Environmental Law: Public Participation in the Environmental Impact Statement Process

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Consumers Power Company applied to the Atomic Energy Commission (Commission) for permission to construct two nuclear powered reactors in Midland, Michigan. At a public hearing conducted by an Atomic Safety and Licensing Board (Licensing Board), individual residents of the neighboring community of Mapleton and several local citizen groups petitioned for and were granted permission to intervene in the reactor proceedings. The intervenors argued that the environmental impact statement (EIS) for construction of the reactors did not adequately consider "alternatives to the proposed action" as required by sections 102(C)(iii) and 102(D) of the National Environmental Policy Act of 1969 (NEPA). In particular, they contended that the EIS was fatally defective because it failed to examine energy conservation as an alternative to plant construction.

Despite these objections, the Licensing Board authorized issuance of an operating license. The Board's decision not to con-

1. On October 11, 1974, Congress passed the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. §§ 5801-5891 (Supp. V 1975)). This legislation abolished the Atomic Energy Commission (AEC) and established in its place two agencies, the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC). ERDA took responsibility for conducting research and developing all energy resources, including nuclear energy, and the NRC assumed the licensing and regulatory functions formerly conducted by the AEC. AEC regulations affecting the licensing process for nuclear reactors were unaffected by this legislation. For purposes of this comment, both the AEC and the NRC are referred to as the Commission, or the Nuclear Regulatory Commission.

2. As required by the Atomic Energy Act, 42 U.S.C. §§ 2039, 2232(b) (1970), the application was referred first to the Advisory Committee on Reactor Safeguards (ACRS) and the AEC staff. In 1970, both ACRS and the staff gave preliminary approval to the proposed project. Aeschliman v. Nuclear Regulatory Comm'n, No. 73-1776, slip op. at 3 (D.C. Cir. July 21, 1976).

3. For a discussion of the composition of the Licensing Board, the procedure it follows, and its relationship to the NRC see note 33 infra.


6. In its decision, the Board stated that energy conservation alternatives were beyond its province to discuss and indicated that the real question was which power generating technology would be superior. Id. at 6.
sider conservation alternatives was affirmed on administrative appeal before the full Commission. The Commission held that before licensing boards need explore energy conservation alternatives, intervenors

must state clear and reasonably specific energy conservation contentions in a timely fashion. Beyond that, they have a burden of coming forward with some affirmative showing if they wish to have... novel contentions explored further.

The Commission elaborated on the "affirmative showing" requirement by establishing a "threshold test" under which intervenors had to demonstrate the reasonableness of an alternative before the Commission would be required to consider it. In the case of the Midland reactors, the Commission found that the intervenors' comments on energy conservation "fell far short" of this standard.

Having exhausted all administrative remedies, intervenors petitioned for review by the United States Court of Appeals for the District of Columbia. There, petitioners argued that the "threshold test"... inconsistent with NEPA's 'basic mandate' to the Commission to 'take the initiative' in considering environmental issues.

In deciding that the Commission had erred in promulgating the "threshold test", the court of appeals substituted its own standard, holding that an intervenor's comments on a draft EIS which raised a "colorable alternative" not considered in the draft must only bring "sufficient attention to

7. The appeal procedure within the NRC is outlined in note 33 infra.
9. Purported energy conservation issues must meet a threshold test—they must relate to some action, methods or developments that would, in their aggregate effect, curtail demand for electricity to a level at which the proposed facility would not be needed. Beyond that the issue must pertain to an alternative that is "reasonably available." NRDC v. Morton, 458 F.2d 827, 834 (C.A.D.C. 1972). (footnote omitted). Furthermore, the impact of proposed energy conservation alternatives on demand must be susceptible to a reasonable degree of proof. Largely speculative and remote possibilities need not be weighed against a convincing project of demand.
10. Id. at 9 (quoting In re Consumers Power Co., 7 A.E.C. at 24).
11. Id. (quoting In re Consumers Power Co., 7 A.E.C. at 32).
the issue to stimulate the Commission's consideration of it."13 Once this sufficient stimulus was provided, "it [was] incumbent on the Commission to undertake its own preliminary investigation of the . . . alternative sufficient to reach a rational judgment whether it is worthy of detailed consideration in the EIS."14 If the Commission decided that further consideration of a suggested alternative was unwarranted, it was obligated, under the court's ruling, to explain the basis for its conclusion. Finding that the intervenors' comments had been adequate to "stimulate the Commission's consideration of energy conservation alternatives,"15 the court remanded the case to the Commission for further proceedings. Aeschliman v. Nuclear Regulatory Commission, No. 73-1776 (D.C. Cir. July 21, 1976), cert. granted sub nom. Consumers Power Co. v. Aeschliman, 45 U.S.L.W. 3554 (U.S., Feb. 22, 1977) (No. 76-528).

