasure to accept the invitation to appear before a joint session of these two distinguished committees. The subject of your hearings, the National Environmental Policy Act of 1969, has been extensively analyzed in various articles and editorial comments appearing in the Environmental Law Reporter. I am pleased to have this opportunity to share with you some of that analysis, and to expand somewhat upon it, regarding progress in the implementation of NEPA by the Federal agencies and especially by the courts.

I will try to touch this morning on four frontiers in the judicial implementation of NEPA that should be brought to the committee's