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On July 30, 1979, the Council on Environmental Quality finalized a set of regulations intended to guide federal agencies in the preparation of Environmental Impact Statements required by the National Environmental Policy Act. In this article, the author discusses how these regulations will affect the preparation of broad coverage Programmatic Environmental Impact Statements. The article examines how the regulations are integrated with existing case law in the area and focuses on the standards for the proper scope and timing of required impact statements.

THE PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT AND THE NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS

*Patrick E. Barney**

The Council on Environmental Quality (CEQ) recently issued a set of regulations intended to guide federal agencies in the preparation of environmental impact statements required by the National Environmental Policy Act. The new regulations are an attempt to clarify problems which arose in the course of statement preparation under the previously existing CEQ statement guidelines. One recurring concern under the old guidelines was the proper treatment of broad agency actions. This paper reviews the leading court cases illustrating the concerns involved in such situations and then examines portions of the new regulations dealing with these concerns.

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Since the National Environmental Policy Act (NEPA)[1] became law in 1970, courts and federal agencies have struggled with the question of what constitutes an adequate environmental impact statement (EIS).[2] Proper application of the EIS requirement is essential to the implementation of NEPA's stated policy of having the ". . . Federal Government . . . use all practicable means and measures . . . to foster and promote the general welfare, [and] to create and maintain conditions under which man and nature can exist in productive harmony. . . ."[3] The importance of the EIS requirement derives from the fact that it is the primary "action-forcing" provision of NEPA.[4] The procedural requirements of Section 102(2)(C) (which contains the EIS requirements) were conceived as a way of ensuring that the policies expressed in the Act were actually implemented by federal agencies.[5] Litigants seeking to enforce agency compliance with NEPA have concentrated on challenges to the adequacy of agency EISs.[6] This dependence upon the adequacy of the EIS as the basis for challenging federal agency action results from the lack of any other procedural or substantive NEPA requirements which are sufficiently clear to challenge through litigation.[7]

Early NEPA challenges focused on the adequacy of narrow agency EISs prepared for individual projects con-

1. 42 U.S.C. §§ 4321 *et. seq.* (1976).
2. Section 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C) (1976) requires "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
   (i) [T]he environmental impact of the proposed action,
   (ii) [A]ny adverse environmental effects which cannot be avoided should the proposal be implemented,
   (iii) [A]lternatives to the proposed action,
   (iv) [T]he relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
   (v) [A]ny irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."
3. 42 U.S.C. § 4331(a) (1976).
4. S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969) [hereinafter cited as S. REP. No. 91-296]; Note, *Appropriate Scope of an Environmental Impact Statement: The Interrelationship of Impacts*, 1976 DUKE L.J. 623, 624 (1976) [hereinafter cited as DUKE Note].
5. *See:* S. REP. No. 91-296, 12-20.
6. *See:* Koshland, *The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach*, 30 STAN. L. REV. 767, 774 (1978) [hereinafter cited as Koshland].
7. Wegner, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124, 132 (1975) [hereinafter cited as Wegner].

sidering only localized effects.[8] However, as NEPA challenges became more refined, the concept of a programmatic, comprehensive, or generic EIS developed.[9] One of the earliest cases to make a thoughtful consideration of the applicability of the programmatic concept was *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission.*[10] *SIPI v. AEC* involved a highly technical nuclear energy research program which consisted of many individual projects.[11] After examining the purpose behind NEPA, the court held "that NEPA requires impact statements for major federal research *programs* . . . aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment".[12] Speaking in broader terms, the court found that the AEC had taken an "unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs . . . . [and that] quite the contrary is true."[13] The court held that justification for requiring Programmatic Environmental Impact Statements (PEISs) exists in the statutory language of NEPA.

Few later cases attained as great an understanding of the concepts which suggest the need for a broad EIS as was expressed by the *SIPI v. AEC* court. Nevertheless, other courts have gareed that at times NEPA requires an EIS covering more than just one limited project. For example, in *Cady v. Morton*[14] the court found that NEPA had not been satisfied in a situation in which individual EISs evaluating individual coal mines had been prepared, but a broader comprehensive statement, reviewing the leasing of a huge tract of federal coal land which encompassed the individual mine sites, had been omitted; and in the case *Kleppe v. Sierra Club*, which may be considered the "last

8. Note, *Program Environmental Impact Statements: Review and Remedies*, 75 MICH. L. REV. 107 (1976) [hereinafter cited as MICH. Note]; Koshland, 775.
9. Hereinafter referred to as a programmatic EIS or PEIS.
10. Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973) [hereinafter cited as *SIPI v. AEC*].
11. *See* text accompanying n. 21 for more detailed discussion of SIPI v. AEC.
12. SIPI v. AEC, *supra* note 10, at 1091.
13. *Id.* at 1086-87.
14. Cady v. Morton, 527 F.2d 786 (9th Cir. 1975).

word" on the programmatic statement requirements of NEPA,[15] the Supreme Court recognized "that [Section] 102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time."[16]

The courts have made it clear that in certain situations NEPA does in fact require the evaluation of an entire government program in an EIS. However, the question which remains is, to which government actions should this broader scope evaluation be applied to fulfill the congressional goal of incorporating environmental concerns into agency decision making.[17]

This potential applicability of NEPA, specifically the EIS requirement, to broad government policy matters has not made the more limited project statement obsolete. The preparation of a site specific EIS remains, in many cases, essential for proper environmental planning. The PEIS simply expresses the need to evaluate some activities from a broader perspective. Overall program decision, which might involve numerous localized actions, may escape environmental review unless a broad scope statement is required. However, often it is not possible to distinguish what is properly called a "program" from what is a "project" for purposes of statement preparation. There are no hard rules governing what each type of statement properly includes. It is certainly possible that concerns considered in one type of statement could be evaluated as well in the other.[18] This inherent flexibility between the definitions of program and project actions has lead to difficulty in determining the proper scope of a required EIS. This softness in the distinction between programs and projects is in part to blame for the difficulty which courts have encountered in developing a set of standards by which to judge the adequacy of a PEIS.[19]

15. Kleppe v. Sierra Club, 427 U.S. 390 (1976). [hereinafter cited in text as *Kleppe*].
16. *Id.* at 409.
17. S. REP. No. 91-296.
18. SIPI v. AEC, *supra* note 10, at 1092.
19. *See* discussion of confusion in concepts at text accompanying n. 86.