NEPA has been described as being "[a]t the very least . . . an environmental full disclosure law."16 The primary vehicle for this disclosure is the impact statement required under section 102 of the Act,17 which must be prepared before federal agencies18 reach any final decision on a proposed "major" action that may "significantly" affect the environment.19 The statement evaluates this action in terms of its environmental impact, unavoidable adverse environmental effects, alternatives available, short term uses of the environment versus long term productivity, and irreversible and irreplaceable commitment of resources.20

The impact statement serves the two related goals of informed decisionmaking and public accountability. The impact statement is aimed partly at ensuring that the responsible agency decision-maker has before him—and presumably will take into account—all possible environmental consequences of a proposed project.21 It is also expected to contribute to informed extra-

20. Id.
agency review of agency decisions by enabling “those removed from the decision-making process to evaluate and balance the factors on their own.” To achieve this goal of public accountability, the Act requires that the environmental impact studies be “placed before the President, the Congress, and the people, for public decision.”

NEPA’s inclusion of environmental considerations in the decisionmaking process forces agencies to employ a “systematic, interdisciplinary approach.” At a minimum, they must look beyond a narrow cost-benefit analysis and consider factors “incapable of quantification in terms of aesthetic, cultural, social or perhaps even psychological values” in deciding whether to pursue a given proposal.

Although a strict reading of NEPA might restrict the EIS commenting process to a solicitation of the views of other government bodies, the Act has not been read so narrowly. Both Executive Order 11514 and the Council on Environmental Quality’s (CEQ’s) Guidelines for implementing the impact statement requirement suggest, instead, a policy favoring broad public involvement in the EIS procedure. Similarly, the courts have generally held that federal agencies are obliged both to seek comments from the public and to consider these comments in developing a final impact statement.

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27. Preparation of Environmental Impact Statements; Guidelines, 40 C.F.R. 1500.2(b) (1976). These Guidelines specify that the public must be given an opportunity to comment on draft impact statements and that the final EIS must be “responsive to the comments received.” Id.
There are a number of advantages to be derived from public participation in administrative hearings. According to one commentator,

Public intervention can provide agencies with another dimension useful in assuring responsive and responsible decisions; it can serve as a safety valve allowing interested persons and groups to express their views before policies are announced and implemented; it can ease the enforcement of administrative programs relying upon public cooperation; and it can satisfy judicial demands that agencies observe the highest procedural standards. If agency hearings were to become readily available to public participation, confidence in the performance of government institutions and in the fairness of administrative hearings might be measurably enhanced.29

A further reason for requiring agencies to consider the views of members of the public as well as those of "experts," is that some of the issues confronting agency decisionmakers are simply beyond the scope of technical expertise.

In the case of a proposed nuclear facility, for example, the decision whether to proceed with construction depends essentially upon striking a balance between the need for power and the imposition of environmental, health, and safety risks on society. This question is resolved ultimately by a subjective determination reflecting basic societal values, morals, and beliefs and not by establishing any objective, scientific truth. While a general public determination that nuclear power is socially acceptable is arguably implicit in congressional authorization of the Nuclear Regulatory Commission's (NRC's)30 activities,31 NEPA

(D. Ariz. 1972), aff'd, 471 F.2d 1275 (9th Cir. 1973) ("[T]he public has a right to participate in drafting the final environmental impact statement by submitting comments and environmental information upon any alleged legal or factual matter in the draft impact statement."); Lathan v. Volpe, 350 F. Supp. 262, 265 (W.D. Wash. 1972) (public involvement was essential to the adequacy of an EIS); Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash.), aff'd, 487 F.2d 1344 (9th Cir. 1972) (NEPA's procedures had otherwise failed to provide an opportunity for public comment on the impact statements which had been prepared); Daly v. Volpe, 350 F. 252 (W.D. Wash. 1972) (same). In Lathan, the court went so far as to suggest that "relevant and reasonable" doubts raised by public comment might have to be resolved by research before the final impact statement would be adequate. 350 F. Supp. at 265. In this respect, Lathan fore-shadowed Aeschliman.


30. See note 1 supra, for a discussion of the 1974 reorganization of the AEC.

31. See note 77 infra.
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still requires agency consideration of public comments whenever a major action significantly affecting the environment is contemplated. If the public's views are to be accurately reflected in an individual licensing decision, there is no substitute for direct public participation to determine whether the community is willing to accept the potential risks.

Despite the NEPA requirement that the public participate directly in the formulation of agency decisions affecting the environment, the public's ability to influence an agency's final decision is rather limited. Nowhere is this limitation more apparent than in the case of the Nuclear Regulatory Commission.


