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DOES NEPA MATTER?—AN ANALYSIS OF THE HISTORICAL DEVELOPMENT AND CONTEMPORARY SIGNIFICANCE OF THE NATIONAL ENVIRONMENTAL POLICY ACT

Kenneth M. Murchison

When President Nixon signed the National Environmental Policy Act (NEPA) on January 1, 1970, he declared that the new statute marked the arrival of the time for environmental action. The quantitative measures of legislative and judicial activity during the ensuing decade suggest that he accurately captured the mood of the times, for the 1970's produced a flurry of new and amended statutes as well as a veritable explosion in environmental litigation. As a result of this burst of energy, environmental law has emerged as an important legal speciality that now commands the attention of law schools, government lawyers, and the private bar, in addition to the environmental groups who dominated the field in its early years.

Now that environmental law has matured into a relatively well-defined field of law, it is necessary to evaluate the significance of the various constituent parts. This article ventures such an evaluation of NEPA. The article begins with an overview of the statute and its legislative history and then offers a detailed summary of its

* Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University. The author wishes to express his appreciation to Roger Anderson for his careful critique of an earlier draft of this article.
2. N.Y. Times, Jan. 2, 1970, at A12, col. 6 ("I have become further convinced that the nineteen seventies absolutely must be the years when America pays its debt to the past by reclaiming the purity of its air, its waters, and our living environment.").
4. The Environmental Law Reporter (ENVT. L. INST.) began reporting environmental cases in 1970 and now includes 17 volumes.
judicial interpretation and administrative implementation. After completing this survey of NEPA's development, the article then analyzes its current significance as a vehicle for protecting the environment.

I. The Statutory Requirements

Proposals for a congressional declaration of environmental policy surfaced on various occasions during the 1960's. One of the principal advocates of such a declaration was Senator Henry Jackson, who introduced the Senate bill that eventually became NEPA. Although Senator Jackson's bill did not contain a declaration of policy as originally introduced, a committee amendment soon added such a declaration together with provisions recognizing that "each person has a fundamental and inalienable right to a healthful environment" and imposing requirements designed to force federal agencies to implement the statutory policy. Among these "action-forcing" provisions was a requirement that responsible officials make findings concerning the probable environmental impact of all major agency actions significantly affecting the quality of the human environment. Following the adoption of these amendments, the bill was unanimously passed by the Senate without debate.

When the Senate bill reached the House, it was amended by substituting a much more restrained version. The House bill contained a much shorter declaration of purpose, included no recognition of the right to a healthful environment, omitted the "action-forcing" provisions of the Senate bill, and added a section declaring that "nothing in this Act shall increase, decrease, or change any responsibility of any Federal official or agency."

The Senate refused to accept the House amendments and requested that a conference committee be appointed. The Senate

11. Id.
also made several de facto amendments in its own bill by instructing its conferees to insist on provisions that were not included in the bill as originally passed. One new provision declared that neither NEPA’s declaration of policy nor its action-forcing provisions affected

in any way . . . the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or state agency, or (3) to act, or refrain from acting, contingent on the recommendations or certification of any other Federal or State agency.

A second new provision changed the requirement that the responsible official make a finding regarding the environmental impact of proposals for major federal actions. The new provision required that the official prepare a “detailed statement” analyzing the environmental impacts of such actions.

The conference committee returned an amended version of the original Senate bill. In addition to accepting the Senate’s own amendments, the committee made several other changes. One change substituted a recognition that everyone “should enjoy a healthful environment” for the Senate bill’s declaration of a “right” to such an environment. Another change modified the obligation of all federal agencies to comply with the action-forcing provisions by inserting the qualifying phrase “to the fullest extent possible.”

Both houses passed the conference version, and it became law on January 1, 1970. Title I of the statute, which contains the congressional policy declarations and the action-forcing provisions im-

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12. 115 Cong. Rec. 29,087-89 (1969) (Senate discussion of conference committee’s position on NEPA); id. at 29,058-59 (description of changes). The changes were endorsed by Senators Muskie and Jackson in prepared statements. Id. at 29,051-53.
13. Id. at 29,058-59.
14. Id. at 29,053 & 29,058.
15. For a summary of changes other than those discussed in the text, see R. Andrews, supra note 6, at 13-14.
16. H.R. Rep. No. 765, 91st Cong., 1st Sess. 3 (1969). The House managers explained that the compromise language was adopted because of their doubts “with respect to the legal scope of the original Senate provision.” Id.
17. Id. See F. Anderson, NEPA IN THE COURTS, supra note 6, at 9, for a brief explanation of the conflicting interpretations of this language.
plementing the declaration, consisted of five sections which are summarized below.19

Section 101 announced congressional policy. After declaring Congress' recognition of modern threats to the environment and of "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," subsection (a) declared, in general terms, the policy of the Federal government "to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."20 To carry out this policy, subsection (b) of section 101 established the "continuing policy of the Federal Government to use all practical means, consistent with other essential considerations of national policy to improve and coordinate Federal plans, functions, programs and resources" to achieve six goals: (1) fulfilling "the responsibilities of each generation as trustee of the environment for succeeding generations;" (2) assuring "safe, productive, and esthetically and culturally pleasing surroundings" for all Americans; (3) attaining "the widest range of beneficial uses of the environment without . . . undesirable and unintended consequences;" (4) preserving "our national heritage" and maintaining, "wherever possible, an environment which supports diversity, and variety of individual choice;" (5) achieving "a balance between population and resource use;" and (6) enhancing "the quality of renewable resources and approach[ing] the maximum attainable recycling of depletable resources."21 Subsection (c) then closed with the recognition "that each person should enjoy a healthful en-

21. Id.
environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."\textsuperscript{22}

Section 102 contained the action-forcing provisions that apply "to the fullest extent possible." These provisions included a general rule of construction for federal laws, regulations, and policies as well as other requirements applicable to all federal agencies. The rule of construction mandated that legal interpretation and administrative implementation proceed "in accordance with the policies set forth in [the] Act."\textsuperscript{23} For the most part, the other requirements contained relatively general directions to agencies. For example, the agencies were to use "a systematic, interdisciplinary approach . . . in planning and in decision-making, . . . [to] identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making, . . . [and to use] ecological information in the planning and development of resource-oriented projects."\textsuperscript{24}

Two requirements were relatively more specific. Subsection 102(2)(C) directed that "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" should include a "detailed statement by the responsible official." The subsection also directed that this statement should "accompany the proposal through the existing agency review process" and should address five matters:

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\textsuperscript{25}

\textsuperscript{22} Id.
\textsuperscript{23} Id. \textsuperscript{\$} 4332.
\textsuperscript{24} Id.
\textsuperscript{25} Id. \textsuperscript{\$} 4332(2)(C).
Another provision, subsection 102(2)(D), required agencies to “[s]tudy, develop, and describe alternatives to recommended courses of action” for all proposals that involved “unresolved conflicts concerning alternate uses of available resources.”

The remaining sections of title I addressed other specific matters. Section 103 imposed a requirement that all agencies review their “statutory authority, administrative regulations, and current policies” for “deficiencies and inconsistencies” prohibiting full compliance with NEPA and that they propose any needed changes to the President by July 1, 1971. Section 104 contained the language of the Senate instruction to its conferees preserving “specific statutory obligations” by requiring compliance with environmental standards, consultations with environmental agencies, or certifications from environmental agencies. Finally, section 105 explicitly declared that NEPA’s “policies and goals” were “supplementary to those set forth in existing authorizations of Federal agencies.”

II. The Rise of Judicial Oversight

NEPA was silent with respect to one crucial point—how Congress intended for it to be enforced. Although portions of the legislative history contain references to judicial enforcement, other passages suggest that the budgetary review process was to be the principal means of enforcement. In any event, budgetary enforcement never materialized and the courts quickly proved themselves willing to find that NEPA established judicially enforcible obligations. As a result of this willingness, courts assumed much of the burden of insuring compliance with NEPA, and the early ju-

26. Id. § 4332(2)(E).
27. Id. § 4333.
30. Id. § 4335.
31. Senate Hearings, supra note 8, at 116-17.
32. F. ANDERSON, NEPA IN THE COURTS, supra note 6, at 11 (citing COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE SUBCOMM. ON FISHERIES AND WILDLIFE CONSERVATION, HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, IMPROVEMENTS NEEDED IN FEDERAL EFFORTS TO IMPLEMENT THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, at 51 (1972)).
33. The CEQ now exercises a limited administrative role in overseeing NEPA compliance. See supra note 19. Even prior to the promulgation of Executive Order 11,991, the CEQ had issued nonbinding "guidelines" to assist federal agencies in complying with NEPA's impact statement requirement. See 38 Fed. Reg. 20,550 (1973); 36 Fed. Reg. 7724 (1971); N. ORLOFF
dicial decisions form an important chapter in NEPA's history.

A. The Promise of Calvert Cliffs'

On December 3, 1970, the Atomic Energy Commission (AEC) promulgated rules outlining how NEPA would be implemented in licensing proceedings for nuclear power plants. Opponents of these rules challenged their adequacy in the District of Columbia Circuit Court of Appeals and succeeded in having the rules set aside. In what must be regarded as the seminal NEPA case, Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, the court ruled that the AEC rules did not comply with NEPA and remanded them to the Agency for reconsideration.

The author of the Calvert Cliffs' opinion was Judge J. Skelly Wright, perhaps the leading judicial activist currently serving as a federal judge, and his very first paragraph set the tone for the opinion. Judge Wright declared that NEPA was "the broadest and perhaps the most important" of recent environmental statutes. The judicial role in implementing these new statutes was to ensure that "the promise of the new legislation will become a reality," and to make certain "that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

Judge Wright conceded that "NEPA, like so much other reform legislation of the last 40 years, is cast in terms of a general mandate and broad delegation of authority." Nonetheless, he found the policies embodied in the statute "a good deal clearer and more

& G. Brooks, supra note 19, at 39-42.
34. 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).
36. Calvert Cliffs', 449 F.2d at 1111.
37. Id.
demanding than does the Commission." He concluded that the policies were sufficiently clear to support a judicial holding "that the Commission’s procedural rules do not comply with the congressional policy."

In explaining the basis for this holding, Judge Wright offered a comprehensive overview of the new statute, and this overview has formed the framework of analysis for most subsequent NEPA litigation. The "general substantive policy" established by section 101 was "a flexible one;" it left "room for a responsible exercise of discretion" and "probably" precluded a judicial reversal of "a substantive decision on the merits, . . . unless it be shown that the [agency’s decision] . . . was arbitrary or clearly gave insufficient weight to environmental values." By contrast, Judge Wright described the action-forcing provisions of section 102 and the authority granted all agencies in section 105 to consider environmental factors in their decision making as "procedural" protections that "establish[ed] a strict standard of compliance." In particular, he rejected the contention that the qualifying phrase "to the fullest extent possible" made these procedural provisions discretionary. To the contrary, he viewed this language as setting "a high standard for agencies," a standard that required compliance in all cases except those where compliance would produce "a clear conflict of statutory authority."

Because Calvert Cliffs' involved only the adequacy of the AEC’s general rules for implementing NEPA, Judge Wright’s analysis addressed only the “procedural” protections of NEPA. However, his analysis demonstrated a willingness to apply those protections strictly, and consequently he found the AEC rules inadequate in four respects. First, the rules directed its hearing board to consider environmental issues only when they were raised by a party to the hearing proceedings. This conflicted with NEPA’s mandate for agencies to "consider the environmental impact of their actions ‘to the fullest extent possible.’" Second, the Commission’s decision to preclude consideration of environmental impacts in most licensing decisions where the notice of hearing appeared less than three

38. Id. at 1112.
39. Id.
40. Id. at 1112, 1115.
41. Id. at 1112.
42. Id. at 1115 (emphasis in original).
43. Id. at 1118-19.
months after adoption of the rules conflicted with its statutory duty to comply with NEPA's action-forcing provisions "to the maximum extent possible." Third, the AEC rule precluding evaluation of environmental impacts when applicants secured certifications showing that they would not violate existing environmental standards conflicted "with the basic purpose of the Act"—to mandate "a case-by-case balancing judgment on the part of federal agencies." Fourth, the Commission's refusal to consider environmental impacts in hearings concerning modification of previously issued construction permits failed to meet the strict standard of compliance applicable to the "procedural duties [of section 102, which requires the agency] to give full consideration to environmental protection."