The programmatic EIS issue usually occurs when the responsible federal agency has prepared an EIS for a site specific project but the agency's failure to evaluate the entire program, of which the project is but a part, in a broad coverage statement is challenged. In such a challenge, the court must decide whether NEPA requires the preparation of the additional broader statement. The court is faced with the choice of either finding the project EIS inadequate due to the lack of a program statement, and perhaps enjoining action on the project until the program statement is completed, or separating examination of the two statements and allowing the project to continue as long as its site specific EIS is adequate.[20] A decision either way produces a chorus of protest from one or the other of the interests involved in the matter.

A thoughtful examination of many of the concerns of a typical programmatic EIS challenge is found in *SIPI v. AEC*.[21] At issue was whether NEPA required the AEC to prepare a broad EIS for its Liquid Metal Fast Breeder Reactor (LMFBR) development program and, if such a statement was required, when should it be prepared. The AEC already had issued adequate project EISs for each of the facilities it had constructed and took the position that "no separate NEPA analysis of an entire research and development program [was] required".[22]

The court was faced squarely with the issue of whether NEPA had been intended to apply to broad programs or was limited to individual actions. After examining NEPA's legislative history and the case law applying NEPA's impact statement procedure to a wide variety of federal agency activities, the court concluded that the Act had been intended to have far-reaching application.[23] The court held that an

20. *See* discussion of Sierra Club v. Kleppe, at text accompanying n. 83, and also approach of new regulations at n. 118.
21. SIPI v. AEC, *supra* note 10.
22. *Id.* at 1085. The court was not faced with the question of whether to halt work on specific sites if a program statement was found necessary. Plaintiffs had not requested such relief and the only relief which the court ruled on was one for declaratory relief. *Id.* at 1082, n. 1.
23. The court also dealt with the question of when a PEIS should be prepared. See discussion in text accompanying n. 62.

overall EIS for the LMFBR program was required in addition to the individual project statements,[24] and concluded that "NEPA requires impact statements for major federal research programs, such as the Commission's LMFBR program, aimed at development of new technologies which, when applied, will significantly affect the quality of the human environment".[25] The holding focused upon the irretrievable commitment of resources which the program would entail and how such a commitment would encourage the completion of individual segments of the program which might not otherwise be completed.[26]

The United States Supreme Court also has considered a case which illustrates how the typical PEIS issue arises. In *Kleppe v. Sierra Club*[27] the Court was faced with a suit which had been brought in the District Court in the District of Columbia, but in which the fact situation involved the Northern Great Plains area of the Far West. The Sierra Club sued the Department of the Interior in an attempt to require preparation of an EIS on the Department's program for coal development in a region known as the Northern Great Plains region. The Sierra Club felt that the Department's coal development policy for the area was of great environmental importance since a large percentage of the ownership rights to the region's enormous coal reserves belong to the Federal Government. The Department had prepared individual impact statements in connection with its approval of each of four mining sites in one small portion of the larger region. In addition to the individual impact statements, the Department had prepared a nationwide EIS evaluating its entire range of coal-related activities. The Sierra Club, however, claimed that by issuing coal leases, granting rights-of-way, and taking other actions to enable the development of the area's coal by private companies, the Department was involved in a major action affecting the entire region. Therefore, the Sierra Club contended that NEPA required the preparation of an EIS of regional scope.

24. SIPI v. AEC, *supra* note 10, at 1088.
25. *Id.* at 1091.
26. *Id.* at 1090.
27. Kleppe v. Sierra Club, *supra* note 15.

The Court was faced with the problem of determining whether an EIS in addition to those of national and project scope was required to evaluate the regional impact of the Department's coal program. In essence, the court had to decide whether NEPA required the preparation of a statement for an area which had been partially evaluated in the limited site specific EISs and evaluated in total in the broad national coal EIS. *Kleppe* points up the difficulty in determining what is the proper extent of a NEPA evaluation. The Court eventually ruled that no regional PEIS was required and that the completed EISs fulfilled the demands of NEPA.[28]

The second important way in which consideration of a programmatic EIS can arise is in effect the inverse of the first situation. It involves situations in which an adequate EIS has been prepared on an overall program and the agency's failure to prepare a site specific EIS is challenged. In *Natural Resources Defense Council, Inc. v. Energy Research and Development Administration*,[29] the court was faced with this type of situation. Plaintiff challenged ERDA's decision not to prepare individual EISs for nuclear waste tanks which it was preparing to construct, stating that the programmatic statements which had been prepared on the entire waste storage program were insufficient to satisfy NEPA. ERDA argued that "no site-specific EISs were necessary because the environmental impacts of these projects had been or were being analyzed in separate programmatic statements. . . ."[30]

The court did not atempt to deal with the difficult issue of deciding how large an area, or what portion of an agency program, should properly be considered in a single EIS. Rather, the court examined the programmatic statements which ERDA had prepared to determine whether they had

28. The court reasoned that a regional development program had not been proposed by the Department and that a statement could be required when the program had not been "proposed" by the agency involved. *See* discussion of Kleppe v. Sierra Club decision at n. 72.
29. Natural Resources Defense Council, Inc. v. Energy Research and Development Administration, 451 F. Supp. 1245 (D.D.C. 1978) [hereinafter cited as *NRDC v. ERDA*].
30. *Id.* at 1256.

considered sufficiently all of the environmental impacts associated with the construction of the individual storage facilities. Finding that the overall statements did not contain adequate evaluations of the individual facilities, the court ruled that ERDA was required to prepare "site specific" EISs for the construction of the new facilities. The approach taken by the court, evaluating whether all impacts are considered in some statement, whatever its form, is arguably superior to the approach of trying to define a program and then requiring an EIS of corresponding coverage found in the *SIPI v. AEC, Kleppe*, type cases. Attempts to determine what is properly a project or program at the expense of losing sight of whether all environmental impacts are considered in one EIS or another fails to effectuate the goals of NEPA.[31]

The development of the programmatic EIS has spawned numerous attempts by commentators[32] and courts[33] to devise a separate set of standards by which to evaluate such statements. A usable set of PEIS standards must focus primarily upon two considerations. The first consideration is the proper scope of a program EIS. The second is the proper time for preparation of the PEIS. Scope refers to the extent of agency activities which are properly considered within a statement. For example, in *Kleppe* the issue of scope required a determination of whether NEPA required a statement on the regional level as well as those which had already been prepared on the local and national levels. Scope is essentially a question of what extent of an agency activity is properly evaluated in an EIS. In considering proper scope, courts often have concentrated on defining the size of the agency action and then requiring a statement of the same extent rather than ensuring that all environmental impacts are considered.[34] This approach has weakened the effectiveness of many of the court devised scope tests.