33. To appreciate the difficulty of effective public participation in the nuclear licensing process, it is first necessary to understand the process itself. The licensing procedure commences with the filing of an application. 10 C.F.R. § 2.101 (1976). NRC regulations require that an applicant obtain both a construction permit to build the facility and an operating license upon its completion. 10 C.F.R. § 50.10(a)-(b) (1976). In connection with the construction permit application, the applicant must file a preliminary safety report for review by the Commission staff. 10 C.F.R. § 50.34 (1976). When the staff's review is complete, the application is reviewed by the independent statutory Advisory Committee on Reactor Safeguards which issues a final report to the full Commission expressing its opinion as to whether the proposed facility can be constructed with reasonable assurance that it will operate without undue risk to public health and safety. 42 U.S.C. § 2039 (1970).

Prior to issuance of a construction permit or an operating license, the applicant is also required to submit an Environmental Report which includes the same kinds of considerations set forth in section 102(C) of NEPA. See 10 C.F.R. §§ 50.30(f), 51.20 (1976). The Commission staff considers this report in preparing its own draft environmental impact statement. The draft EIS is then circulated for public comment. After reviewing comments received from various federal, state, and local agencies and officials, from the applicant, and from private organizations and individuals, the Commission staff prepares a final impact statement. This final EIS is sent to the Council on Environmental Quality and is made available for public scrutiny. Subsequent hearings and actions on environmental matters involved in the Commission's issuance of a construction permit or operating license are based on the Commission's final EIS. 10 C.F.R. §§ 51.22-.26 (1976).

Under the Atomic Energy Act, public hearings are necessary in conjunction with the construction permit application but are required at the operating license stage only upon the filing of a public request for a hearing accompanied by a petition to intervene. 42 U.S.C. § 2239 (1970). The public hearing is an adjudicatory proceeding conducted by a Licensing Board. Each Board is composed of three members selected from a panel appointed by the Commission from the private sector, the Commission staff, and other administrative agencies. 10 C.F.R. § 2.721 (1976). The parties to the hearing include the applicant, the Commission staff, and any intervenors. Any of these parties may submit evidence to the Board on those issues the Board is required to consider and on those issues in controversy among the parties. See 10 C.F.R. §§ 50.35(a), 50.57
The public's efforts to ensure consideration of its views by the Commission are hampered by several features of the licensing process. First, a general agency bias favoring the promotion of nuclear power pervades agency proceedings. Under NRC regulations, the three member Licensing Board appointed to evaluate each proposed facility must include at least two persons with expertise in either nuclear technology or a field related to issues raised in the proceeding. While some nuclear expertise is essential for Board members to successfully resolve the complex technical problems associated with atomic energy licensing, the effect of this regulation has been to fill Board positions with Commission employees or scientists who have been supported by Commission research grants, both of whom have an interest in nuclear promotion. As a result of this pro-nuclear bias, Board members tend to approach licensing proceedings with a predisposition to grant the license requested.

(1976) for a description of the issues to be considered in contested permit and licensing proceedings, respectively. After considering all the evidence, the Board either grants or denies the license. 10 C.F.R. 2.760 (1976). A party to the proceeding, however, may appeal the Licensing Board's decision by filing exceptions with the Commission. If exceptions are filed, the Commission appoints an Appeal Board to review the prior Licensing Board decision. 10 C.F.R. §§ 2.762, 2.785-87 (1976). The Appeal Board is chosen from a panel in a manner similar to the selection of Licensing Board members and is generally free to consider the entire record on review, though its inquiry may be limited to matters to which exceptions have been filed. 10 C.F.R. § 2.770 (1976). A determination by the Appeal Board is subject to further agency review by certification to the Commission. 10 C.F.R. § 2.786 (1976). Finally, judicial review of final agency action is available in the United States Courts of Appeals. 28 U.S.C. § 2342(4) (1970); 42 U.S.C. § 2239 (1970). Venue is in the Circuit Court of Appeals where the petitioner resides or in the U.S. Court of Appeals for the District of Columbia. 28 U.S.C. § 2343 (1970).

34. 10 C.F.R. § 2.721(a) (1976).
35. See Ellis & Johnston, Licensing of Nuclear Power Plants by the Atomic Energy Commission, 13 Atom. Energy L.J. 101, 127 (1971). But see S. EBBIN & R. KASPER, CITIZEN GROUPS AND THE NUCLEAR POWER CONTROVERSY: USES OF SCIENTIFIC AND TECHNOLOGICAL INFORMATION 177 (1974), in which the authors note that recent appointments to the Atomic Safety and Licensing Board Panel have included experts in the environmental sciences as well as hearing board chairmen with few ties to the AEC or the NRC.

The general pro-nuclear bias of Board members has been summarized as follows by one of the Midland intervenors:

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Board members have a long and successful relationship with the development of nuclear power; and inherent (almost genetic) feeling that a loss of coolant accident will never happen; and that any safety or environmental problem raised during the course of licensing hearings can be resolved at some point before it is too late.

Id. at 82.