Because the Atomic Energy Act contained an express provision authorizing the District of Columbia Circuit Court to review the Commission's rules, Calvert Cliffs' did not need to address the preliminary issues of jurisdiction, standing, and reviewability. Although other courts had to face such issues, they generally concluded that the courts had a significant role to play in enforcing NEPA. When no statute specifically provided for judicial review, the courts have found various other statutes, such as the Administrative Procedure Act and the general federal-question statute, sufficient to confer jurisdiction. The courts have also found that persons alleging environmental injury had standing to litigate

44. Id. at 1119-22.
45. Id. at 1123.
46. Id. at 1128-29.
NEPA claims and that NEPA claims were reviewable under the Administrative Procedure Act. Many of these early decisions involved development agencies (typically the Corps of Engineers and the Federal Highway Administration), and cases following Calvert Cliffs' generally displayed a willingness to engage in careful scrutiny of their actions for NEPA compliance.

B. The Threshold Determination: Whether an Impact Statement Must Be Prepared

The bulk of the reported decisions concern subsection 102(2)(C), which requires the preparation of a "detailed statement" for all "proposals for legislation or other major federal action significantly affecting the quality of the human environment." Most of the earliest NEPA cases involved the threshold decision not to prepare an impact statement. These cases were based on allegations that the agency failed to prepare a statement in a situation where one was required. The discussion below summarizes these decisions by grouping them into three categories: those addressing what standard of review applied to the threshold determination; those providing definitions for the principal statutory terms; and those deciding whether the courts should imply exceptions for particular types of actions.

1. Standard of Review

Because the level of judicial review employed can have a decisive impact on a court's decision, an important preliminary question in any judicial review of administrative action is what standard of review the court will use in reviewing the agency decisions. NEPA cases were no exception. Thus, how closely courts would review an agency's decision not to prepare an impact statement was an important aspect of the initial batch of NEPA cases. Most of the

54. See, e.g., Environmental Defense Fund, Inc. v. United States Army Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).
55. See generally Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 Colum. L. Rev. 612 (1970) (discussing the limitations imposed on judicial review of administrative agency determinations by the "rational basis" rule).
early district court decisions applied the “arbitrary and capricious” standard of the Administrative Procedure Act, but occasional exceptions meant that the issue would require resolution at the circuit level.

The first circuit court decision to attempt to define the standard of review for NEPA threshold determinations was Hanly v. Kleindeinst. The Hanly court adopted the arbitrary-and-capricious standard as the appropriate test for reviewing NEPA threshold cases, but it qualified that deferential standard by requiring the agency to compile an adequate administrative record documenting that its decision was not arbitrary. Hanly even required the agency to prepare a preliminary environmental analysis when the initial information available to the agency indicated that the proposal might have a significant impact on the environment.

Just five weeks after the Second Circuit issued its Hanly opinion, the Fifth Circuit suggested an alternate standard for reviewing NEPA threshold determinations. The Fifth Circuit described the threshold decision as a “jurisdiction-type conclusion” and concluded in Save Our Ten Acres v. Kreger that courts should review the decision not to prepare a statement “under a more relaxed rule of reasonableness, rather than by the narrower standard of arbitrariness or capriciousness.” The Fifth Circuit described its standard as a two-part analysis. First, the court had to “determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality.” Second, if the answer to the first inquiry was positive, “the court should proceed to examine and weigh the evidence of both the plaintiff and the agency to deter-

58. See, e.g., Scherr v. Volpe, 336 F. Supp. 886, 888 (W.D. Wis. 1971) (“[T]he court . . . must construe the statutory standards . . . and, having construed them, then apply them to the particular project, and decide whether the agency's failure violates the Congressional command.”), aff'd, 466 F.2d 1027 (7th Cir. 1972); Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 366 (E.D.N.C. 1972) (quoting Scherr).
60. Id. at 832.
61. 472 F.2d 463 (5th Cir. 1973).
62. Id. at 465.
63. Id. at 466.
mine whether the agency reasonably could have concluded that the particular project would have no effects which would significantly degrade our environmental quality." Save Our Ten Acres emphasized that this latter inquiry "need not be limited to consideration of the administrative record"; the reviewing court could consider "supplemental affidavits, depositions, and other proof concerning the environmental impact of the project . . . if an inadequate evidentiary development before the agency can be shown."

Although a Seventh Circuit decision accepted the arbitrary-and-capricious standard of Hanly, most courts followed the lead of Save Our Ten Acres. Eventually, the Eighth, Ninth, Tenth, and District of Columbia circuits adopted the reasonableness standard as did district courts in the First, Third, Fourth, and Sixth circuits. These developments indicate that all of the circuits that considered the issue (even the Second Circuit, through its requirement for an adequate administrative record) tried to provide for significant judicial oversight in cases where agencies elected not to prepare an environmental impact statement.

2. Definition of Statutory Terms

One of the time-honored methods through which courts control administrative actions is by defining particular questions as "issues of law" for which the judiciary is responsible. Courts regularly employed this technique in the early NEPA cases to narrow agency discretion in refusing to prepare an impact statement. In doing so, they attempted to define at least four terms that describe the type

64. Id. at 467.
65. Id.
66. First Nat'l Bank of Chicago v. Richardson, 484 F.2d 1369, 1380 (7th Cir. 1973).
68. City of Davis v. Coleman, 521 F.2d 661, 670-74 (9th Cir. 1975).
of proposals requiring the preparation of an impact statement: (1) when was an action considered "major," (2) what actions were "federal," (3) what environmental impacts were "significant," and (4) what constituted "the human environment."\textsuperscript{76}

The leading decision on the meaning of the term "major" was \textit{Minnesota Public Interest Research Group (MPIRG) v. Butz.}\textsuperscript{77} In \textit{MPIRG}, the Forest Service argued that NEPA established a bifurcated test requiring that two conditions be satisfied before an impact statement was mandated. First, the action had to be major, and second, the environmental impacts had to be significant.\textsuperscript{78} The Eighth Circuit, however, summarily rejected this approach and refused to "separate the consideration of the magnitude of federal action from its impact on the environment."\textsuperscript{79} Adopting such a formalistic approach would be inconsistent with "the purposes of the Act" and would create the anomalous category of "minor federal action significantly affecting the quality of the human environment" for which no statement would be prepared.\textsuperscript{80} To avoid this result, the \textit{MPIRG} court concluded that "the activities of federal agencies cannot be isolated from their impact on the environment" and that agencies had to provide "the detailed consideration [of environmental impacts] mandated by NEPA" when any action has "a significant effect" on the environment.\textsuperscript{81}

Arguments that NEPA was inapplicable because an action was not "federal" arose in two contexts. One set of cases involved situations where the primary actor was a private individual or a private business concern, but the private actor had to secure federal approval before undertaking the action. The second group of cases involved projects where the primary actor was a state or local government but the federal government participated in a significant way, usually by providing a substantial portion of the project's funding. In both types of cases, the trend of the NEPA decisions pointed in the same direction: NEPA applied whenever a federal agency participated in a significant way.

In the cases involving private actors, the courts generally required the preparation of an impact statement whenever the gov-

\textsuperscript{76} See generally 42 U.S.C. § 4332(2)(C) (1982).
\textsuperscript{77} 498 F.2d 1314 (8th Cir. 1974).
\textsuperscript{78} Id. at 1321.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 1321-22.
\textsuperscript{81} Id. at 1322.
ernment authorized a project that would have required a statement if the government had tried to undertake the project itself. The decisions seemed to pay little attention to whether an action was labelled a permit, license, or lease, or received some other designation. If a federal agency had significant discretion to allow or refuse to allow the private actor to proceed, the agency had to prepare a statement before exercising its discretion.82 If no agency had authority to control the private activity, then no statement was required.83

The courts used a similarly pragmatic approach for projects involving federal cooperation with state and local authorities. Although agencies did not have to prepare impact statements for state or local projects over which they had no control,84 courts did require the preparation of impact statements when federal agencies played a significant role in a project or had discretion as to whether to fund a project.85 Furthermore, courts refused—especially in highway construction cases—to allow state and local governments to avoid environmental scrutiny by funding the controversial portions of joint projects with nonfederal funds.86

82. E.g., id. (extensions and modifications to contracts allowing the cutting of timber on federal lands); Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (approval of a ninety-nine year lease on an Indian reservation); National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (leases for offshore oil exploration by private companies); Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972) (reviewing NEPA rules that apply in licensing proceedings for construction and operation of nuclear power plants by private companies).

83. See W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 763 (1977) (“Without attempting to explain or reconcile all the cases, the distinguishing feature of federal involvement is the ability to influence or control the outcome in material respects. The [impact statement] process is supposed to inform the decision-maker. This presupposes he had judgment to exercise. Cases finding federal action emphasize authority to exercise discretion over the outcome.”).


85. E.g., Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (amendments to urban renewal contracts); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (construction grant for medical facility at state prison).

86. E.g., Ecology Center of La., Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933 (1972); James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., 359 F. Supp. 611 (E.D. Va. 1973); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972), aff'd, 484 F.2d 11 (8th Cir.
The early NEPA cases were less successful in defining the term "significantly" so as to narrow agency discretion with regard to the threshold determination. The Court in *Hanly* expressed confidence that "the meaning of the term 'significantly'... can be isolated as a question of law" and proceeded to offer the following test for determining when environmental impacts are significant:

"In deciding whether a major federal action will "significantly" affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the area."\(^87\)

Although widely followed,\(^88\) the *Hanly* test (especially the italicized language) did little to alter the factual nature of the significance inquiry. As a result, cases involving disputes over the significance of environmental harm formed the bulk of the cases where courts tried to develop more stringent standards for reviewing agency discretion.\(^89\)

The final term defined by the courts was "human environment." Here the dispute revolved around whether an impact statement was required only when an action significantly affected natural resources like land, air, or water or whether it also applied when the significant effects were socio-economic in nature. The government advocated a narrow definition that provided little scope for judicial...
review of the agency decision. The issue, however, tended to divide commentators. Some argued for a broad "ecological" approach that recognized social and economic impacts as part of the decisional matrix; others expressed concern that such a broad and vague definition of the term "environmental" would give agencies still another excuse for giving short shrift to impacts on natural resources or the physical environment.

The judges proved as ambivalent as the commentators. The seminal case defining "human environment" was Hanly, which involved the General Services Administration's proposal to construct a metropolitan correction center as part of an annex to the United States courthouse in Manhattan. On the one hand, the Second Circuit suggested, in dicta, that "[i]t is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making . . . [a threshold] determination since they do not lend themselves to measurement." On the other hand, the court did conclude that the agency was to consider two issues with more social than physical impact: whether a proposed community treatment program for drug addicts would endanger the health and safety of persons in the area and whether construction of the proposed facility would increase the risk of crime in the area.

Most other cases tended to give lessened scrutiny to socio-economic impacts, but stopped short of holding that the effects were outside NEPA's scope. A general resolution of the issue finally

91. E.g., Peltz & Weinman, NEPA Threshold Determinations: A Framework of Analysis 31 U. Miami L. Rev. 71, 116-17 (1976); cf. Anderson, The National Environmental Policy Act, Fed. Envtl. L. 311-12 (Dolgin & Guilbert eds. 1974) ("[T]here is a danger that project justification and economic and technical considerations will swallow up environmental impact analysis if the scope of the statement [were] expanded" to require it to contain "the full record documenting how costs and benefits were traded off.").
92. The Hanly litigation also challenged the failure to prepare an impact statement for an office building, located in the same complex, to house the United States attorney and his staff. Because that building did not involve the same threat of increased crime and adverse health impacts on the public, the Second Circuit upheld the GSA determination that no impact statement was required. Hanly, 471 F.2d 823.
93. Id. at 833. But cf. 42 U.S.C. § 4332(2)(B) (1982) (NEPA provisions requiring federal agencies to develop methods and procedures that "will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.").
94. Hanly, 471 F.2d at 832.
95. E.g., Nucleus of Chicago Homeowners v. Lynn, 524 F.2d 225 (7th Cir. 1975), cert.
emerged in a series of decisions rendered during the middle of the decade. The cases that prompted the resolution concerned a common factual question—whether the socio-economic impacts associated with eliminating a military organization or reducing its size required the preparation of an impact statement. With one significant exception, the decisions reached a curious compromise. Although the courts refused to define “human environment” so as to exclude socio-economic impacts, they ruled that these impacts would not require the preparation of an impact statement in cases where the impact on the physical environment was not “significant.”