31. *See* discussion of conceptual problems involved in usual approach to PEIS at text accompanying n. 86.
32. *See* Koshland *supra* note 6, Wegner *supra* note 7, DUKE Note *supra* note 4 and MICH. Note, *supra* note 8.
33. *See* SIPI v. AEC, *supra* note 10, Kleppe v. Sierra Club, 427 U.S. 390 (1976) and cases cited therein.
34. *See* discusion at text accompanying n. 29 considering the court's approach in NRDC v. ERDA.

Courts have developed several approaches in attempting to deal with the scope issue. The majority of courts have applied variations of the *independent utility test.*[35] The source of this test is found in NEPA cases considering what form of EIS was required for highway construction projects.[36] The concerns with which the highway cases attempted to deal are evident in *Indian Lookout Alliance v. Volpe.*[37] *Indian Lookout* involved a situation in which the Iowa State Highway Department had developed a plan for construction of approximately 2,000 miles of highway. This highway plan, however, remained highly tentative. The highway department requested federal funding for a seven-mile segment of the plan which they were prepared to build.[38] Plaintive environmentalists contended that, if the project received federal funding, the entire 2,000 mile construction plan required an environmental impact statement. The lower court had concluded that an impact statement limited in scope to an improved fourteen mile segment of the highway was proper.[39] The appellate court was faced with the classic PEIS problem of proper scope: "[W]hat is the minimum appropriate length of a highway project to be environmentally considered under [NEPA]. . . ."[40] The court realized that allowing preparation of an EIS limited to a relatively small segment of the highway construction would ignore the cumulative environmental impact of the entire system and, furthermore, such small segment planning would foreclose consideration of alternatives.[41] Balancing these concerns was the realization that requiring an EIS on the entire system would not only be uneconomical, but would fail to provide useful facts on a system which largely remained in the planning stage.[42] The court concluded that if a proposed segment of highway could be said to have "independent utility", then an EIS limited

35. Wegner *supra* note 7, at 141.
36. *See e.g.*, Daly v. Volpe, 514 F.2d 1106 (9th Cir. 1975); Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975); Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (D. Conn. 1972).
37. Indian Lookout Alliance v. Volpe, 484 F.2d 11 (8th Cir. 1973) [hereinafter cited at Indian Lookout].
38. *Id.* at 13.
39. Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972).
40. Indian Lookout, *supra* note 37, at 13.
41. *Id.* at 14.
42. *Id.* at 16.

to that segment was appropriate.[43]

Although the *Indian Lookout* court did develop at least some form of a test to determine the proper extent of a highway to be evaluated in an EIS, it failed to set a scope standard useful to later courts and agencies considering different types of agency action or even similar highway situations. In addition, despite the court's recognition of environmental planning problems, its "independent utility/ major termini" test is too rigid to allow for the complete evaluation of environmental impacts in all situations.

Later EIS cases, searching for a meaningful standard, followed the lead of the highway cases and applied independent utility reasoning in contexts other than highway construction.[44] The approach of the courts in these cases has been to hold that the scope of the project EIS is adequate to satisfy NEPA if the action has independent utility, and to require a broad program EIS only where the individual projects do not have such independence.[45] This independent utility reasoning contains a logical error which reduces the effectiveness of the EIS in agency planning and defeats the purpose of NEPA. The fact that a project is sufficiently independent of other actions to be evaluated in a separate EIS has no bearing on whether the environmental impact of the entire program, of which the independent action is but a part, will be fully evaluated. This independent utility test fails to consider that the total impact of a program may exceed the sum of the impacts associated with the individual projects making up the program. Failure to require a single EIS covering all facets of a program may mean that these cumulative impacts are never discussed, and the effectiveness of long range environmental planning is inhibited.[46]

43. The court implied that the test for independent utility would be a determination that the ends of the highway were at major termini. *Id.* at 19.
44. *See e.g.*, Trout Unlimited v. Morton, 509 F.2d 1276 (9th Cir. 1974) (an EIS need not be prepared to include both the initial construction of a dam and the later disposal of half the created reservoir capacity); Sierra Club v. Stamm, 507 F.2d 788 (10th Cir. 1974) (programmatic EIS was not required for the Central Utah Reclamation Project as long as an EIS was prepared for each independent unit of the project).
45. *Id.*
46. *See* discussion of cumulative impact test at text accompanying n. 48 and Wegner, *supra* note 7, at 147-58.

The test also fails to consider a project's implications for shaping future decisions.[47] Allowing a series of projects to proceed on the basis of individual statements means that completion of the first project will push the scales in favor of completing each additional associated project, since certain of the associated costs have already been incurred with the development of the first project. Each additional project may add only a small increase in harm to the environment, but the total impact may be severe. In such situations, if the entire project had been examined before allowing an individual project to proceed, the environmental costs may have been sufficient to stop the program, or at least force a consideration of alternatives. The independent utility test fails to consider the cumulative impact of an entire program or the tendency of one completed project to tip the scales in favor of further projects. But, probably more importantly, it fails to provide a clear guide to agency planners of what is proper EIS scope.

Some courts have realized that the *cumulative impact* of several actions may be greater than the sum of the individual impacts and have required preparation of a program EIS on that basis.[48] The *cumulative impact* analysis is a more sophisticated approach than the *independent utility* test since it is based on a determination of what environmental impacts may occur.

The test incorporates the realization that the overall environmental impact of a series of insignificant agency actions may in sum be significant and thus justify preparation of a PEIS. The cumulative impact test does not attempt to determine what is the proper extent of an agency action to be considered in a statement. Rather the approach highlights a factor, overall impacts, which should be evaluated as part of the scope determination. In this sense it is superior to the independent utility test which concentrates on finding a justifiable limit to statement scope rather than attempting to ensure that all environment aspects are considered.