36. Ebbin and Kasper have documented this bias through inter-
In addition to the bias of Licensing Board members, the Commission staff generally acts more as the applicant's ally than as an independent fact finder. By the time a case is set for public hearing, the Commission staff has met with the applicant and resolved to the Commission's satisfaction potential barriers to issuance of the license. At the hearing the staff typically helps the applicant to establish that the proposed facility poses no safety hazard. While NRC regulations require the applicant to demonstrate that a license should be granted, the staff's advocacy effectively shifts the burden of proof from the applicant to the intervenors who must show good cause for its denial. Given the bias of both the Commission staff and the Licensing Board, public intervenors seeking to influence an agency decision face formidable opposition.

The carefully restricted scope of the hearings authorized by NRC regulations also makes effective public participation difficult. While NRC rules permit citizen participation, they confine the scope of licensing hearings largely to technical aspects of reactor safety, thus allowing for only minimal and often meaningless public participation, since technical matters of plant construction are generally beyond the public's competence to discuss. Opportunity to debate the broad social policy considerations underlying the use of nuclear power is limited basically to that phase of the hearing process devoted to determining the adequacy of the Commission's environmental impact statement, and, even here, the question of energy alternatives may only

views with Licensing Board members as well as through observation of nuclear proceedings. EBBIN & KASPER, supra note 35, at 178-79.

37. See generally id. at 235-36.
40. As one commentator has observed: "[C]oncerned citizens have been led, like lambs to the slaughter, into the promoters' arena to contest a variety of valves, filters, cooling towers, and miscellaneous other items of hardware in specific nuclear power plants." Remarks of Prof. John Gofman, ENVIRONMENTAL ACTION (Nov. 1972), reprinted in part in A. RETTZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES at 17-3 (1974).
41. A number of environmental interest groups have been able to compensate for their lack of technical expertise by employing counsel with extensive experience in nuclear licensing cases. In the Midland case, for example, one of the intervenors was represented by Myron Cherry, a veteran in nuclear proceedings, who makes up for his lack of scientific experience by being accompanied at agency hearings by scientific experts. See EBBIN & KASPER, supra note 35, at 169.
42. See 10 C.F.R. § 51.52 (1976).
be raised if couched in terms of one of the specific environmental requirements set forth in NEPA.43

Possible citizen impact on agency decisions is also impeded by the regulations limiting who may participate in those deliberations. Although the NRC tightened the requirements for public intervention in 1972,44 ostensibly to focus the hearings on matters actually in controversy,45 the amendments were apparently enacted in response to the efforts of some environmentalists to convert the licensing proceeding into a national forum46 for educating the public and its elected representatives about the risks of nuclear energy.47 Despite the new regulations, however, environmentalists are unlikely to be discouraged from future efforts to use the licensing proceedings as a vehicle for generating public awareness of the risks of nuclear power and ultimately for promoting a congressional reassessment of our nation's nuclear policy.48 The hearings are thus a means of furthering the second

43. See text accompanying note 20 supra.
44. The new rules require any potential intervenor to establish his qualifications by setting forth "with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene." 10 C.F.R. § 2.714 (1976). These rules were published initially in 37 Fed. Reg. 15132 (July 28, 1972). As one commentator observed,

Obtaining supporting evidence for the contentions contained in the petition is difficult, since much of the necessary information is in the possession of the applicant and the AEC staff. In addition, even in situations where the supporting documents are made public, an intervenor often has insufficient time for a comprehensive evaluation prior to the Licensing Board's preliminary determination of the issues in controversy at the first prehearing conference.

46. Ebbin and Kasper have identified three major purposes underlying citizen-group participation in nuclear regulatory proceedings: (1) to ensure that the plant be made as safe as possible and that the detrimental effects of its operation be minimized; (2) to upgrade the public's awareness as to the risks of nuclear power; and (3) to delay or stop the construction and operation of a given nuclear facility. EBBIN & KASPER, supra note 35, at 190.
48. One commentator has expressed the goal of environmentalists in the following terms:

[I]t is the duty of citizen intervenors to transform the agency hearings into a dramatic medium, which by its content and total effect will educate the public and its opinion and policy—
of the NEPA goals—the promotion of informed extra-agency review of agency decisions.49

While the public's impact on agency decision-making may be hampered by some of these features of the licensing process, the agency itself may be similarly hampered by certain aspects of public participation. Environmentalists' attempts to expand the hearing process from the consideration of a single license application into a general discussion of nuclear policy, for example, inevitably result in time-consuming delays in the hearing process—precisely what the agency wishes to avoid.50 Moreover, even where deliberate delaying tactics are not employed, the EIS process as outlined in section 102(C)61 is cumbersome and lengthy. Particularly time-consuming is NEPA's requirement that agencies explore alternatives, given the wide range of potential choices that exist for almost every project. While the Act has been held to require only a "meaningful reference" to possible adverse environmental impacts in the EIS,52 the language of section 102(E) orders agencies to "study, develop, and describe appropriate alternatives,"53 and CEQ Guidelines direct them to make a "rigorous exploration" of alternative actions that "might avoid some or all of the adverse environmental effects."54

makers to the possible environmental hazards, and compel their commitment to and participation in political activity aimed at ultimately winning the victory not attainable in the narrow confines of the agency proceeding.