3. Exceptions

The early NEPA cases also reflected a judicial reluctance to fashion exceptions exempting particular federal actions from the impact statement process. As a result, the courts held that NEPA’s requirement that “all agencies” comply with the action-forcing provisions “to the fullest extent possible” precluded exemptions except when an agency’s NEPA duties directly conflicted with another statutory mandate. They also carved out an exemption for the Environmental Protection Agency only when the agency’s regulatory procedures provided “the functional equivalent of an impact statement.” Finally, they even applied the impact statement requirement to projects begun before NEPA was enacted whenever the remaining governmental action “would qualify independently

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98. E.g., Calvert Cliffs’ Coordinating Comm. v. United States Atomic Energy Comm’n, 449 F.2d 1109, 1115 (D.C. Cir. 1971). For a discussion of the cases accepting and rejecting the argument that only “substantial compliance” with NEPA was required, see also W. Rodgers, supra note 33, at 764-65.

under the Act as a 'major federal action.'”

C. The Duty to Consider Alternatives

Although section 102(2)(C) contained a number of action-forcing provisions, the impact statement was the most specific and thus the most amenable to judicial enforcement. Nonetheless, several decisions held that a second requirement, the direction to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources,” also imposed judicially enforceable obligations.

A Fifth Circuit decision concluded that this duty to “study, develop, and describe alternatives” imposed more stringent obligations than the mandate that impact statements discuss “alternatives to the proposed action.” According to Environmental Defense Fund, Inc. v. United States Army Corps of Engineers (Tennessee-Tombigbee Waterway), the separate requirement to study, describe, and develop alternatives was “supplemental to and more extensive in its commands” than the duty imposed by section 102(2)(C) to consider alternatives in an impact statement. Its purpose was “to emphasize that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action,” including those that were beyond the proposing agency’s powers to implement.

The Second Circuit extended the Tennessee-Tombigbee analysis to hold that NEPA required federal agencies to study, develop, and describe alternatives in some cases where the agency was not required to prepare an impact statement. The court noted in Trinity Episcopal School Corp. v. Romney that the alternatives mandate applied to “any proposal which involves unresolved conflicts concerning alternative uses of available resources,” not just to


101. 42 U.S.C. § 4332(2)(E) (1982). This subparagraph was § 102(2)(D) of NEPA as originally enacted. See supra note 26 and accompanying text.

102. 492 F.2d 1123 (5th Cir. 1974).

103. Id. at 1135.

those that had a significant impact on the quality of the human environment.\textsuperscript{105} Without attempting to define the "outer limits" of this language, the court affirmed that the alternatives analysis was required whenever "the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment."\textsuperscript{106} Applying that standard to the case before it, the Second Circuit ruled that the Department of Housing and Urban Development had to prepare an alternatives analysis for a proposed change in an urban redevelopment plan even though the change did not require the preparation of an impact statement.\textsuperscript{107}

D. Impact Statements

As the foregoing discussion illustrates, the courts quickly demonstrated their willingness to review the threshold determination of whether an environmental impact statement had to be prepared. As a result, agencies began to acknowledge their duty to prepare the statements,\textsuperscript{108} and opponents of proposed agency actions began to question agency compliance with the statute's requirements. Three types of issues appeared in the cases: when must impact statements be prepared; who must prepare them; and what must they include.

1. When Must an Impact Statement be Prepared?

For many development projects, the courts made little effort to specify when the statement had to be prepared, except to require its preparation before the federal government began construction or made an irrevocable commitment to the project. If the government tried to begin a "major federal action," such as building a highway or constructing a dam without preparing a statement, courts regularly enjoined agencies from proceeding with the project until it complied with NEPA's procedural requirements.\textsuperscript{109} Moreover, compliance was required even in situations where intuition suggested that the environmental analysis might amount to a post

\textsuperscript{105} Trinity Episcopal, 523 F.2d at 93.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 95.
\textsuperscript{108} After preparing 319 draft statements in 1970, federal agencies prepared more than 1000 in each of the next five years. 1976 U.S. COUNCIL ON ENVTL. QUALITY, SEVENTH ANN. REP. ON ENVTL. QUALITY 132 (Table I-33) [hereinafter cited as 1976 U.S. COUNCIL].
\textsuperscript{109} See W. RODGERS, supra note 83, at 799-801.
hoc rationalization for the project. Perhaps courts believed that procedural compliance was necessary to preserve the "integrity" of the statutory scheme or that the availability of the injunctive remedy would encourage agencies to prepare statements earlier in future projects. Or maybe they believed that careful scrutiny of the statement itself and of the merits of the agency's decision would enable them to set aside such rationalizations in subsequent litigation. At any rate, the prohibitory injunction quickly became the standard remedy for forcing agencies to prepare statements before they began development projects.

However, the prohibitory injunction seemed especially inadequate in two types of cases: grants programs (such as the Federal Highway Act) where the federal funding commitment was reached long after the basic design and location decisions had been made, and research programs (like the liquid fast breeder reactor program) that involved substantial expenditures before the federal government committed itself to the development of the technology. In both cases, postponing the environmental analysis until the time for the final federal decision could seriously bias the decision by discouraging alternate designs or locations, or by advancing the research technology to a point that gave it a clear advantage over alternative technologies. Although the courts occasionally tried to force granting agencies to consider the broader design and location issues, the case that directly addressed the timing issue involved the research problem.

The plaintiffs in Scientists' Institute for Public Information (SIPI) v. Atomic Energy Commission challenged the AEC's failure to prepare an impact statement with respect to its research and development program for a liquid fast breeder reactor to be used in nuclear power plants. Although the AEC conceded that constructing and operating its test facilities for the program would require preparation of impact statements for the various facili-

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110. Id. at 738.
112. For a discussion on the review of the adequacy of impact statements, see infra text accompanying notes 145-56.
113. For a discussion of the cases that did review the substance of agency decisions, see infra notes 157-66 and accompanying text.
115. 481 F.2d 1079 (D.C. Cir. 1973).
116. Id. at 1082-84 (describing the fast breeder technology).
ties,\textsuperscript{117} it argued that the impact statement requirement did not apply to research and development projects and that, in any event, the uncertain prospects of breeder technology made the preparation of a statement premature.

Judge Wright authored the \textit{SIPi} opinion, and he gave the AEC's decision the same strict scrutiny he had advocated in \textit{Calvert Cliffs}.'\textsuperscript{118} In his view, the agency's attempt to exclude research and development programs from the statement requirement rested on an "unnecessarily crabbed approach" to the statute.\textsuperscript{119} He concluded that there were two grounds upon which to require statements for on-going research efforts like the breeder reactor program. First, because of the AEC's annual appropriation requests, such a project amounted to a "proposal for legislation."\textsuperscript{120} Second, since technology development programs involved "federal" actions and the environmental impacts of the breeder program were significant, the breeder program was a "major federal action significantly affecting the quality of the human environment."\textsuperscript{121}

The question of "[w]hether a statement on the overall [breeder] program should be issued now or at some uncertain date in the future" was a more difficult one for the court. The underlying policy of NEPA favoring meaningful and timely information on the effects of agency action pulled the court in conflicting directions: "[s]tatements must be written late enough in the development process to contain meaningful information, but they must [also] be written early enough so that whatever information is contained can practically serve as an input into the decision making process."\textsuperscript{122} To solve that dilemma, the court identified four factors as relevant in deciding when a statement was required: (1) the likelihood that the technology would reach commercial feasibility in the near future; (2) the availability of meaningful information on the effects of application of the technology; (3) the extent to which the development of the technology causes irretrievable commitments and precludes the pursuit of alternatives; and (4) the severity of the environmental effects if the technology proves commercially feasi-

\textsuperscript{117} Id. at 1085.
\textsuperscript{118} See supra notes 34-44 and accompanying text.
\textsuperscript{119} \textit{SIPi}, 481 F.2d at 1086-87.
\textsuperscript{120} Id. at 1088. The Supreme Court later rejected the argument that appropriation requests were "proposals for legislation." Andrus v. Sierra Club, 442 U.S. 347 (1979); see infra notes 230-35 and accompanying text.
\textsuperscript{121} \textit{SIPi}, 481 F.2d at 1088-89.
\textsuperscript{122} Id. at 1094.
Because each of these factors indicated that the time for an impact statement on the breeder program had arrived, the court entered a declaratory judgment holding that NEPA required the AEC to prepare an impact statement on the program.

Subsequent decisions served to clarify the relationship of the "programmatic" statements required by SIPI to the specific projects that formed the bulk of NEPA litigation. These cases emphasized that preparation of the programmatic statement did not always eliminate the responsibility to prepare additional statements on individual projects in the program. If the individual projects would have significant impacts not considered in the programmatic statement, the agency also had to prepare additional "site-specific" statements covering those projects.

2. Who Must Prepare the Statements?

Section 102(2)(C) directs the "responsible official" to prepare the "detailed statement" required for "proposals for . . . major federal actions significantly affecting the quality of the human environment." This requirement presents relatively few problems with respect to the government's own projects, but it raises difficulties when the government authorizes private action or funds state or local actions. In those cases, the government frequently preferred to have the applicant for the permit or grant prepare the environmental analysis, while environmental plaintiffs argued that section 102(2)(C) mandates that the agency itself prepare the statement.

The most stringent restrictions on the federal government's power to delegate preparation of the impact statement to private groups or to state or local governments came in a series of decisions rendered by the Second Circuit. The first of these decisions was Greene County Planning Board v. Federal Power Commission (FPC). In Greene County, the court of appeals invalidated an

123. Id. Three years later, the Supreme Court reversed Judge Wright's attempt to apply this four-part test where the agency "anticipated" a proposal for a major federal action significantly affecting the quality of the human environment. See Kleppe v. South Carolina, 427 U.S. 390 (1976); infra notes 223-35 and accompanying text.

124. SIPI, 481 F.2d at 1095 n.68.

125. The plaintiffs in SIPI did not seek to enjoin continued research and development work pending completion of the statement. Id. at 1082 n.1; see W. Rogers, supra note 83, at 791.


127. 455 F.2d 412 (2d Cir.), cert. denied, 404 U.S. 849 (1972).
FPC rule that required all applicants for permits involving construction of "major projects" to prepare the impact statements needed to satisfy NEPA.\textsuperscript{128} According to the Second Circuit, NEPA required the FPC staff to prepare its own impact statement before holding hearings on an application for a permit.\textsuperscript{129} To guide the agency in revising its rules, the court cited with approval the rules the AEC had adopted following the remand in \textit{Calvert Cliffs}.\textsuperscript{130} Those rules, the court noted, not only required "an applicant to submit its environmental report," but they also obligated the agency to prepare the "final detailed statement, which is offered in evidence at a contested hearing."\textsuperscript{131}

Nearly three years later, the Second Circuit expanded its \textit{Greene County} holding to encompass governmental applications for federal grants. In \textit{Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation},\textsuperscript{132} the appellate court ruled that the Federal Highway Administration (FHWA) could not satisfy NEPA by requiring the state agency seeking funds to prepare the impact statement. Quoting the holding in \textit{Greene County}, the court explained that state agencies are "established to pursue state goals" that may not parallel the federal commitment to environmental protection; therefore, "[t]ransposing the federal duty to prepare the [statement] is . . . unlikely to result in as dispassionate an appraisal of environmental considerations as the federal agency itself could produce."\textsuperscript{133} To the contrary, the best method for obtaining "an objective, comprehensive" statement was to require "strict adherence" to the \textit{Greene County} rule in the highway-grant context.\textsuperscript{134}

Not all decisions applied the "responsible official" requirement so strictly. Indeed, some were quite tolerant of agency delegation of these responsibilities. Perhaps the most tolerant was the Ninth Circuit's decision in \textit{Life of the Land v. Brinegar}.\textsuperscript{135} 

\textsuperscript{128} The FPC regulation required the commission staff to prepare its own statement in uncontested cases, but not in contested cases. \textit{Greene County}, 455 F.2d at 416-17. Because \textit{Greene County} was a contested case, the staff had not prepared an impact statement.