47. *See* discussion of environmental concerns text accompanying n. 60.
48. Cady v. Morton, *supra* note 14 and Kleppe v. Sierra Club, *supra* note 15.

On the whole, the cumulative impact test is responsive to environmental concerns.[49] However, courts applying the cumulative impact analysis can be criticized for failing to indicate what that cumulative impact is and what relationship exists between the adequacy of the project EIS and the need for a program statement.[50]

Another judicial approach, which is often used in combination with cumulative impact reasoning, concentrates upon the *irretrievable commitment of resources* which implementation of a particular action will involve. Such an approach conforms to the requirements of NEPA[51] and is responsive to environmental considerations generally.[52]

The leading case applying this approach is again *SIPI v. AEC*.[53] The court required the AEC to prepare an EIS covering its entire LMFBR program[54] reasoning that the massive funding and long-lead time required to develop new energy technology would effectively foreclose alternative energy sources which might be considered in the future.[55] In effect, the court felt that the current commitment of resources to the LMFBR program would make it impossible to switch funding to alternative energy technology at some later date since such an action would require the abandonment of the time and resources already expended on the LMFBR program.[56] "The manner in which we divide our limited research and development dollars today among various promising technologies in effect determines which technologies will be available, and what type and amount of environmental effects will have to be endured, in the future when we must apply some new technology to meet the projected energy demand."[57]

49. *See* discussion of environmental concerns at text accompanying n. 60.
50. In other words, there may be situations in which the sum of the environmental impacts of a number of projects is properly considered if each project is evaluated individually. To avoid duplication of the EIS process, courts should explain what additional impact will occur from a series of projects which is not considered in the individual project statements.
51. NEPA requires that agency EISs contain an evaluation of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action" 42 U.S.C. § 4332 (2) (C) (1976).
52. *See* discussion of environmental concerns at text accompanying n. 60.
53. *See* discussion at text accompanying n. 10 and 22.
54. *Id.*
55. SIPI v. AEC, *supra* note 10, at 1090.
56. *See* discussion in DUKE Note, *supra* note 4, at 634.
57. SIPI v. AEC, *supra* note 10, at 1090.

The court feared that by allowing individual projects to proceed without an evaluation of the entire LMFBR program, less environmentally harmful alternatives would be dismissed as a result of the commitment already made. What the court hoped to produce was a consideration of alternative energy programs before massive investments of time and money had been made in the LMFBR program and at a time when other approaches to energy development were still viable alternatives.[58]

The *SIPI v. AEC* opinion pointed up the need to look at a program with a broad enough perspective to understand all of its implications for environmental impact. However, having pointed out that the failure to evaluate agency actions on a broad enough scale could lead to foreclosure of alternatives, the court failed to develop a test which would indicate when such a situation existed other than a "I know it when I see it" type of reasoning. If we consider the situation in *Kleppe*, the *SIPI v. AEC* reasoning tells us that the Department of Interior's coal leasing program had to be evaluated at a level broad enough to ensure that alternative approaches are considered before their implementation is effectively foreclosed. However, *SIPI v. AEC* fails to provide a basis for determining what is the proper scope for statements made in such evaluations. The *SIPI v. AEC* reasoning applied to *Kleppe* could as easily lead to a holding that a regional statement was required or, instead, a state-wide statement, or perhaps a river basin statement. Despite this weakness, the *SIPI v. AEC* opinion did point up one more factor which should be considered in determining the scope of a PEIS.

The numerous attempts to develop a standard approach to the question of proper EIS scope is reflective of the difficulty of the problem. To date, no single, consistently useful, approach has been developed. Agencies are faced with the problem of complying with inconsistent standards of

58. For other cases examining the foreclosure of alternatives analysis, *See* Atchison, Topeka, & Santa Fe Ry. v. Calloway, 382 F. Supp. 619 (D.D.C. 1974); Society for Protection of New Hampshire Forests v. Brinegar, 381 F. Supp. 282 (D.N.H. 1974).

scope and with little guidance as to which one ultimately will be used to judge their NEPA compliance.

Any test of EIS scope should provide a clear guide to agencies of what a statement should include. In addition, the test should reflect the concerns of both those who prepare statements and those anxious to protect the environment. The agency position is comparable to that taken by any business or individual who is forced to comply with a difficult and potentially costly set of government requirements which eventually may lead to extensive litigation. Ever mindful of projects which divert funding from their assigned missions, agencies tend to view an EIS as an unnecessary expenditure of funds. The broader the statement required, the greater the cost.

An agency concern, equally as important as cost, is the restriction upon agency action which the EIS requirements impose. Federal agencies often function in incremental steps with no overall plan. This is in direct conflict with the theory behind proper preparation of the PEIS. Requiring agencies to prepare broad evaluation statements forces them to function in an unaccustomed manner and is generally viewed, by the agencies, as inhibiting agency effectiveness and efficiency.[59]

Presently, agencies are left in a position in which they have no clear test of what constitutes proper scope for an EIS and their natural tendency is to press for as restrictive an interpretation of statement scope as is reasonably possible. The predictable result is agency resistance to broad program statement requirements.

These agency concerns and fears are matched by equally prominent concerns on the part of environmentalists, some of which are reflected in the court approaches discussed

59. For example, water development projects on the Colorado River should arguably be evaluated on a programmatic scale by the agency primarily responsible for them, perhaps the Corps of Engineers or the Department of the Interior. However, such a requirement certainly would impede agency progress in approving and guiding new dams and other river-use projects. *See* discussion in Wegner, *supra* note 7, at 128.

earlier. The environmental position can be summarized as vehement opposition to overly narrow EISs which permit agencies to function without adequately considering the environmental impact of their decisions. When decisions are made in a step-by-step manner, rather than by considering the overall effects of the final outcome, less damaging alternatives are easily foreclosed.[60] Such short range planning means that less environmentally harmful approaches are not considered and also that any major alteration in approach is made impracticable by the costs already sunk into the program and which would be lost in any change in the approach.

In addition to foreclosing less environmentally harmful alternatives, statements which are too restricted in scope ignore the cumulative impacts of a series of projects making up a program.[61] Narrow statements may show that the harm associated with each segment of a program is reasonable. However, the narrow statements may fail to indicate that the overall impact, from all of the projects, will be unacceptable.