Like, supra note 47, at 8-9. And Ebben and Kasper conclude, based on interviews with various environmental groups, that public education is a major goal of virtually every group that intervenes in nuclear proceedings. EBBIN & KASPER, supra note 35, at 163.

49. One vehicle that intervenors have relied upon to generate public discussion of the social acceptability of nuclear power is the directive provided in section 102(C) (iii) of NEPA that agencies must consider "alternatives to the proposed action." 42 U.S.C. § 4332(C) (iii) (Supp. V 1975). As in Aeschliman, environmental groups have argued that this section requires consideration of the alternative of not building the nuclear plant at all. See, e.g., Carolina Envir'l Study Group v. United States, 510 F.2d 796, 798 (D.C. Cir. 1975).

50. The applicant too has a substantial interest in avoiding the costs associated with prolonged agency proceedings. According to one trade publication, licensing delays in the Midland case added over $430 million to the cost of the Consumers Power project. EBBIN & KASPER, supra note 35, at 85.


The potential for delay and expense in the NEPA impact statement requirements made it imperative to limit the scope of the EIS, and particularly the alternatives to be considered, to prevent NEPA from completely frustrating the agency decisional process.\(^5\) Beginning with *Natural Resources Defense Council, Inc. v. Morton*,\(^6\) courts recognized the costliness of the earlier judicial emphasis on the most complete disclosure possible.\(^6\) This awareness is reflected in limitations on both the range of alternatives that must be discussed and the depth in which they must be examined.

In *Morton*, the District of Columbia Circuit Court pronounced a "rule of reason" which stated that only those alternatives reasonably available—that is, available in the same time span as the original proposal—need be discussed at all.\(^5\) Somewhat tautologically, the court indicated that the scope of the discussion of reasonable alternatives itself was subject to a limitation of reasonableness. Thus, NEPA did not require detailed discussion of the environmental effects of alternatives put forward in comments when the effects "cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities."\(^5\) Instead, the EIS only had to include those alternatives "sufficient to permit a reasoned choice."\(^6\) The *Morton* approach of restricting the contents and scope of impact statements has been followed in subsequent decisions.\(^6\)

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55. Both the Senate and Conference Committee reports on NEPA expected the impact statement process not to add measurably to the time it takes to make a decision and to fit comfortably within the normal decision-making procedure. COMMITTEE OF CONFERENCE, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, H.R. REP. NO. 91-765, 91ST CONG., 1ST Sесс. 29 reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2767, 2769; S. REP. NO. 91-296, 91st Cong., 1st Sess. 23 (1969).
57. See Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). In that case, the court took note of the NEPA requirement that agencies must comply with section 102 "to the fullest extent possible." 42 U.S.C. § 4332 (Supp. V 1975). The court interpreted this requirement to mean that section 102 duties must be met "unless there is a clear conflict of statutory authority." 449 F.2d at 1115. Furthermore, "[c]onsiderations of administrative difficulty, delay or economic cost [would] not suffice to strip the section of its fundamental importance." *Id.*
58. 458 F.2d at 834.
59. *Id.* at 837-38.
60. *Id.* at 836.
61. See Carolina Envir'l Study Group v. United States, 510 F.2d 796, 801 (D.C. Cir. 1975) (agencies need only consider "alternatives as they exist and are likely to exist"); *Life of the Land v. Brinegar*, 485 F.2d
While Aeschliman v. Nuclear Regulatory Commission does not directly contravene the limitations suggested by Morton and its progeny, it does undercut these earlier decisions by expanding the scope of the EIS inquiry. Aeschliman leaves untouched the requirement that only "reasonable" alternatives need to be included in the final EIS, but, if an intervenor provides "sufficient" stimulus regarding a proposed alternative when commenting on a draft EIS, the agency must develop that alternative to the point at which a determination of its reasonableness can be

460, 471 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974) (only alternatives that are "reasonable or feasible" need be discussed).

62. The Aeschliman court mentions Morton only in passing and gives no reason for the apparent departure from its emphasis in Morton on restricting the scope of the impact statement. One explanation for this seeming reversal in direction by the D.C. Circuit is that Aeschliman was decided by a different three-judge panel than that which participated in the Morton decision. (Morton was decided by Judges Leventhal, Tamm, and McKinnon; Aeschliman by Judges Bazelon and Fahy of the D.C. Circuit and Judge Justice, a U.S. District Judge for the Eastern District of Texas, sitting by designation pursuant to 28 U.S.C. § 292(d)). Judge Bazelon's opinion in Aeschliman is consistent with his emphasis in prior decisions on creating a full record as a check against abuse of discretion by administrative agencies. See, e.g., his concurring opinion in International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973):

In cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public. . . . If we were to require procedures . . . that open the Administrator's decision to challenge and force him to respond, we could rely on an informed [public] rather than on our own groping in the dark to test the validity of that decision.