\textsuperscript{129} Id. at 422.

\textsuperscript{130} Id. (citing 36 Fed. Reg. 18,071 (1971)).

\textsuperscript{131} \textit{Greene County}, 455 F.2d at 422.

\textsuperscript{132} 508 F.2d 927 (2d Cir. 1974), \textit{vacated}, 423 U.S. 809 (1975), \textit{rev'd on remand}, 531 F.2d 637 (2d Cir. 1976).

\textsuperscript{133} Id. at 931.

\textsuperscript{134} Id. at 932.

\textsuperscript{135} 485 F.2d 460 (9th Cir. 1973), \textit{cert." denied}, 416 U.S. 961 (1974). \textit{See also} Movement Against Destruction v. Volpe, 500 F.2d 29 (4th Cir. 1974); Iowa Citizens for Envtl. Quality,
Land involved a Federal Aviation Administration (FAA) grant to help finance the construction of a new runway for Honolulu International Airport, a project that the FAA recognized as requiring the preparation of an impact statement. According to the Ninth Circuit, the impact statement was a group effort. A "team" of "federal and state officials, and employees of . . . a private consulting company" all participated in the writing of the initial draft. This team also prepared the final statement that was approved by the Assistant Secretary for Environment and Urban Systems in the Department of Transportation.136

The plaintiffs objected to the participation of the consulting firm's employees in the preparation of the statement. The plaintiff argued that because the consulting firm had also been awarded a management contract to supervise construction of the runway, allowing its employees to help prepare the impact statement amounted to an impermissible delegation of responsibility for the statement to a private firm with "a major and direct contingent financial interest in the . . . construction [of the runway]."137

The Ninth Circuit unequivocally rejected the plaintiff's argument. Acknowledging that the record showed that the consulting firm "had a financial interest in an affirmative decision on the proposed project,"138 the court did not believe that this fact disqualified its employees from assisting in the preparation of the impact statement. In the Ninth Circuit's view, "nothing . . . in either the wording of NEPA or the case law . . . indicates that, as a matter of law, a firm with a financial interest in [a] project may not assist with the drafting of the [statement]." All that NEPA mandated was that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of section 102(2)(C)." The FAA had satisfied that requirement because the record demonstrated that FAA officials "actively participated in all phases of the [statement] preparation process."139


136. Life of the Land, 485 F.2d at 466-67. The FAA conceded that it bore the ultimate responsibility for the statement. Id. at 467.
137. Id. at 467.
138. Id.
139. Id.
It is possible to reconcile Life of the Land with the Second Circuit decisions by arguing that the distinction was factual rather than conceptual; that is, by emphasizing the Ninth Circuit's findings concerning the adequacy of the FAA's contribution to the statement and of its oversight of the nonfederal party's contribution to the impact statement. However, the FHWA was unwilling to rely on its ability to persuade either the Supreme Court or the Second Circuit and its sister tribunals to limit the Greene County-Conservation Society rule, and it quickly persuaded Congress to amend NEPA to permit state highway departments to prepare draft impact statements. Although the amendment granted the FHWA the specific relief it sought, it still required the FHWA officials to participate in the preparation of the statement, to evaluate the statement "independently," and to assume responsibility for the statement's "scope, objectivity, and content." Moreover, in an apparent attempt to limit the amendment to highway cases, the amendment only applied when the agency preparing the statement had statewide responsibilities for the type of project that the federal government was supporting through its grant program.

Most other agencies seemed relatively untroubled by the delegation cases. They accommodated themselves to the Greene County-Conservation Society-Life of the Land line of decisions by assuming responsibility (using either governmental employees or consultants with no direct financial interest in the proposal) to prepare impact statements. They did, however, frequently require permit and grant applicants to supply the ecological and other data that would be used in preparing the statements.

140. Life of the Land distinguished the cases in this way: "Unlike . . . [Green County and Conservation Society of Southern Vermont], the federal agency here involved did not abdicate a significant part of its responsibility to another organization." Id. at 468 (citations omitted).


142. See S. Rep. No. 152, 94th Cong., 1st Sess. 2 (1975). According to the Senate Report, the proposed statute "would establish a single, uniform procedure for [impact statement] preparation in a very limited number of Federal programs most analogous to, and including, the Federal-aid highway program." Id. at 9.

143. Even the Second Circuit permitted agencies to use consultants who did not have a financial interest in the project. See National Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 87 (2d Cir. 1975).

144. See, e.g., 10 C.F.R. § 51.20 (1976) (Nuclear Regulatory Commission); 18 C.F.R. § 2.81 (Federal Power Commission); cf. 33 C.F.R. §§ 209.410(e)(7)-.410(e)(8) (allowing the corps of engineers to consider environmental submissions of nonfederal applicants for permits).
3. What Must the Statement Include?

The third, and most fundamental, problem regarding impact statements was the determination of whether a statement satisfied the statute's requirement of a "detailed statement" analyzing the environmental consequences of the proposal. NEPA provided little guidance on what had to be included; it simply directed that the statement address each of five fairly general topics. Far fewer early cases dealt with the question of statement "adequacy" than dealt with the threshold question of whether an impact statement had to be prepared. But the federal courts reaching the adequacy issue proved willing to add substance to the rather vague statutory provision that Congress had enacted.

As was true with the threshold decisions not to prepare a statement, one of the first issues courts reviewing the adequacy of statements had to face was specifying the applicable standard of review. The reported decisions reached a result that paralleled the one taken in the threshold cases. Searching for an intermediate level of review between the deferential "arbitrary and capricious" standard and the standard of de novo review, most courts settled on a standard of "reasonableness." This standard required the courts to take a "hard look" at whether the agency had made a good faith effort to cover the statutory topics.

The cases reaching the adequacy issue tended to focus on two of the topics enumerated in the statute: the duty to analyze the environmental impacts of the proposed action and the responsibility to discuss alternatives to the proposed action. With respect to both topics, courts tried to force agencies to make the statement a "full disclosure" document that could form the basis for rational

145. See supra text accompanying note 25.
146. The reason for this focus in the early cases is obvious. There were relatively few impact statements prepared in NEPA's first year. For a summary of the statements agencies prepared during the first half of the 1970's, see 1976 U.S. COUNCIL, supra note 108, at 132 (Table I-33).
An early case that emphasized the need for the statement to analyze environmental impacts was *Committee for Nuclear Responsibility, Inc. v. Seaborg.* Seaborg reversed a district court order granting the AEC summary judgment regarding the adequacy of the statement it had prepared on a proposal to conduct an underground nuclear test. The plaintiffs offered to establish that the statement omitted "responsible scientific opinion" on the environmental consequences of the proposed test, and the court of appeals held that this offer was sufficient to raise a disputed issue of material fact rendering the entry of summary judgment improper.

In explaining the basis for its ruling, the court disavowed any judicial authority "to rule on the relative merits of competing scientific opinion." Instead, the judicial duty was to ensure that statements included "opposing scientific views" and that agencies did not "take the arbitrary and impermissible approach of completely omitting from the statement . . . any reference whatever to the existence of responsible scientific opinions concerning possible adverse environmental effects." The court conceded that the preparers of the statements had "discretion" to exclude opinions that did not qualify as "responsible opposing views," but held that the exercise of that discretion was subject to judicial review. Thus, it was improper to grant summary judgment before giving the plaintiffs the opportunity to prove that the agency had exceeded its discretion.

The leading case explaining the need for a statement to discuss "alternatives to the proposed action" was *Natural Resources Defense Council, Inc. v. Morton.* The case involved a challenge to the adequacy of an impact statement prepared by the Interior Department with respect to its proposal to grant oil and gas leases for off-shore lands in the Gulf of Mexico. All parties conceded that the department had accurately described the environmental impacts of the proposals. The plaintiffs, however, argued that the statement

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149. 463 F.2d 783 (D.C. Cir. 1971).
150. Id. at 787.
151. Id. (emphasis in original).
152. 458 F.2d 827 (D.C. Cir. 1972).
153. Id. at 833.
did not satisfy NEPA's requirements because it failed to discuss various alternative ways to satisfy the energy needs that had prompted the proposal for off-shore leasing.

Before considering the particular alternatives suggested by the plaintiffs, the court broadly defined the purposes that Congress "contemplated" impact statements would serve. According to the court, Congress intended for the statement to do more than guide the official who was responsible for its preparation. The statement also was to "constitute the environmental source material for the information of Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of—and by—the public."

Analysis of the Interior Department's statement in light of this congressional purpose led the court to conclude that it did not satisfy NEPA's requirement to discuss alternatives. The most significant omission was the failure to discuss the alternative of eliminating oil import quotas. The Department defended this omission on the grounds that its Secretary lacked the power to implement the alternative and that a statement did not have to address any alternatives that were beyond the proposing agency's powers to adopt or put into effect. The court unequivocally rejected this analysis. Instead, it insisted that the range of alternatives the statement had to discuss was as broad as the problem it was attempting to redress. The court concluded that the statement was to guide "Congress and the President, to whom [it] goes" as well as to explain "the thinking of the agency that prepared it." As a result, the statement had to address all reasonable alternatives, such as the elimination of import quotas, that fell within the purview of "these ultimate decision makers."

In applying this analysis to the other alternatives suggested by the plaintiffs, the court emphasized that the statement only had to address those suggestions that were reasonable alternatives to the need for energy through the mid-1970's. On the basis of this criterion, the court upheld the agency's failure to discuss development of oil shale, desulfurization of coal, coal liquefaction and gasification, tar sands, and geothermal resources. As for various other alternatives that would require congressional action to implement, the court merely announced the following rule of reasonableness:

154. Id.
155. Id. at 835.
without explaining how it would apply to the suggested alternatives:

The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch. But the need for an overhaul of basic legislation certainly bears on the requirement of the Act. We do not suppose Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the antitrust laws.\textsuperscript{156}

E. \textit{Review of Substantive Decisions}

The ultimate aim of NEPA was neither to assure the preparation of impact statements nor to guarantee the high quality of statements that were prepared. It was to change the substantive decisions made by federal agencies, to induce them to reach decisions less harmful to the environment than what would have been reached without NEPA. NEPA cases did consider the extent to which courts would enforce this ultimate or substantive goal of NEPA, but the answer they gave was equivocal. The courts generally found substantive decisions reviewable, but they normally applied the deferential "arbitrary and capricious" standard in reviewing specific agency decisions. Nonetheless, the issue remained unsettled, and environmentalists continued to argue for stricter scrutiny of these substantive decisions.


\textsuperscript{156} \textit{Id}. at 837.


\textsuperscript{158} \textit{Id}. at 1115.
Although some decisions indicated that NEPA authorized no substantive review at all,\textsuperscript{159} most followed the \textit{Calvert Cliffs}' dicta. The cases claimed a power to review agency decisions but adopted a deferential standard that invariably sustained the agency's determination.\textsuperscript{160} Perhaps the best illustration of this combination of formal review authority and practical impotence is the Eighth Circuit's decision in \textit{Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army (Gilham Dam)}\textsuperscript{161} Both NEPA's language and its legislative history convinced the appellate court that the statute was designed "to effect substantive changes in decision making" and led it to conclude that the district judge had erred in failing to recognize that NEPA imposed substantive obligations that were subject to judicial review. Nonetheless, the court affirmed the district court's judgment in favor of the Corps of Engineers. According to the Eighth Circuit, NEPA permitted a court to overturn substantive decisions only when an agency failed to make "a full, good faith consideration and balancing of the environmental factors" or when the balance the agency struck "was arbitrary or clearly gave insufficient weight to environmental values."\textsuperscript{162} Applying this deferential standard, the Eighth Circuit was unwilling to set aside the Corps' decision. In view of the advanced stage of the project when NEPA was passed,\textsuperscript{163} the decision of the Corps of Engineers' was defensible, even though the official in charge of preparing the impact statement had assured local civic leaders that the dam would be built while the statement was being prepared.\textsuperscript{164}


\textsuperscript{161} 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973).