In addition to proper statement scope, the PEIS problem involves the equally important question of proper timing. In considering when a statement should be prepared, one must remember that a statement is not an end in itself. Rather, it is intended to aid in agency consideration of environmental impacts associated with government actions. To serve this function, a statment must be prepared at a point in the agency planning process where it can illuminate potential environmental problems. A statement should be used to help make agency decisions. It was not intended to be used as post justification for decisions already made. The timing question, which extends beyond the realm of the programmatic statement question, comes down to the question of when statements should be required in order that they will be as helpful as possible to agency decision makers.

60. *See* discussion of irretrievable commitment of resources at text accompanying n. 51.

61. *See* discussion of cumulative impact tests at text accompanying n. 48.

Once more, as in the case of proper statement scope,[62] the court in *SIPI v. AEC* provided an illuminating discussion of the timing issue. Discussing the central concerns of the timing issue, the court said ". . . we are pulled in two directions. Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decision making process."[63] The court then proceeded to develop a test which balanced the considerations pressing for early preparation of a statement against those which would favor delayed preparation. The court sought a formula which would provide an EIS at that point in time when it would be most helpful to agency decision-makers.

The court applied a four-factor balancing test to determine whether preparation of an EIS was timely. The factors which the court considered were identified as the likelihood that a program would actually be developed,[64] the extent to which information is currently available on the environmental effects of proceeding with the proposed program,[65] the extent to which irretrievable commitments of resources are being made,[66] and finally, the severity of the environmental impacts which would result if the action were implemented.[67] After examining these factors, the court concluded that there was "no rational basis for deciding that the time is not yet right for drafting an impact statement on the overall LMFBR program. Consideration of each of the facts set out in our balancing test point in the direction of drafting an impact statement now."[68]

The court's test attempts to devise a flexible method of determining when a statement should be prepared. However, the resulting test is so flexible that it fails to provide any real guidance. Each factor which is incorporated into the test is

62. *See* discussion at text accompanying n. 53.
63. SIPI v. AEC, *supra* note 10, at 1094.
64. *Id.* at 1096.
65. *Id.*
66. *Id.* at 1098.
67. *Id.*
68. *Id.* at 1095-96.

one of degree. The court fails to reveal what degree must be reached for each factor before a statement is required. Furthermore, there is no explanation of the relationship between the factors and whether or not a statement should be begun on the basis of less than all of the factors.

The court of appeals applied this same balancing test in the case of *Sierra Club v. Morton.*[69] In that case, the court again ruled that the time was proper for preparation of a programmatic EIS. However, the *Kleppe* case (renamed *Kleppe v. Sierra Club*) was appealed to the Supreme Court which pointedly rejected the lower court's determination of proper statement timing by using the balancing test. "A court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement *should be prepared.*"[70]

The Supreme Court's rejection of the *SIPI v. AEC*-type balancing test probably was based upon a fear that such a test would result in an excessive number of decisions requiring preparation of EISs. The court was anxious to avoid a test which would require the development of a statement, and the expenditure of funds necessary for the development of such a statement, in situations in which agency action had not progressed sufficiently that it could be considered as likely to occur. In effect, the court was faced with the same problem as the *SIPI v. AEC* court, but rejected *SIPI v. AEC's* balancing approach and, instead, ruled that the timing issue was to be decided upon a strict reading of the statutory language in NEPA.[71]

Kleppe[72] is the only Supreme Court opinion to provide an in-depth consideration of the PEIS issue. Although the *Kleppe* opinion is informative on certain aspects of the programmatic question, overall it tends to confuse rather

69. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).
70. Kleppe v. Sierra Club, *supra* note 15, at 406.
71. *See* discussion of major policy pronouncements contained in Kleppe v. Sierra Club at text accompanying n. 76.
72. *See* explanation of fact situation at text accompanying n. 27.

than to enlighten. Since this is the major pronouncement by the highest court in the land on the programmatic question, it is important to examine the holdings of the case prior to an evaluation of the new CEQ regulations.

Most significantly, the Court clearly stated its approval of the interpretation of NEPA which would require a broad, programmatic EIS in certain situations. The court found that a number of proposed actions could require an overall EIS if the actions would have a "cumulative or synergistic environmental impact."[73] To this extent, the Court agreed with the plaintiff environmental organization bringing suit in *Kleppe*. However, the Court did not agree that the individual actions taken by the Department of Interior related to coal development in the Northern Great Plains region were such as to require a PEIS. The plaintiffs had contended that a PEIS was required for all coal-related projects in the region "because they [were] intimately related."[74] The Court ruled instead that the determination of the proper scope of an EIS was to be based upon *agency* consideration of relevant factors such as "the interrelationship among proposed actions and practical considerations of feasibility."[75] The Court concluded that evaluation of these factors was a highly technical and involved process and one which the involved agency was best equipped to handle. Therefore, the Court felt that it was proper to give a high degree of deference to an agency determination of proper statement scope and ruled that a regional EIS was not required.

The *Kleppe* opinion considered the question of timing of a PEIS as well as the question of proper statement scope. The Court concluded that the question of proper statement timing could be resolved by a reading of the statutory language in NEPA. Section 102(2)(C) of NEPA requires an impact statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environ-

73. *Id.* at 410.
74. *Id.* at 408.
75. *Id.* at 412.

ment."[76] Basing its determination of the timing issue squarely upon this statutory language, the Court ruled that a PEIS is not required unless there is an agency *proposal* for the action or group of actions in question.[77] The Court found that, in the *Kleppe* situation, local and national proposals had been developed and that these required impact statements (which had been prepared). The Court, however, found that no proposal existed for an action of regional scope as the plaintiffs had contended.[78] Therefore, an EIS of regional scope was not required.

This strict statutory interpretation of the impact statement timing issue overruled the balancing approach to timing which the court of appeals had taken.[79] The court of appeals did not find that there was a regional program being developed by the Department of Interior, rather the lower court had concluded that there was a contemplated plan or program. The lower court, proceeding upon the premise that it was proper to require preparation of an impact statement at some point prior to the formal report on a proposal, applied its four-part balancing test and concluded that the time was right for preparation of an impact statement if the federal agency intended to continue its control of coal development in the region. The Supreme Court flatly rejected this approach. "The Court [circuit] reasoning and action is required, and find no support in the language or legislative history of NEPA. The statute clearly states when an impact statement is required and mentions nothing about a balancing of factors."[80] Relying upon an earlier NEPA case,[81] the Court determined that the statutory language of NEPA required an EIS only when a *proposal* had been put forth.