In International Harvester, Judge Bazelon, although coming to the same conclusion as the majority, disagreed with the opinion written by Judge Leventhal, the author of Morton. Id. at 650-52. Their disagreement in International Harvester, moreover, paralleled the difference in perspective of the reviewing courts in Aeschliman and Morton.

See also Judge Bazelon's opinion in D.C. Fed'n of Civil Ass'ns v. Volpe, 459 F.2d 1231, 1249 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972) ("even though formal administrative findings are not required by statute, the Secretary could best serve the interests of the parties as well as the reviewing court by establishing a full-scale administrative record which might dispel any doubts about the true basis of his action"), and his statement in Aeschliman v. Nuclear Regulatory Comm'n, No. 73-1776, slip op. at 12 n.12 (D.C. Cir. July 21, 1976) ("The decision that a technological or other development is a 'realistic' alternative which merits full consideration in an EIS ought not turn on the intuition of 'technically illiterate' judges that it is 'reasonable.'").

made. This requirement will almost certainly result in additional expenditures of time, effort, and money by agencies seeking to comply with the Aeschliman mandate. If the decision contributed significantly to either informed decision-making or greater public accountability, some additional delay and expense in the EIS process might be tolerable. Aeschliman, however, does not appear to materially advance either of these goals.

Assuming an agency has complied in good faith with the NEPA requirements, its impact statement should contain reference to "reasonable alternatives" in keeping with the Morton "rule of reason" test. Failure to mention a given alternative suggests either that the agency considered the alternative and found it unreasonable, in which case Aeschliman requires only a pro forma explanation of the decision, or that the agency inadvertently overlooked the alternative. At first glance, Aeschliman seems to advance the goal of informed decision-making by bringing the overlooked alternative to agency attention.

Underlying NEPA is an unstated premise that institutional bias may prevent an agency from recognizing and considering alternatives beyond the range of its expertise. It is seemingly to compensate for such agency bias that NEPA requires the solicitation of opinions from other agencies and members of the public in preparing environmental impact statements. Aeschliman fosters public participation in NEPA proceedings by shifting the costs of investigation to the agency, thus helping to remove the economic barrier to public intervention by any but the most well-

64. See text accompanying notes 13-15 supra for the test propounded by the court.
65. See text accompany notes 21-23 supra.
66. Thus, Senator Edmund S. Muskie, one of the chief sponsors of NEPA, urged during floor debate that responsibility for enforcing the Act not be left entirely to the agencies, and that a mechanism for inter-agency review of impact statements be implemented as a check on agency bias. In support of his position, Muskie stated:

The concept of self-policing by Federal agencies which pollute or license pollution is contrary to the philosophy and intent of existing environmental quality legislation. In hearing after hearing agencies of the Federal Government have argued that their primary authorization, whether it be maintenance of the navigable waters by the Corps of Engineers or licensing of nuclear power-plants by the Atomic Energy Commission, takes precedence over water quality requirements.

I repeat, these agencies have always emphasized their primary responsibility making environmental considerations secondary in their view.

67. See notes 26-27 supra and accompanying text.
financed groups. Increased public participation, in turn, increases the likelihood that alternatives not previously considered by the agency will be brought to its attention.

The conclusion that Aeschliman fosters informed agency decisions, however, necessarily presupposes that an agency will adequately consider an alternative if it is brought to the agency's attention, a result which is by no means certain. Indeed, the institutional bias that initially caused the agency to overlook the alternative is likely to prevent full appreciation of its merits once it is suggested. Under Aeschliman, the burden of developing the case for an alternative shifts from the intervenor to the agency.

As noted above, however, the NRC staff's role in licensing proceedings is essentially that of a proponent of the nuclear plant in question. As an advocate of plant construction, the staff lacks the incentive to diligently investigate or enthusiastically present to the Commission an alternative that threatens plant completion. Even more determinative than agency bias is that the NRC staff is unlikely to possess adequate knowledge to fully investigate non-nuclear alternatives.

Those proposing an alternative have considerable interest in seeing that it is thoroughly investigated, earnestly advocated, and favorably considered, but Aeschliman does little to assist intervenors to develop a convincing case. Mere satisfaction of the "sufficient" stimulus test by the intervenors is not likely to convince a skeptical agency of an alternative's merit; unless intervenors present more information than Aeschliman requires, they are unlikely to persuade the agency, the courts, the Congress, or the public of their alternative's value. While Aeschliman may thus encourage public participation in agency proceedings by re-

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68. According to EBBIN & KASPER, supra note 35, at 194, the cost of intervention in NRC proceedings can run as high as $100,000. The financial straits of many public intervenors dictate not only their initial decision as to whether to participate in a proceeding but also subsequent decisions concerning strategy and the possibility of judicial appeal.