\textsuperscript{162} Id. at 300.

\textsuperscript{163} "[T]he overall project was authorized by Congress eleven years prior to the passage of NEPA, and was sixty-three percent completed at the date this action was instituted." Id. at 301.

\textsuperscript{164} "Colonel Vernon W. Pickney, District Engineer in charge of preparing the impact statement until his retirement, [spoke] before a local Chamber of Commerce meeting, assuring his listeners that the Gillham Dam would definitely be built." Id. at 295.
Environmentalists welcomed the two-pronged test of Gilham Dam, but they objected to the Eighth Circuit's application of it and argued that it did not exhaust NEPA's substantive requirements. Their arguments frequently relied on Citizens To Preserve Overton Park, Inc. v. Volpe,165 in which the Supreme Court interpreted the Department of Transportation Act as a strict limitation on the federal government's ability to fund highways that cross publicly owned park land. Environmentalists suggested that various phrases in section 101 of NEPA were susceptible to a similarly restrictive reading. For example, environmentalists suggested that the direction to "use all practical means" to achieve NEPA's goals could be read to require federal agencies to mitigate environmental harm whenever feasible. Furthermore, the references to "each generation as trustee of the environment for succeeding generations" could incorporate the public trust doctrine that had formed the basis for state law decisions protecting the environment.166 Even though environmentalists did not prevail on these arguments, they remained hopeful that courts might eventually scrutinize substantive decisions as carefully as the courts had come to scrutinize threshold determinations and impact statements.

III. PRELIMINARY ASSESSMENTS OF NEPA

When those who had advocated greater sensitivity to environmental values paused to assess NEPA in the mid-1970's, most of their appraisals were positive, but not euphoric.167 For example, when Frederick Anderson, the director of the Environmental Law Institute, carefully analyzed NEPA's judicial history in 1973168 and its institutional implementation a year later,169 he lauded NEPA's accomplishments while cautioning that much remained to be done. In his book, NEPA in the Courts, Anderson praised the early judicial decisions for establishing "NEPA's potential for lasting reform

168. F. ANDERSON, NEPA IN THE COURTS, supra note 6.
169. Anderson, supra note 91, at 73.
of federal government;" but he also noted that analysis of the decisions shed "little light on the actual difference, if any, that NEPA is making in the final decisions of the federal agencies and in the quality of the environment."170 A year later, Anderson authored an institutional analysis of NEPA, and offered definite, but restrained, praise for NEPA's accomplishments. He declared that NEPA had produced "progress in reforming the bureaucratic processes that neglect environmental values," but he hastened to add that this progress still fell "short of the fundamental administrative revolution that the Act contemplates." In particular, he found more progress in procedural compliance than in substantive agency decisions.171

When Professor Rodgers published his environmental law treatise in 1977, he offered a more positive assessment of NEPA.172 It was, he asserted, "the Sherman Act of environmental law," an "enactment that introduces federal courts to environmental questions comprehensively for the first time, expands the scope of judicial review of administrative action, injects new discipline and values into administrative decision-making, and strengthens the hand of Congress in overseeing agency actions with adverse environmental effects."173 Despite these accomplishments, he acknowledged that NEPA could still be dismissed as "a paper tiger;" like all "significant legislation," it fell "short of its supporters' fondest aims."174

Not all appraisals of NEPA were so favorable. Perhaps the most notable of the nay-sayers was Professor Joseph Sax of the University of Michigan.175 Based on his experience in opposing airport expansion projects,176 he concluded that NEPA was largely a failure that produced "little except fodder for law review writers and contracts for that newest of growth industries, environmental con-

170. F. ANDERSON, NEPA IN THE COURTS, supra note 6, at vii-ix.
172. W. RODGERS, supra note 83.
173. Id. at 697.
174. Id.
176. One of the projects that prompted the Life of the Land litigation was the expansion of the Honolulu Airport. See supra text accompanying notes 135-39.
sulting.” In his view, significant environmental reform required more than laws requiring governments to study environmental consequences before acting. To be effective, laws had to change "behavioral realities" by making environmentally preferable actions as easy to implement and as certain to receive adequate financing as alternatives that cause greater damage to the environment. Since NEPA did neither, it would “not lead to significant self-reform by agencies.”

IV. Administrative Codification of the Early Decisions

In the last half of the 1970’s, increased administrative review of NEPA decisions served to reinforce the rules reflected in the early judicial opinions described in the preceding section. The Council on Environmental Quality (CEQ) was the agency primarily responsible for the new administrative oversight, and the chief vehicle for oversight was the CEQ’s adoption of regulations, made binding on all federal agencies by executive order.

Title II of NEPA had created the CEQ as an advisory body in the office of the President. Shortly after it was organized, the CEQ promulgated a set of guidelines to aid other federal agencies in complying with their duties regarding the preparation of impact statements. Although agencies and courts frequently followed these guidelines in interpreting NEPA, their scope was limited, and they were advisory rather than mandatory in character.

177. Sax, supra note 175, at 248.
178. Id. at 245.
179. See supra note 19.
182. The guidelines only addressed the preparation of impact statements. However, they grew “more elaborate and sophisticated” with each revision: “The first guidelines, issued in April 1970 as interim guidelines, were eight pages long. The second set, released in April 1971, increased in length to eighteen pages. By the third revision of August 1973, the guidelines had evolved to a length of approximately sixty-five printed pages.” N. ORLOGG & G. BROOKS, supra note 19, at 42.
183. Id. The authors asserted that [the Executive Order designated the CEQ directives “guidelines,” a term that does
In 1977, President Carter issued an executive order giving the CEQ authority to establish NEPA regulations that all federal agencies were obligated to follow. After holding public hearings, polling federal agencies, and publishing a draft set of regulations, the CEQ issued its final regulations on November 29, 1978, and made them effective on July 30, 1979. Three aspects of the new regulations were important. First, they tried to streamline and improve NEPA compliance. Second, they codified most of the substantive rules that had evolved in the early litigation described above. Third, they enhanced the CEQ’s role as an overseer of NEPA compliance.

In streamlining and improving NEPA compliance, the CEQ regulations attempted to respond both to the complaints of federal agencies and their supporters that NEPA was unreasonably delaying federal actions, and the complaints of environmentalists that NEPA compliance frequently amounted to a paper-shuffling exercise that did not affect actual decisions. To reduce delays and paperwork, the regulations limited the length of impact statements, allowed agencies to reuse impact statements when later actions raised issues that had previously been considered, and permitted agencies to identify categories of action as exempt from impact statement requirements. Much of the effort to encourage greater use of statements in agency decision making was hortatory in nature, but two new requirements did appear. The regulations directed agencies to use a “scoping” process to identify significant

not have an accepted meaning in traditional legal theory. The directives were not “regulations,” nor were they promulgated under the rulemaking procedures of the Administrative Procedures Act. Accordingly, courts were reluctant to accord them the full status of law; and judicial interpretations of their authoritativeness varied substantially . . . . The agencies’ responses to the guidelines were similarly mixed. Although most agencies readily acquiesced in the Council’s elaboration of NEPA’s mandates, a few agencies recoiled at the additional requirements established by the Council and declined to follow provisions in the guidelines.

187. Id. § 1500.4(a). “The text of final environmental impact statements . . . shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.” Id. § 1502.7.
188. Id. §§ 1500.4(i), 1500.4(j), 1502.4(a), 1502.20, 1502.21.
189. Id. §§ 1500.4(p), 1507.3(b)(2)(ii), 1508.4.
190. E.g., id. § 1500.4(b) (preparing analytic, rather than encyclopedic, environmental impact statements); id. § 1500.4(d) (writing environmental impact statements in plain language); see also id. §§ 1500.4(f), 1500.4(k), 1500.5(a)-(c), (g), (i).
environmental issues before beginning work on a statement, and they obligated agencies to explore ways in which environmental harm could be mitigated if the proposed action were carried out.

On almost all substantive issues, the regulations adopted the positions reflected in the circuit court decisions summarized above. The regulations adopted the requirement of Hanly for an environmental assessment of all actions that might have a significant impact on the environment and even mandated an administrative "record of decision" to facilitate judicial review. They also accepted the judicial definition of statutory terms like "major," "federal," "significantly," and "human environment," as well as the judicial construction of the obligation to consider alternatives as distinct from the impact statement obligation. With respect to impact statements, the CEQ regulations followed SIPI in establishing a requirement for programmatic statements and post-SIPI decisions by recognizing that agencies might have to supplement these programmatic statements with "site-specific" statements for particular projects. They also accepted the federal agency's responsibility for the content of the statement as well as its duty to ensure the "scientific integrity" of the statement and to consider all reasonable alternatives to the proposed actions (including those beyond the control of the initial decision-maker). Finally, the regulations emphasized that NEPA had a substantive as well as a procedural character. The purpose of the NEPA process was "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment."

The regulations also gave the CEQ an enhanced role in ensuring

191. Id. § 1501.7.
192. Id. § 1505.3. See also id. at §§ 1502.14(f), 1502.16(h), 1503.3(d), 1505.2(c), 1508.20.
193. See supra note 60 and accompanying text.
195. Id. §§ 1505.3, 1506.1, 1508.13.
196. Id. § 1508.18.
197. Id.
198. Id. § 1508.27.
199. Id. § 1508.14.
200. Id. § 1507.2(d).
201. Id. § 1502.5.
202. Id. § 1508.28.
203. Id. § 1506.5.
204. Id. § 1502.24.
205. Id. § 1502.14.
206. Id. § 1500.1(c).
that agencies complied with their NEPA obligations. The expanded role included at least four new responsibilities: authority to determine whether the implementing regulations of other agencies complied with the CEQ regulations,207 authority to designate the “lead agency” when two or more agencies were involved in a proposal;208 authority to refer disputes over the potential environmental impact of a project to the President for review,209 and authority to exempt agencies from the regulatory requirements in emergency situations.210 Assigning these responsibilities to the CEQ thus granted general oversight of the NEPA compliance of development agencies to an agency with a clear environmental mandate.

V. THE RETREAT FROM JUDICIAL OVERSIGHT

Even before the CEQ began its regulatory codification of the early circuit court decisions, the Supreme Court handed down the first in a series of decisions that seemed to reflect a much more deferential attitude toward the NEPA determinations of federal agencies. Moreover, this deferential attitude persisted in decisions rendered after adoption of the new regulations as the Court consistently reversed circuit court decisions that had overturned agency determinations. In response to the Supreme Court decisions, circuit courts appear to have retreated from the close scrutiny characteristic of the early NEPA cases. The discussion below briefly chronicles these developments.

A. The Supreme Court Decisions

1. The Early Counter Theme

The first Supreme Court opinion to consider the scope of the new duties that NEPA imposed on federal agencies came in United States v. Students Challenging Regulatory Agency Procedures (SCRAP),211 where the Court held that NEPA did not abrogate the rule precluding temporary injunctions against general rate increases granted by the Interstate Commerce Commission (ICC). Two years later, a second decision involving SCRAP ruled that the ICC had sufficiently complied with its NEPA duties before al-

207. Id. § 1507.3.
208. Id. § 1501.5(e).
209. Id. § 1504.3(f)(7).
210. Id. § 1506.11.
lowing the general rate surcharge to take effect.\textsuperscript{212} Although these two decisions together could have been read as an endorsement of a narrow interpretation of NEPA language\textsuperscript{213} and a repudiation of the careful scrutiny of agency compliance displayed in the circuit court decisions, commentators did not generally treat them in that fashion.