Although the Supreme Court invalidated the lower court's balancing test approach, it appears likely that the

76. 42 U.S.C. § 4332(2)(C) (1976).
77. Kleppe v. Sierra Club, *supra* note 15, at 399.
78. *Id.* at 400.
79. Sierra Club v. Morton, *supra* note 69. The court of appeals had applied the same balancing test to determine whether the time was right for a PEIS as it had applied in SIPI v. AEC. *See* discussion at text accompanying n. 63.
80. Kleppe v. Sierra Club, *supra* note 15, at 405.
81. Aberdeen & Rockfish Railroad Co. v. SCRAP, 422 U.S. 289, 320 (1975).

Court disagreed more with the result of the balancing test than its actual application. Both courts were concerned with developing a method of timing which would ensure that statements were prepared early enough to adequately evaluate environmental impacts, but yet not require statements for ideas which would never develop beyond the discussion stage. The court of appeals approached this problem with its balancing test. The Supreme Court found its solution in the proposal language of the NEPA statute. Theoretically, requiring an EIS at the time of an agency proposal is reasonable. However, the court in *Kleppe* seems to have overlooked the fact that no uniform definition of proposal exists.[82] The Court's failure to define proposal, or to allow courts to make their own assessment of when an EIS should be prepared, in large part leaves courts in the position of having to accept agency determinations of what is a proposal (and so requires an EIS) and what is only contemplated.

A third important aspect of the *Kleppe* decision involves the Court's opinion that projects, which have individual EISs, may proceed under certain circumstances even though a PEIS has not been prepared for the entire program of which the projects are a part.[83] The court noted that individual projects with proper EISs should be allowed to proceed even though a broader statement covering several projects had not been prepared, unless individual statements inadequately analyzed the environmental impacts of, or alternatives to, the specific projects. If it was later determined that a broad program statement should be prepared, then that statement would take into consideration environmental effects of the projects which already had been initiated.[84]

Although there may be situations in which projects may proceed without harm before the overall program EIS

82. Consider that the court was able to state "that the mere 'contemplation' of certain action is not sufficient to require an impact statement. . . .", Kleppe v. Sierra Club, *supra* note 15, at 404, and then base its determination of whether a statement was required upon the existence of a proposal. Without the court providing some sort of explanation, it is difficult to see the distinction between a contemplated action and a proposal.
83. *Id.* at 407 n. 16 and at 414 n. 26.
84. *Id.*

is completed, the *Kleppe* Court failed to adequately state the considerations involved in defining such projects. The Court's opinion does note that when the program statement is prepared it should incorporate a consideration of the cumulative environmental effect of the existing projects, as well as the proposed projects.[85] While this reasoning touches upon the cumulative impact aspect of proper EIS preparation, it fails to consider the problem of incremental decision making. In a situation in which some projects are allowed to proceed before an overall evaluation of the program is made, the limited environmental costs of each project may be so insignificant as to have little or no effect upon the methods selected to implement the program. However, were the environmental costs of the entire program evaluated prior to the initiation of the individual projects, those costs could prove sufficient to halt the program or alter it. Considerations such as these may have been intended by the Court when it spoke in terms of statements considering the cumulative impact of proposals. However, this is not made clear.

The treatment of the scope and timing issues in the context of the programmatic EIS reveals a failure to develop useful approaches to these difficult problems. It appears that in large part the difficulty derives from the continuing attempt to develop standard, methodical approaches which are applicable to every situation when, in fact, the scope and timing concerns require a case-by-case consideration of what approach will best serve the aims of NEPA. Courts have attempted to define the scope of a program and then require an EIS of corresponding coverage rather than ensuring that all impacts are evaluated somewhere. In fact, there is no systematic test for determining whether a set of agency actions are properly a program or merely individual projects. Furthermore, if a program exists, there is no exacting way of determining just which agency actions should be included as part of that program. This is the problem which the Court in *Kleppe* faced. It was presented with the situation in which there were no obvious bounds for the scope of the EIS

85. *Id.*

analysis.[86] The *Kleppe* Court faced this problem by concluding that the extent of a program, and therefore the extent of the EIS, was what the agency said it was.

In much the same way that courts have failed to deal adequately with the question of proper PEIS scope, they have failed to provide a workable standard of when such a statement should be required. The *Kleppe* Court attempted to resolve the problem by once more giving deference to agency determination of proper timing. Here again, the court seems determined to find a concrete standard which will be applicable to every situation and hit upon the statutory proposal language of NEPA as an answer. As noted earlier, this presents the problem of defining a proposal which *Kleppe* implies should be left to the agency. The courts have failed to provide agencies with useful standards for determining the proper scope and timing of broad environmental impact statements. They have become bogged down in attempts to develop hard and fast rules which are applicable to every situation. In doing so, they have often neglected to ensure that NEPA's goal of including environmental factors in agency decision processes is met and thus the goal of protecting the environment to the fullest extent possible is slighted. The new Council on Environmental Quality Regulations are faced with the difficult task of providing rules definite enough to give agencies guidance in preparing EISs while at the same time remaining flexible enough to ensure adequate protection of the environment in the myriad of activities in which the federal government is involved.

The CEQ's new NEPA Regulations became effective on July 30, 1979. These regulations, which require mandatory compliance by federal agencies, replace the Council's NEPA Guidelines which had been in effect prior to July 30th. In addition to being binding upon agency decision-makers, the new Regulations address all nine sub-divisions of Section 102(2) of NEPA rather than just the EIS provision covered by the old Guidelines. President Carter directed the Council

86. *Id.* at 402 n. 14.

to develop these new regulations in Executive Order 11991 issued on May 24, 1977.[87] The President requested that the regulations be ". . . designed to make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives."[88]

The new regulations[89] represent an extensive revision of the old guidelines. Despite this extensive revision, and the long-raging debate over the programmatic EIS issue, the regulations make no attempt to deal with the programmatic issue separately or outside of the requirements for an adequate EIS of any scope. This approach seems well thought out and helpful. It represents the realization that, for the purposes of a NEPA EIS, agency programs can be dealt with in the same manner as individual projects. It is unnecessary to develop a separate set of rules governing programmatic statements. This approach underscores the fact that it is not particularly important in what form environmental impacts are evaluated, as long as they are properly evaluated.[90]

Having concluded that the agency action in question is federal,[91] and significantly[92] affects[93] the quality of the environment,[94] and therefore requires an EIS, we can then consider how the new regulations deal with the questions of proper statement scope and timing.