69. No. 73-1776, slip op. at 12-13 (D.C. Cir. July 21, 1976). Intervenors are, of course, not precluded from independently developing their alternative. The thrust of Aeschliman, however, is to encourage participation by those who, in the past, have been discouraged from participation because they lack the resources to develop their alternative to the point where it satisfies the reasonableness standard of Morton. Aeschliman lowers the threshold barrier for these groups by only requiring them to meet the "sufficient" stimulus test. Id. Nonetheless, their financial situation is likely to make them dependent on the agency for development of their alternative.

70. See text accompanying notes 37-39 supra.
ducing its expense, the result will not necessarily be more informed decisions. Instead, to the extent that alternatives are left to agency investigation, they are apt to receive only perfunctory and cursory treatment rather than the careful analysis and aggressive advocacy essential to responsible decisionmaking.  

Aeschliman's contribution to the second of the major NEPA objectives, that of public accountability, is similarly marginal. If an agency's initial decision is unresponsive to public desires, external pressure may be exerted on it either by the courts or by Congress. The court in Aeschliman appears to advocate the judicial route, justifying its requirement that agencies explain their basis for concluding that no further consideration of an alternative is warranted as facilitating judicial review. Despite assertions that NEPA mandates judicial review of substantive agency decisions, however, courts generally have been un-
willing to inquire into the merits of a decision, absent a clear abuse of discretion.\textsuperscript{75} Agencies are virtually free to disregard environmental considerations, provided they comply with the procedural formalities of NEPA. In other words, they must prepare an impact statement, solicit outside comments, and fulfill the rest of the impact-reporting requirements set forth in NEPA, but the final balance between the environmental costs of a project and its economic or technological benefits is committed to agency discretion.\textsuperscript{76} Judicial reluctance to engage in substantive review of agency decisions makes this route an unlikely means of achieving public accountability.

Absent judicial willingness or ability to achieve NEPA's goal of public accountability, the responsibility appears to rest with Congress,\textsuperscript{77} which, to date, has shown no proclivity to intervene in the nuclear power controversy.\textsuperscript{78} To the extent that this lack

\textsuperscript{75} Indeed, it appears that each time a court has purported to review an agency's decision on the merits, it has permitted the agency action to continue. See, e.g., Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973); Environmental Defense Fund, Inc. v. TVA, 371 F. Supp. 1004, 1014 (E.D. Tenn. 1973), aff'd on other grounds, 492 F.2d 465 (6th Cir. 1974); Environmental Defense Fund, Inc. v. Froehlke, 368 F. Supp. 231, 244-46 (W.D. Mo. 1973), aff'd sub nom. Environmental Defense Fund, Inc. v. Calloway, 497 F.2d 1340 (8th Cir. 1974); Cape Henry Bird Club v. Laird, 359 F. Supp. 404, 414 (W.D. Va.), aff'd, 484 F.2d 453 (4th Cir. 1973).


\textsuperscript{77} It has been argued that Congress implicitly left the authority to balance the potential benefits and risks of nuclear power to the Commission by its enactment of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2014 (1970), which established the foundation for the development of atomic energy in this country. See, e.g., Rolnick, supra note 44, at 1074. Environmentalists counter that the general policy statements and vague goals enunciated in the opening sections of the Atomic Energy Act cannot reasonably constitute an indication of congressional intent to abdicate responsibility for determining our nuclear policy. See, e.g., Muchnicki, The Proper Role of the Public in Nuclear Power Plant Licensing Decisions, 15 ATOMIC ENERGY L.J. 34, 43 (1973).

\textsuperscript{78} See S. REP. No. 93-960, 93d Cong., 2d Sess. § 109(a) in which the Senate Committee on Governmental Operations found and declared in reporting the Energy Reorganization Act of 1974:
of congressional action represents an affirmative determination that our present nuclear policy should continue, the NEPA goal of public accountability appears satisfied. It is arguable, however, that Congress has not acted because it is unaware of the public's views on nuclear power and thus unable to translate those views into law. To remedy this communication problem, environmentalists seek to use agency proceedings to elevate public awareness of the risks of nuclear power and bring public pressure to bear on the Congress.

If *Aeschliman* fosters use of the impact statement to generate public discussion, it might be seen as contributing to public accountability. Under CEQ Guidelines the agency's position is already evident from the record, since agencies must include in the final impact statement all public comments received, and an agency's decision not to adopt an alternative suggested in a public comment necessarily indicates rejection of that alternative. Requiring an agency to make explicit the rationale underlying its rejection of an alternative, which *Aeschliman* mandates, potentially increases both the visibility of the agency's position and its vulnerability to public scrutiny and, in this way, provides environmentalists with a means of stimulating the public debate and controversy considered essential to public accountability.