A number of reasons help to explain why the SCRAP decisions were not viewed as a repudiation of the developing circuit court law requiring careful scrutiny of agency decisions. First, the SCRAP decisions did not represent total defeat for the environmentalists; indeed, the first decision was an important expansion of standing for environmental plaintiffs.\textsuperscript{214} Second, the cases involved judicial review of a general rate increase for railroads, a type of ICC decision that the Court had long treated very deferentially. Third, the SCRAP cases were not ones in which environmental issues had been completely ignored; the ICC had prepared an impact statement analyzing the environmental issues raised by the opponents of the increase. Fourth, the cases stood as lonely exceptions during the first half of the 1970’s to the general rule that close judicial scrutiny of agency decisions was appropriate. In \textit{Citizens to Preserve Overton Park, Inc. v. Volpe},\textsuperscript{215} the Supreme Court itself had encouraged close judicial scrutiny of environmental challenges to development projects,\textsuperscript{216} and the Court’s denial of certiorari in a number of leading circuit court decisions\textsuperscript{217} suggested that it was not dissatisfied with the general trend of the lower court decisions.


\textsuperscript{213} \textit{Id.} at 320 (emphasizing that the duty to prepare an impact statement arises under NEPA only when an agency has made "a proposal for federal action") (emphasis in original).

\textsuperscript{214} See SCRAP, 412 U.S. at 683-90.


\textsuperscript{216} \textit{See} Leventhall, \textit{Environmental Decisionmaking and the Role of the Courts}, 122 U. PA. L. REV. 509, 514 (1974) (describing the Overton Park hearing following the Supreme Court's remand as an example of "the 'hard look' doctrine in spades").

2. Threshold Determinations

In June of 1976, the Court rendered two more decisions reversing circuit court judgments declaring that federal agencies had failed to comply with NEPA. Both cases involved the threshold question of whether the agencies had to prepare impact statements. While the first of these decisions could plausibly be dismissed as an exceptional case analogous to *SCRAP*, the other more obviously manifested a general attitude of deference.

*Flint Ridge Development Co. v. Scenic Rivers Association*\(^{218}\) involved the question of whether the Secretary of Housing and Urban Development had to prepare an impact statement before allowing a land developer's registration statement to become effective. The Secretary argued that his action did not constitute major federal action significantly affecting the quality of the human environment because he lacked authority to take environmental factors into account in deciding whether a disclosure statement should become effective. However, the Supreme Court refused to decide that question. Instead, the Court relied on the "to the fullest extent possible" language in section 102 of NEPA, finding it to be a recognition "that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way."\(^{219}\) In the Court's view, the provision of the Disclosure Act that conflicted with NEPA was the section providing that disclosure statements would become effective within thirty days, subject to the Secretary's authority to suspend the effective date if a disclosure statement was "on its face incomplete or inaccurate in any material respect."\(^{220}\) Since the preparation of an environmental impact statement within thirty days was not feasible,\(^{221}\) the result was "a clear and fundamental conflict of statutory duty," making NEPA's impact statement requirement "inapplicable."\(^{222}\)

The other 1976 decision, *Kleppe v. Sierra Club*,\(^ {223}\) followed the *SCRAP* decision by strictly limiting the obligation to prepare an impact statement to situations where a "proposal" for federal action already existed. *Kleppe* involved a challenge to the federal

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219. Id. at 787-88.
220. Id. at 789-90.
221. Id. at 788-89.
222. Id. at 791.
government's failure to prepare an impact statement analyzing coal development in the northern Great Plains region of the United States. In ordering the government to prepare such a regional statement, the District of Columbia Circuit expanded its four-part SIPI test to apply to situations where the government "anticipated" a proposal for a major federal action significantly affecting the quality of the human environment. The Supreme Court, however, reversed the court of appeals, holding that no regional impact statement was required because the government had not yet produced "a report or recommendation on a proposal for major federal action with respect to the . . . region."

The government itself acknowledged the existence of two types of federal proposals regarding coal development: a national program for coal leasing on federal lands, and localized decisions allowing development at specific sites. Moreover, the government also recognized its responsibility to prepare impact statements on any of these proposals that significantly affected the environment; it had prepared a "Coal Programmatic" statement on the national program as well as statements for individual mining sites. But the government contended, and the Supreme Court agreed, that it had no responsibility to prepare an impact statement with respect to the northern Great Plains region because "there is no evidence in the record of an action or a proposal for an action of regional scope."

The Court also rejected the argument that the government had to prepare a regional impact statement addressing "all coal-related projects in the region" because the various projects were intimately related. In rejecting this attack on the government's decision "not to prepare one comprehensive impact statement on all proposed projects in the region," the Court announced an extremely deferential standard of judicial review. The Court concluded that the plaintiffs could prevail only if they showed the government acted "arbitrarily" when it declined to prepare one comprehensive statement. Under this very narrow standard of review, Kleppe upheld the government's determination to rely on "basins, drain-

224. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975). For an explanation of the SIPI holding, see supra notes 115-25 and accompanying text.
226. Id. at 400.
227. Id. at 408.
228. Id. at 409-12.
age areas, and other factors” in establishing the scope of statements as a nonarbitrary decision concerning a matter “assigned to the special competence of the appropriate agencies.”

Three years later (and one year after the promulgation of the CEQ regulations), the Court continued the trend toward narrow construction of NEPA’s statutory terms in Andrus v. Sierra Club. Andrus raised the question of whether NEPA required the preparation of impact statements on appropriation requests. A unanimous Court, again reversing the District of Columbia Circuit, held that it did not.

According to Andrus, impact statements were not required for appropriation requests because the requests were neither proposals for “legislation” nor proposals for “major federal action.” In holding that appropriation requests were not proposals for legislation, the Court relied on two factors: the administrative interpretation adopted in the CEQ regulations and the distinction that congressional rules drew between “legislation” and “appropriations.” The Court reasoned that appropriation requests are not properly described as “proposals for . . . major federal actions” because such a description “distorts the language of the Act, since appropriation requests do not ‘propose’ federal actions at all; they instead fund actions already proposed.” In addition, requiring impact statements would be repetitive. Since the agency would have to prepare a statement if any program revisions it proposed in response to budget cuts would significantly affect the environment, requiring the agency “to include an [impact statement] with its revised appropriation requests would merely be redundant.”

3. Impact Statements

The only Supreme Court decision that has considered the adequacy of an impact statement was Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. Vermont Yankee involved consolidated challenges to several licensing

229. Id. at 414.
231. Id. at 355, rev'd 581 F.2d 895 (D.C. Cir. 1978).
232. Id. at 356-59.
233. Id. at 359-61.
234. Id. at 361-62.
235. Id. at 363.
decisions of the Nuclear Regulatory Commission. The general theme of the Supreme Court’s opinion severely criticized the District of Columbia Circuit for its lack of deference to the Commission. Most of the claims involved the Atomic Energy Act rather than NEPA, but one basis for the decision of the court of appeals was its conclusion that the impact statement for one of the plants was inadequate because it failed to address “energy conservation” as an alternative to the construction of new nuclear power facilities.

The Supreme Court unequivocally rejected the lower court’s approach to the NEPA issue. According to Justice Rehnquist’s majority opinion, “the concept of ‘alternatives’ is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.”237 Emphasizing that courts had to review decisions with regard to the alternatives available to the agency at the time the decision was made, the majority argued that the actions of the AEC’s Licensing Board “were well within the proper bounds of its statutory authority” when judged by that standard.238 At the time of the AEC decision, energy conservation’s potential as an alternative to the construction of new facilities had been given “little thought in government circles” and the administrative record indicated that the proposed project was actually needed. In light of these factors, one could not fairly characterize the board’s failure to consider energy conservation as an alternative as “arbitrary and capricious.” Moreover, nothing in NEPA authorized a reviewing court to “substitute its judgment for that of the agency.”239

4. Review of Substantive Decisions

A 1980 decision extended the court’s deferential approach to NEPA to decisions reviewing the merits of agency decisions. In Strycker’s Bay Neighborhood Council, Inc. v. Karlen,240 the Department of Housing and Urban Development (HUD) justified its refusal to choose environmentally preferable sites for low-income housing on the grounds that relocation of the project would result in an unacceptable delay of two years. The Second Circuit set

237. Id. at 552-53.
238. Id. at 553.
239. Id. at 554-55 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
aside HUD's decision, holding that it conflicted with the substantive requirement of NEPA that "environmental factors, such as crowding low-income housing into a concentrated area should be given determinative weight," but the Supreme Court summarily reversed without even granting plenary review on the merits. The per curiam opinion, quoting Vermont Yankee, emphasized that NEPA's requirements are "essentially procedural." Beyond these procedural requirements, the court's "only role . . . is to insure that the agency has considered the environmental consequences"; it has no authority to "interject itself within the area of discretion of the executive as to the choice of the action to be taken." Since HUD had satisfied the procedural requirements of NEPA and had "considered the environmental consequences of its decision," it had complied with NEPA, and the Second Circuit's judgment setting aside its decision was reversed.

5. Recent Limitations on Judicial Review

The Supreme Court has rendered three additional NEPA opinions since its per curiam decision in Strycker's Bay. Although all involved relatively narrow NEPA issues, they nonetheless confirm the Court's deferential attitude toward NEPA review.

The case of Weinberger v. Catholic Action of Hawaii involved an attempt to force the Department of the Navy to prepare an impact statement analyzing the environmental effects of constructing and operating a facility capable of storing nuclear weapons. Reversing the Ninth Circuit, the Court held that the plaintiffs had failed to show "that the Navy . . . failed to comply . . . with NEPA's requirements for the preparation and public disclosure" of an impact statement. Weinberger relied on Kleppe for the proposition that mere construction of a facility capable of storing nuclear weapons did not require preparation of an impact statement regarding the hazards of storing nuclear weapons. To the contrary, NEPA required such a statement only after a Navy "proposal" to store nuclear weapons at the facility came into existence. Because

243. Id. at 227-28 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).
244. 454 U.S. 139 (1981).
245. Id. at 140-41, rev'g 643 F.2d 569 (9th Cir. 1980).
246. Id. at 142.
the location of the weapons storage facilities was classified, the Navy could "neither admit nor deny" that it planned to use any particular facility to store nuclear weapons. Without this information, the plaintiffs could not prove the existence of the requisite "proposal for . . . major federal action significantly affecting the quality of the human environment," and thus they could not establish the Navy's duty to prepare an impact statement.247

Metropolitan Edison Co. v. People Against Nuclear Energy248 arose out of the accident at one of the nuclear generators at Three Mile Island. In deciding whether to allow the undamaged nuclear facility at the site to resume operations, the Nuclear Regulatory Commission declined to consider whether the resumption would adversely affect the psychological health of residents in the area. The Supreme Court upheld that decision.

The Metropolitan Edison opinion began with the premise that NEPA's primary aim was to require agencies to consider "the effect of their proposed actions on the physical environment." To effectuate this aim, the Court limited the environmental effects that NEPA required agencies to consider to those that bear "a reasonably close causal relationship to a change in the physical environment." The psychological effects alleged in Metropolitan Edison failed to satisfy that requirement because they flowed from the risk that an accident might occur in the future rather than from a direct change in physical environment. The effect of this "element of risk" was to lengthen "the causal chain beyond the reach of NEPA."249

Less than two months after the decision in Metropolitan Edison, the Supreme Court continued its deferential approach in Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.250 In Baltimore Gas & Electric, the Court upheld the Nuclear Regulatory Commission's "zero-release" assumption for permanent storage of nuclear wastes. The adoption of this assumption directed licensing boards to ignore the possibility that nuclear wastes might escape from their permanent storage repositories when conducting licensing hearings for individual plants. After detailing the careful consideration that the agency had given to the issue, the Court ap-

247. Id. at 146.
249. Id. at 1560-62.
plied the "arbitrary and capricious" standard in sustaining the merits of the agency's approach. Emphasizing the limited purpose of the zero-release assumption, the conservative character of the agency's assumptions as a whole, and the "special expertise" of the NRC on the subject, the Court unanimously concluded that the assumption fell "within the bounds of reasoned decision-making."251

6. The Cumulative Impact of the Decisions

If the Supreme Court decisions are considered individually, one can explain each of them as a narrow exception to broad NEPA duties. The SCRAP decisions reflected the extreme deference afforded to ICC decisions regarding the scope of general rate hearings. Flint Ridge Development Co. involved a case of physical impossibility. Kleppe refused to force agencies to prepare the impact statements for programs that did not exist. Andrus followed a traditional congressional distinction between legislation and appropriations. Vermont Yankee struck down an overzealous application of the reasonableness test for reviewing impact statements. Stryker's Bay and Baltimore Gas & Electric followed the earlier circuit decisions and limited substantive review to the question of whether the agency action was arbitrary and capricious. Weinberger recognized that even NEPA had to give way to national security. Metropolitan Edison insured that the term "environmental" would not be defined so broadly as to dilute its protection of the physical environment.