The CEQ has sought to ensure that agency statements will be prepared at a time which will ensure that they become an integral part of the agency decision making process. The statement should aid in the making of agency decisions rather than being used as a mechanism for post-decision justification.[95] The CEQ's approach to proper statement

87. Exec. Order No. 11991, 42 Fed. Reg. 26967 (1977).
88. *Id.* Sec. 3(h).
89. All citations to the new regulations are to the relevant section reprinted in 40 C.F.R. (1980).
90. *See* SIPI v. AEC, *supra* note 10, at 1092.
91. 40 C.F.R. § 1508.18 (1980).
92. 40 C.F.R. § 1508.27 (1980).
93. 40 C.F.R. § 1508.3 and § 1508.8 (1980).
94. 40 C.F.R. § 1508.4 (1980).
95. 40 C.F.R. § 1502.2(g) (1980).

timing is based upon the *Kleppe* decision. A reading of that opinion leaves one with the impression that an agency need not consider preparing an EIS until such time as it has formally proposed an action. In effect, this seems to mean that an agency is given a free hand to make its planning decisions and then justify these decisions, in violation of the goals of NEPA, with an EIS. The regulations begin with the Supreme Court determination that an agency need not have a final statement ready until such time as it proposes an action[96] and modifies the Court's apparently restrictive interpretation of EIS timing by defining proposal and by adding the concept of a preliminary or draft EIS.

A proposal exists at that point in time when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated."[97] This definition embodies the dual considerations involved in any determination of proper statement planning. First, it states that a proposal exists at that point when decisions are being made, in essence at a point in time early enough that preparation of an EIS could play an integral part in the decision process. Secondly, the definition requires that the effects of an agency action can be meaningfully evaluated before a proposal can be said to exist. It is also important to note that the definition goes on to state that a proposal "may exist in fact as well as by agency declaration. . . ."[98] This means that courts may rule that the time is right for the preparation of a statement in situations in which agencies have not declared a proposed action. This is despite language in *Kleppe* which could be read as giving agencies the sole power to determine when a proposal does, in fact, exist.

After defining a proposal as existing at the time an agency is preparing to make a decision, the regulations tie in the EIS requirement by requiring a two-step statement procedure. The CEQ requires that the EIS process be timed so that a final statement will be completed in time for

96. Kleppe v. Sierra Club, *supra* note 15, at 406.
97. 40 C.F.R. § 1508.23 (1980).
98. *Id.*

inclusion in any report or recommendation upon a proposed agency action.[99] The CEQ then ensures that agencies will consider environmental concerns prior to the report stage by requiring preparation of a *draft* EIS as a preliminary step in the development of the final statement.[100] The Regulations require that there be at least forty-five days allowed for comment on the draft statements before issuance of the final environmental impact statement.[101] Furthermore, the Regulations state that the entire impact statement preparation process shall commence as close as possible to the time an agency is developing or is presented with a proposal.[102] In effect, the regulations ensure that the environment will be considered during the decision-making process, not by changing the point at which the final EIS is required, but by requiring an elongated process leading up to the completion of any EIS.

By requiring an agency to develop a final EIS only through a rather lengthy process and requiring that the process, and thus the final EIS, be completed in time for inclusion in any report on a proposal for agency action, the regulations have ensured the consideration of the environment during the decision-making process. Since the regulations make no timing demand upon the final EIS, other than that it be complete at the time of a report of recommendation on an agency proposal, they do not conflict with the *Kleppe* opinion. The Council has merely developed an extensive statement process necessary for the preparation of a final EIS and thus required agencies to begin work on the statement before the final report stage is reached.[103]

Not only do the new regulations not violate the timing determination which the *Kleppe* court reached, but it appears that they incorporate the considerations which led the *Kleppe* court to make such a restrictive reading of NEPA.

99. This coincides with the Kleppe v. Sierra Club holding on the timing issue.
100. *See* 40 C.F.R. § 1502.9(a) (1980) for the requirements of the *draft* EIS.
101. 40 C.F.R. § 1506.10(c) (1980).
102. 40 C.F.R. § 1502.5 (1980).
103. *See* dissenting opinion in Kleppe v. Sierra Club, *supra* note 15, at 415, expressing the opinion that a statement is useful only if it is prepared prior to the report stage.

The probable motivation for the court interpretation was a fear that statements would be required at too early a point in the agency decision process. The two-stage definition of a proposal which is set out in the regulations[104] clearly was intended to require that statements be prepared only for those agency actions which are likely to develop to fruition.[105]

The new regulations approach the issue of proper statement scope with the presumption that no distinction need be made between programs and individual projects. Therefore, the regulations provide only one set of rules governing statement scope. These rules are aimed at requiring the consideration of all important environmental impacts at some point, rather than at determining that certain types of impacts should be considered in either broader or narrower statements.

The regulations emphasize that EISs are required for broad agency actions impacting upon the environment, as well as more narrowly defined actions. The regulations specifically state that impact statements may be required for broad agency actions or new programs.[106] The Council concludes that federal actions which are the potential basis of an EIS tend to fall into one of four categories.[107] These categories include (1) adoption of official policy such as rules or regulations, (2) adoption of formal plans which prescribe alternative uses of federal resources and which will guide future agency actions, (3) adoption of programs such as a group of actions to implement a specific policy, and (4) approval of specific projects.[108] These categories make it clear that agency actions of broader scope than specific projects may require an EIS.[109]

104. 1) the agency has a goal it is attempting to reach and 2) the effects of alternative means of accomplishing that goal can be meaningfully evaluated. *See* 40 C.F.R. § 1508.23 (1980).
105. *See* 43 FED. REG. 55989 § 1508.23, comment 2, expressing the Council's intent that the regulations not be read to mean that a proposal exists at a point too early in the planning process to make adequate evaluation possible.
106. 40 C.F.R. § 1502.4 (1980).
107. 40 C.F.R. § 1508.18(b) (1980).
108. *Id.*
109. *See* 40 C.F.R. § 1502.4 (1980) generally.