*Aeschliman*'s contribution to increased public awareness of nuclear power issues is limited, however, because agency proceedings are particularly poor forums for public education. NRC hearings are sparsely attended by the public and only sporad-

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79. Council on Environmental Quality Revised Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.10 (1976): "All substantive comments received on the draft . . . should be attached to the final statement, whether or not each such comment is thought to merit individual discussion by the agency in the text of the statement."

80. If a congressional response was the goal of intervenors in *Aeschliman,* they appear to have met with initial success. On August 27, 1976, the Joint Committee on Atomic Energy scheduled a hearing for the purpose of questioning NRC Chairman Marcus Rowden about the *Aeschliman* decision and a related decision, Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, No. 74-1586 (D.C. Cir. July 21, 1976). 112 CONG. REC. D 1160 (Aug. 27, 1976).

81. See generally EBBIN & KASPER, supra note 35, at 192.

82. Those few individuals who do attend contested hearings are usually allied with one of the parties and generally are less interested
ically reported by the news media. Even less attention is paid to the bulky transcripts prepared from the hearings. No matter how explicit the agency's position is made in the hearing record, little public education is likely to occur in the average case.

In fact, Aeschliman might even detract from effective external review of agency decisions. The sheer volume of documents and materials that comprise agency environmental impact statements itself deters public scrutiny. By adding to the size of the agency record, Aeschliman makes it more difficult for the courts, the Congress, and the public to evaluate the agency's position. Likewise, by establishing another procedural requirement with which agencies must comply, Aeschliman increases the likelihood that those engaging in extra-agency review will mistake procedural compliance with NEPA for substantive compliance with the Act. Lacking the expertise to analyze an agency decision in detail, the public, the courts, and the Congress are forced to rely partially on the appearance of a good faith effort in determining the adequacy of an agency's environmental investigation. To the extent that form is mistaken for substance, compliance with the Aeschliman disclosure requirement may lull the public and its governmental representatives into foregoing an independent inquiry into the validity of an agency's actions.

Finally, Aeschliman is likely to add to the expense already associated with the EIS process. This possibility is somewhat mitigated by the court's statement that a preliminary investigation, if required, need not be detailed.83 Furthermore, as the court notes, if an agency has passed on the merits of an alternative in a conscientious manner, the requirement that it explain its position should not prove "onerous," nor, presumably, need it be particularly time-consuming.84 The "cost" of Aeschliman is, nonetheless, likely to be increased expense and delay in project implementation.85

Applying a balancing process, this "cost" might be tolerable when the environmental stakes are especially high. In these situations, public participation in and accountability for decisions

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84. Id. at 13-14.
85. In addition, the ambiguity inherent in the court's requirement of "sufficient" stimulus invites additional litigation. This too is likely to be a "cost" of Aeschliman.
made are particularly important. Even the small contributions made by Aeschliman toward achieving these objectives can accordingly be viewed as worthwhile. But cases involving significant environmental stakes generally attract well-financed public interest groups that can afford to hire technical consultants to develop the arguments for an energy alternative. They can thus compel agency consideration of their proposals by satisfying the "reasonableness" test\textsuperscript{86} articulated in Morton and will benefit little from Aeschliman's more attenuated "sufficiency" test\textsuperscript{87}

In the majority of cases, whatever small benefits might accrue from Aeschliman are likely to be outweighed by their costs. For this reason, courts should interpret the decision restrictively in order to limit the situations in which an agency will be required to undertake an investigation of an energy alternative. This can be accomplished by varying the intervenor's burden of demonstrating the need for agency investigation according to the magnitude of the project and the likelihood of the environmental harm. The amount of information required to satisfy the sufficient stimulus test should be inversely related to the likelihood and magnitude of the potential environmental harm. In the case of a nuclear facility, for example, the potential environmental risk is substantial. Relatively little information about an alternative should therefore have to be presented before a court requires further agency study.\textsuperscript{88} Projects posing a less serious environmental threat would demand an increase in the intervenor's burden of proof.\textsuperscript{89} This approach to Aeschliman leaves the courts with discretion to confine the agency burden imposed by the decision to situations of relatively important environmental stakes. Unless Aeschliman is confined in this manner, its major contribution to the NEPA process is likely to be increased expense and delay, features which are already too prominent in the area of environmental regulation.

\textsuperscript{86} See text accompanying notes 58-60 supra.
\textsuperscript{87} See text accompanying notes 13-15 & 62-64 supra.
\textsuperscript{88} A narrow reading of Aeschliman might limit its applicability exclusively to cases involving the NRC and, hence, to cases involving significant environmental risks. Environmentalists, however, are unlikely to perceive the case in such narrow terms.
\textsuperscript{89} Courts might choose, alternatively, to focus on the magnitude of the suggested alternative in determining how much information would be "sufficient" to justify an agency response. Applying this approach, even in cases where a project's overall environmental impact appeared relatively insignificant, only slight stimulus would be required to prompt exploration if the proposed alternative appeared likely to significantly reduce that impact.