When the Supreme Court decisions are viewed as a group, they are much more difficult to harmonize with the careful scrutiny of the early circuit decisions. First, all of the Court's decisions have reversed circuit court decisions that the Court believed extended NEPA too far; none have overturned lower court decisions because they failed to go far enough, and none have affirmed expansive lower court decisions. Second, the Supreme Court's opinions substituted a deference to agency determinations252 for Calvert Cliffs' determination to prevent congressional purposes from being "lost

251. Id. at 2257.

in the vast hallways of the bureaucracy. Third, the Supreme Court opinions frequently supplanted the "reasonableness" language of circuit court decisions with the "arbitrary and capricious" terminology. As a group then, the decisions suggest that the Supreme Court has been trying to instruct lower federal courts to show more restraint in reviewing NEPA decisions.

B. The Response of the Circuits

The decisions of the last several years suggest that the message of restraint may be reaching the courts of appeal. Moreover, the influence seems to have gone beyond inducing compliance with the Supreme Court's express holdings. Although exceptions can still be found, recent decisions reflect greater willingness by the lower courts to accept negative threshold determinations and to find impact statements adequate. Moreover, they also seem less willing to bring private or state actions within the federal umbrella.

254. See supra notes 55-74 and accompanying text.
256. Lower federal courts have generally rejected arguments that the Supreme Court's NEPA opinions should be narrowly confined to their particular facts. See, e.g., Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 531 F.2d 637 (2d Cir. 1976) (following SCRAP); Laine v. Weinberger, 541 F. Supp. 599 (C.D. Cal. 1982) (following Catholic Action).
257. See, e.g., Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); Johnston v. Davis, 698 F.2d 1088 (10th Cir. 1983); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983); California v. Block, 690 F.2d 753 (9th Cir. 1982); Manatee County v. Gorsuch, 554 F. Supp. 778 (M.D. Fla. 1982).
260. See, e.g., Save the Bay, Inc. v. United States Army Corps of Eng'rs, 610 F.2d 322 (5th Cir.), cert. denied, 449 U.S. 900 (1980); Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979); NAACP v. Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978); Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Comm'n, 550 F. Supp. 1206 (S.D. Fla. 1982); National Org. for the Reform of Marijuana
and they have remained deferential to agency decisions on the merits.\footnote{261} A significant part of the increased acceptance may stem from both a greater willingness to prepare impact statements in obvious cases and from the improved quality of the statements due to more experience.\footnote{262} However, the more deferential attitude reflected in recent Supreme Court decisions probably deserves at least some of the credit.

Perhaps the best example of the direct influence of the Supreme Court decisions can be seen in the more frequent use of the "arbitrary and capricious" language in describing the scope of judicial review. Although the Supreme Court's decision in Kleppe has not completely reversed the trend toward the reasonableness standard for reviewing threshold determinations,\footnote{263} it has prompted the First and Fourth circuits\footnote{264} to join the Second\footnote{265} and Seventh\footnote{266} in using the "arbitrary and capricious" approach. Similarly, the "arbitrary and capricious" language has crept into a number of cases reviewing the adequacy of impact statements,\footnote{267} and even the District of Columbia Circuit has emphasized the substantial role of agency discretion in determining whether the time is ripe for the preparation of a programmatic impact statement.\footnote{268}

\begin{footnotes}
\footnotetext{261}{See South La. Envtl. Council, Inc. v. Sand, 629 F.2d 1005, 1011-12 (5th Cir. 1980); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1027 (9th Cir. 1980); cf. Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980) (dictum).}
\footnotetext{262}{The annual reports of the CEQ indicate that federal agencies have averaged more than 1000 impact statements a year between 1970 and 1981. See 1982 U.S. Council on Envtl. Quality, Thirteenth Ann. Rep. on Envtl. Quality 314 (Table A-82); 1976 U.S. Council, supra note 108, at 124 (Table I-33).}
\footnotetext{263}{See Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 855 (9th Cir. 1982); Concord Township v. United States, 625 F.2d 1068, 1073 (3d Cir. 1980) (dictum); City of San Francisco v. United States, 615 F.2d 498, 500 (9th Cir. 1980).}
\footnotetext{264}{Providence Road Community Ass'n v. Environmental Protection Agency, 683 F.2d 80, 82 (4th Cir. 1982); Aertsen v. Landrieu, 637 F.2d 12, 19 (1st Cir. 1980).}
\footnotetext{265}{See, e.g., Cross-Sound Ferry Serv., Inc. v. United States, 573 F.2d 725 (2d Cir. 1978).}
\footnotetext{266}{See, e.g., City of West Chicago v. United States Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983).}
\footnotetext{267}{See, e.g., Citizens for Mass Transit, Inc. v. Adams, 630 F.2d 309, 313 (5th Cir. 1980); Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233, 239 (6th Cir. 1979). But see, e.g., Sierra Club v. United States Army Corps of Eng'rs, 701 F.2d 1011 (2d Cir. 1983) (applying rule of reason).}
\end{footnotes}
VI. NEPA’s Current Impact

A. The Cause for Skepticism

The decisions summarized in the preceding section appear to justify considerable skepticism about NEPA’s contemporary significance. One is tempted to agree with Professor Sax that NEPA’s faith in rationality and procedure was naive. Because NEPA failed to change the institutional pressures on federal agencies, it has not significantly affected the decisions those agencies make. As a result, the public has received little in the way of an improved environment, and the only real beneficiaries have been the consultants who prepare impact statements for the agencies and the law professors who still have a seemingly endless stream of environmentally objectionable decisions to criticize.

The most obvious and consistent failure of the NEPA cases has been the courts’ inability to develop a standard that would permit more than perfunctory review of the merits of agency decisions. The early cases presaged this failure, but hopeful environmentalists could still explain them away. Initially, *Calvert Cliffs* referred to the “arbitrary and capricious” standard as the guide for substantive review, but that reference was qualified by the adverb “probably” and came in dicta. Although *Gilham Dam* converted the *Calvert Cliffs*’ dicta to holding, it involved a dam that was almost complete at the time NEPA was enacted. However, such explanations ring false after *Strycker’s Bay*. Not only did the Supreme Court reverse the only circuit decision to set aside an action on the merits, it did so summarily without a hearing on the merits, and its opinion chastised the circuit court for failing to recognize the “essentially procedural” nature of NEPA’s requirements. If any substantive review remains after *Strycker’s Bay*, it seems to be only the relatively toothless “arbitrary and capricious” standard.

In its other opinions, the Supreme Court has displayed a deferential attitude in reviewing even the “procedural” duties, and recent cases suggest the circuit courts are following this lead. With respect to the threshold determinations of whether to prepare an

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269. Notwithstanding the Supreme Court decision in *Strycker’s Bay*, the CEQ has advised the Senate Committee on the Environment that NEPA establishes substantive standards that are judicially enforceable under the “arbitrary and capricious” standard. See letter from Nicholas C. Yost, CEQ General Counsel, to Philip Cummings, Counsel, U.S. Senate Committee on the Environment and Public Works (Feb. 4, 1980).
impact statement, the courts have been willing to accept agency determinations about the timing of statement preparation, 270 the reach of statutory terms, 271 and the significance of environmental harm. 272 In reviewing the adequacy of impact statements, recent decisions have generally been willing to accept good faith attempts at compliance. 273 Taken as a group, these decisions lessen the likelihood of securing even the temporary relief won in the early NEPA cases—delaying the action until the agency prepared or improved an impact statement.

Finally, recent Supreme Court decisions make it possible to argue that some of the early NEPA cases were wrong and should be abandoned. As the preceding section indicated, the most obvious candidate is the "reasonableness" standard for reviewing threshold determinations, 274 and at least two circuits have already moved in that direction. 275 The deferential attitude emphasized in Vermont Yankee 276 could also support a similar argument with respect to the adequacy of impact statements. Finally, the narrow definition of NEPA terminology and deference to agency definitions endorsed in cases such as Kleppe, 277 Andrus, 278 and Metropolitan Edison 279 could support a reconsideration of the looser and less deferential approach reflected in circuit decisions such as MPIRG, 280 Green County, 281 and Natural Resources Defense Council, Inc. v. Morton. 282


273. See cases cited supra at note 259.

274. See supra notes 55-74, 147 and accompanying text.

275. Providence Road Community Ass'n v. EPA, 683 F.2d 80 (4th Cir. 1982); Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980).

276. See supra notes 236-39 and accompanying text.

277. See supra notes 223-29 and accompanying text.

278. See supra notes 230-35 and accompanying text.

279. See supra notes 248-49 and accompanying text.

280. See supra notes 77-81 and accompanying text.

281. See supra notes 127-31 and accompanying text.

282. See supra notes 152-56 and accompanying text.
B. The Continuing Importance of NEPA

Closer study of the NEPA decisions tends to allay some of the pessimism noted in the preceding subsection. Even if one acknowledges that NEPA has failed to alter agency mandates or to induce agencies to abandon development of environmentally questionable projects and that recent decisions have established a framework permitting the repudiation of many early NEPA decisions, careful analysis suggests that general repudiation of the early decisions is unlikely and that NEPA can still have an impact on agency decisions.

1. Vitality of the Early Precedents

Two factors combine to suggest that a general repudiation of the early NEPA doctrines is unlikely: (1) favorable citations to many of these decisions in the most deferential of the Supreme Court opinions, and (2) the CEQ's regulatory codification of many of the substantive rules established in the early cases. Taken together, these two factors indicate that the doctrines outlined in the earlier circuit court decisions are likely to remain authoritative in the foreseeable future. Furthermore, some recent cases suggest that the courts of appeal have not completely abandoned the careful scrutiny characteristic of the early decisions.\textsuperscript{283}

Two of the most deferential Supreme Court opinions, Kleppe and Vermont Yankee, contain favorable citations to some of the more expansive circuit court decisions. For example, in Kleppe,\textsuperscript{284} the Court cited both SIPI,\textsuperscript{285} which applied a balancing test to determine when a research proposal was sufficiently developed to require the preparation of an impact statement, and Davis v. Morton,\textsuperscript{286} which held that impact statements were required before the federal government could permit private actions that would significantly affect the environment. Similarly, in the portion of the Vermont Yankee opinion that confirmed the adequacy of the impact statement prepared with respect to the Midland reactor, the Court quoted\textsuperscript{287} from Natural Resources Defense Council, Inc. v. Mor-

\textsuperscript{283} See cases cited supra note 257.
\textsuperscript{284} Kleppe v. Sierra Club, 427 U.S. 390, 399 (1976).
\textsuperscript{285} See supra notes 115-26 and accompanying text.
\textsuperscript{286} 469 F.2d 593 (10th Cir. 1972).
ton, which applied a fairly rigorous "reasonableness" standard for review of impact statements. These favorable citations suggest that the Court's purpose in its recent decisions has been to retard the development of new doctrines rather than to reverse existing rules.

The codification of most of the early substantive rules in the CEQ regulations makes a wholesale reversal of those rules even less likely. There are several reasons for this conclusion. First, the present regulatory basis for these rules makes it extremely difficult to imagine a judicial challenge to them as too stringent. Moreover, even if an agency were to challenge those rules today, the legal issue would not be whether the statutory language of NEPA compels the rule but whether the CEQ's regulatory interpretation was an appropriate one. Andrus indicates that the Supreme Court would be reluctant to overrule a CEQ interpretation that could be regarded as reasonable. Of course, the regulatory definitions could be reversed administratively, but that is unlikely to occur. The CEQ would almost certainly oppose such reversals to protect its own administrative turf and other agencies would hesitate to invest their limited bureaucratic muscle to force changes in rules with which they have been able to live for a decade or longer. In addition, political realists in the executive branch would be reluctant to arouse the opposition of environmentalists over an issue that does not directly frustrate either government programs or private enterprise initiatives.