The regulations require that the subject of each EIS be properly defined in that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement."[110] To assist in meeting this requirement, the Council has included a section which explains the considerations which should play a role in the proper determination of what to include in a single statement.[111] The section explains that the agency's determination of proper statement scope should be based upon an analysis of three types of "actions", three types of "alternatives", and three types of "impacts" which may be involved in an agency action.

From the standpoint of the programmatic problem, the discussion of the three types of actions which should be considered in setting statement scope is most useful. The first type of action, connected actions, includes actions which (1) automatically trigger other actions, (2) cannot proceed unless other actions are taken, and (3) are inter-dependent parts of a larger action. The description of connected actions shows the broad application to agency programs and related actions which the CEQ intends the EIS requirement to have.

The second type of action which agencies should consider, and probably the most important from the perspective of the PEIS situation, are cumulative actions. This section includes actions which, when viewed with other proposed actions, have cumulatively significant impacts. The Council states that such cumulative impacts can result from the "incremental impact of the actions when added to other past, present, and reasonably foreseeable future action. . . ."[112] The regulations also make clear that cumulative impacts requiring evaluation can result "from individually minor but collectively significant actions taking place over a period of time."[113] By making clear that the overall or cumulative impact of several agency actions can be sufficient to justify

110. *Id.*
111. 40 C.F.R. § 1508.25 (1980).
112. 40 C.F.R. § 1508.7 (1980).
113. *Id.*

an EIS, the regulations deal with one of the more frequently overlooked concerns which a complete statement should speak to.

The final form of actions are those which have similarities that provide a basis for evaluating their environmental consequences together. Examples of such similarities are common timing or geography.

A determination that agency actions are either "connected" or "cumulative," as judged by the stated criteria, requires that such actions be evaluated in one statement. A finding that agency actions are similar does not require evaluation in one statement but such a unitary evaluation is encouraged if it appears to be the best way to assess potential environmental impacts.

The regulations also attempt to avoid the foreclosure of less environmentally harmful alternatives by the commitment of resources to activities whose environmental implications have not been fully considered. Agencies are specifically directed not to "commit resources prejudicing selection of alternatives" before making a decision which takes into account the possible environmental impacts, on the preferable means of achieving its goal.[114] More specifically, the regulations speak to the technological development situations such as were involved in *SIPI v. AEC*. Statements on such actions must be prepared and be available "before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives."[115]

The Regulations make clear that the contents of any individual statement may depend upon its relationship to other statements and the contents of those statements. The Council encourages preparation of statements of varying coverage on the same subject. This approach, known as tiering,[116] means that broad actions such as programs or

114. 40 C.F.R. §§ 1502.2(f) and 1506.1(a) (1980).
115. 40 C.F.R. § 1502.4(c)(3) (1980).
116. 40 C.F.R. § 1508.28 (1980).

policy decisions could be considered in statements of broad scope, while narrower statements analyzing specific components of the broad agency action subsequently would be prepared. Tiering is representative of the flexible attitude to scope which the new regulations take. The emphasis is not upon determining what matters should be evaluated in what type of statement, but rather upon ensuring that all impacts are evaluated somewhere.[117] This flexible approach echoes the sentiments of the *SIPI v. AEC* court: "So long as the . . . NEPA analysis of the overall program is prepared, we think it of little moment whether that analysis is issued as a separate NEPA statement or whether it is included within a NEPA statement on a particular facility."[118]

The regulations consider the problem which often arises in PEIS disputes of whether individual actions may proceed before the completion of a necessary program statement.[119] The CEQ has determined that projects may proceed prior to the completion of the program statement in certain circumstances. To proceed, the project in question must be justified independently of the program, have been evaluated by an adequate EIS and, most importantly, must not prejudice the ultimate decision on the program.[120] These requirements greatly limit the projects within a program which can proceed prior to a PEIS and make it clear that such projects will be allowed only when they do not involve the risk of creating unevaluated environmental impacts.

CONCLUSION

Overall, the new regulations are an advance in dealing with the programmatic statement question. They have noted, and in some cases made extensive comments on, the important considerations in broad impact statements. The CEQ has devised a timing process which requires preparation of the

117. Note, however, that the regulations attempt to ensure that the actions which are best evaluated together are analyzed in a single statement. *See* discussion at text accompanying n. 112 concerning what agencies to include in a single statement.
118. SIPI v. AEC, *supra* note 10, at 1092.
119. 40 C.F.R. § 1506.1(c) (1980).
120. An action "prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives". *Id.*

EIS prior to a formal agency proposal and thus helps to integrate environmental considerations into the decision process. The regulations make clear that cumulative environmental impacts, or the chance that alternative approaches will be foreclosed, as well as broad agency activities in themselves, may trigger the EIS requirement. Most importantly, the new regulations provide a stronger framework for guiding agency determinations of what should be included in an EIS.

The Council's regulations may be criticized, from the programmatic statement standpoint, for failing to specifically deal with the classic programmatic problems. However, the regulations incorporate the typical PEIS concerns into the rules applicable to all statements. The result is a more concise set of regulations which avoid any gaps in coverage which might result from separate rules. The regulations concentrate on ensuring that all environmental impacts are properly evaluated without distinguishing projects from programs. The PEIS problem is not dealt with explicitly, but the concerns which have been associated with broad agency actions are dealt with in a manner applicable to agency actions of any size.

Admittedly, the new regulations may not solve all programmatic problems. The CEQ has attempted to develop a new groundwork which will guide agencies in approaching the PEIS problem. Without contradicting the "proposal" language of *Kleppe*, the regulations require a timing of the statement process which incorporates the EIS into the agency decision process. The new regulations are not concerned with the size of an agency action, but rather concentrate upon ensuring that all significant impacts upon the environment be evaluated at some point. Of course, agencies are still left to decide if cumulative impacts exist or if alternatives are foreclosed. But, short of allowing the CEQ to prepare statements for each agency, it is impossible to eliminate all agency discretion in proper statement preparation. Given agency expertise within their own areas, it is efficient to develop a framework that points out traditionally overlooked

environmental concerns and then allow the agencies to act upon these concerns themselves.

The new regulations provide helpful guidance to agencies facing the concerns involved in a broad EIS. By pointing out the need for consideration of environmental impacts on a broad scale, the regulations have done much to eliminate the traditional programmatic impact statement problems.