In sum, the contribution of the early NEPA decisions is likely to prove enduring. The "procedural" duties of NEPA will remain judicially enforceable, and agencies will probably continue to produce large numbers of impact statements. At a minimum, NEPA will remain valuable for environmental consultants and law professors.

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F.2d 827, 837-38 (D.C. Cir. 1972)).

288. See supra notes 152-56 and accompanying text.
289. See supra notes 194-210 and accompanying text.
2. Mitigation of Development Plans

As Professor Sax has persuasively argued, requiring the preparation of impact statements will not alter the development bias of many agencies. It may, however, affect the way that development projects are implemented.

Even if fundamental environmental issues normally involve hard choices which turn on values more than information, many specific decisions may involve choices between competing methods of accomplishing an agency objective. In those situations, the information generated in the preparation of an impact statement may either induce the agency to choose the method of achieving the objective that will cause less environmental damage, or it may suggest a way of accomplishing the objective that was not immediately apparent. Thus, NEPA may induce an agency to choose an environmentally preferable alternative that does not seriously compromise the agency's basic objectives, especially when ignoring the environmentally preferable alternative may involve the agency in time-consuming litigation.

Professor Sax's own illustration furnishes an example of how NEPA can affect agency decisions at the implementation stage. His criticism of impact statements on airport expansion for considering only three options—"build the proposed new runway; build a new airport elsewhere; or adopt . . . 'the do-nothing alternative'"—may be valid for some expansion projects, but extensive comparisons of alternative locations for the expansion is surely possible even after one has decided to expand. Since even an undesirable airport expansion can be constructed on more or less desirable sites in terms of its impact on the environment, the statement may help persuade the agency to choose the more desirable location. The point here is a simple one: NEPA's failure to give environmental factors primacy at the planning level should not blind one to its possibilities at the implementation level.

291. Sax, supra note 175.
292. Id. at 245.
293. Life of the Land v. Brinegar, 485 F.2d 460, 470 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974) ("The [impact statement] contains a brief discussion of four alternatives to the proposed construction of the Reef Runway extension. Three involve various runway concepts and configurations, and the fourth, the alternative of taking no action.").
3. Compliance with Regulatory Obligations

Now that detailed regulatory schemes implementing NEPA exist throughout the federal government, opponents of agency action may rely on the requirements in these regulations to establish minimal standards of NEPA compliance. Although agency regulations may not dilute statutory responsibilities, they can go beyond judicially imposed obligations in fulfilling the environmental mandate that NEPA has made "supplementary to those set forth in existing authorizations of Federal agencies."294 Moreover, to the extent that environmentalists can uncover regulations that impose such limits on agency conduct, they need not convince the reviewing court that NEPA itself imposes the obligation.

The "mitigation" provisions of the CEQ regulations offer one example of regulatory mandated obligations that may exceed the minimum requirements imposed by NEPA.295 In at least three respects, these provisions establish standards that have not been imposed in judicial proceedings. First, they expressly require impact statements to discuss appropriate mitigation measures296 and to explain any failure to condition the preferred alternative on the implementation of all practical means to minimize environmental harm.297 Second, they require "cooperating" agencies that object to a proposal to specify the mitigation measures that would make the proposal acceptable.298 Third, they require agencies to implement "[m]itigation . . . and other conditions . . . committed as part of the decision."299

Because the mitigation provisions have been imposed by regulations, enforcing them is fully consistent with the deference to administrative authority reflected in recent cases. Therefore, they may serve as the basis for the next series of NEPA cases. Similarly,

295. The requirement that agencies make a "worst case" analysis in situations that would involve severe, but uncertain, impacts on the environment is another example of a regulatory directive that probably goes beyond the statute. See Southern Or. Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475 (9th Cir. 1983), cert. denied, 53 U.S.L.W. 3366 (U.S. Nov. 13, 1984); United States v. 101.80 Acres of Land, 716 F.2d 714 (9th Cir. 1983); Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983); 40 C.F.R. § 1502.22 (1983); Yost, Don't Gut Worst Case Analysis, 13 ENVTL. L. REP. (ENVT. L. INST.) 10,394 (1983).
297. Id. § 1505.2(c).
298. Id. § 1403.3(d).
299. Id. § 1505.3.
careful attention to the regulations of particular agencies\textsuperscript{300} may generate like obligations that apply to specific situations.

4. Interaction with Other Statutes

The preceding discussion suggests a role for NEPA that one might charitably describe as modest. It forces agencies to prepare statements for many actions, it may affect the implementation of decision making, and regulatory requirements may impose additional procedural obligations. But the discussion concedes that NEPA has neither altered agency biases nor provided a vehicle for judicial reversal of substantive decision. Surely, a more important role than this is required if NEPA is to merit recognition as an important environmental statute.

One way that NEPA may substantially affect decision making is through its interaction with other statutes that impose substantive environmental obligations. Through this interaction, NEPA may aid plaintiffs in securing substantive relief in a judicial proceeding even though NEPA's own substantive duties are nonexistent or at least judicially unenforceable. To the extent that other statutes limit agency authority to undertake environmentally harmful action, NEPA's procedural duties may provide plaintiffs with information that will enable them to show that the substantive limits have been violated.

The snail darter litigation provides a well-known illustration of this interaction between NEPA and other statutes. Although the Tennessee Valley Authority (TVA) had begun construction of the Tellico dam in Tennessee before NEPA was enacted, a federal court eventually enjoined its completion until an impact statement was prepared.\textsuperscript{301} After TVA completed the environmental study mandated by NEPA, the district court dissolved its injunction and TVA elected to complete the dam.\textsuperscript{302} By this time, however, a researcher had discovered a new species of perch, the snail darter.

\textsuperscript{300} The CEQ regulations require each agency to revise its NEPA regulations to conform to the CEQ provisions. \textit{Id.} § 1507.3. For the NEPA regulations of various agencies, see 7 C.F.R. § 3100 (1979) (Agriculture Department); 44 Fed. Reg. 44,718 (1979) (Forest Service); 32 C.F.R. § 214 (1979) (Department of Defense); 44 Fed. Reg. 56,420 (1979) (Department of Transportation); 40 C.F.R. § 6 (1979) (EPA).


Environmentalists persuaded the Secretary of the Interior to list the snail darter as an "endangered species" and the area to be flooded by the Tellico dam as a "critical habitat" for the snail darter. Consequently, the Endangered Species Act\(^3\) required all federal agencies to ensure that their actions would not result in the destruction of that habitat. Because the operation of the Tellico dam would be inconsistent with that substantive obligation, the Supreme Court upheld an injunction forbidding the dam's operation,\(^4\) and it was not placed in service until Congress passed a special statute permitting it to begin operations.\(^5\)

Other statutes also impose obligations to protect the environment or to consider specific environmental impacts. Most apply to particular agencies,\(^6\) but a few impose such responsibilities on all

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306. The Department of Transportation Act is an example of a statute that contains such a substantive limit on agency authority. It prohibits the Secretary of Transportation from approving any project that uses publicly owned land from a park recreation area, wildlife refuge, or historic site "unless . . . there is no feasible and prudent alternative to the use of such land." 49 U.S.C. § 303 (1982); see also 23 U.S.C. § 138 (1982) (Federal Highway Act); 49 U.S.C. app. § 1610 (1982) (mass transit construction). As authoritatively construed by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), this language allows the use of parkland "only [in] the most unusual circumstances." Although the statute does not require the Secretary to ignore "cost and disruption of the community," it does establish a substantive rule requiring "that protection of parkland . . . be given paramount importance" and allowing the destruction of parkland only when "alternative routes present unique problems." Id. at 412-13.

The interaction between NEPA and the Transportation Act is obvious. Since construction of a highway through a park would normally have a significant impact on the environment, NEPA requires discussion of all reasonable alternatives in an impact statement, and the Transportation Act prohibits the use of the parkland unless the Secretary finds no alternative is "feasible and prudent." Thus, the failure to discuss a reasonable alternative renders the statement inadequate and the Secretary's determination arbitrary and capricious. See, e.g., Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980). The result under the two statutes would not be identical, however, if the statement documented a feasible alternative. NEPA allows the Secretary to give priority to general development goals and ignore the feasible alternative, but the Transportation Act requires him to choose the alternative that avoids the use of parkland.

Not surprisingly, most of the pro-environmental decisions under the Transportation Act have involved a failure to consider the feasibility of rejected alternatives. See, e.g., Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983). Nonetheless, the substantive duty provides the basis for review of the merits of the decisions, and it has at least occasionally served as the basis for a decision not to approve the use of parkland. See, e.g., Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975).
federal agencies. Wherever these substantive obligations exist, NEPA's procedural requirements that agencies analyze environmental impacts and develop alternatives can provide an important aid to those seeking to enforce these obligations, especially in view of the Supreme Court's recent aversion to judicial imposition of procedural protections that go beyond those explicitly imposed in substantive statutes.

5. The Political Value of Impact Statements

The preceding sections demonstrate that NEPA does impose judicially enforceable obligations and that these obligations cannot be dismissed as inconsequential. However, these judicially enforceable obligations do not fully explain NEPA's contemporary significance. NEPA's procedural requirements, particularly the duty to prepare impact statements, can serve an important role for environmentalists; but appreciating that role requires one to look beyond the judicial forum to the political arena. The production of impact statements can assist environmental groups in their political struggles against agency decisions by providing two indispensable prerequisites to effective political action: information and time. In effect, the statements are a necessary, but not a sufficient, element of effective political action. They make such action possible although they do not ensure that political activism will materialize or that the political action will be effective if it does materialize.

With respect to information, NEPA serves as an affirmative freedom of information act. Agencies frequently justify refusals to provide citizens with requested information on the ground that the information is not contained within any agency record. It has been held that the lack of a record is a sufficient justification to deny a request under the Freedom of Information Act. NEPA precludes this response, however. If an agency proposes a major fed-

307. E.g., 16 U.S.C. § 1133(b) (1982) (each agency administering a "wilderness" area "shall be responsible for preserving the wilderness character of the area"); 16 U.S.C. § 470(f) (1982) (duty to "take into account" the impact of federal activities on sites included in, or eligible for inclusion in, the National Register).

308. E.g., 42 U.S.C. § 4332(2)(C), (E) (1982); see supra notes 102-07, 152-56 and accompanying text.


eral action significantly affecting the quality of the human environment, it must develop information concerning the environmental impacts of the proposal and provide this information to the public. Armed with this information, those who oppose the proposal can lobby the political branches (i.e., Congress and the President) in order to defeat the proposal.

Without such information, the lobbying of environmental activists would be far less effective. The preparation of impact statements is expensive, and environmental organizations (especially ad hoc groups formed to oppose specific projects) generally lack the resources to generate the information themselves. By forcing agencies to assume that financial burden, NEPA provides a basic ingredient for meaningful public debate.

Time is a second prerequisite of effective political action, and NEPA grants opponents of proposed actions time by lengthening the lead-time for implementing major federal actions. From "scoping" to final statement, the minimum time for preparation for impact statements is usually at least eighteen months, and the preparation time is frequently much longer. Not only does this preparation time provide the opportunity for aggressive lobbying, it often includes an election in which the issue can be raised. Without this lead-time, agency actions would frequently be completed, or at least well underway, before an effective political opposition could be organized.

The dispute over basing the MX missile in underground silos located in Nevada and Utah illustrates how NEPA obligations can assist political opponents of important governmental actions. Only the most naive observer would have believed that the Air Force would decide to abandon its proposal for strategic deterrence because of the environmental concerns, or that a court was likely to force it to do so. Nonetheless, the preparation of the impact statement on the basing plan did contribute to the abandonment of the basing program. The quantification of such impacts as those the construction program would have on the construction industry and on population growth helped arm opponents with political ammunition. More importantly, the time consumed in preparing the statements helped delay the basing decision until after the election of a new President who eventually declared his opposition to the

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underground basing proposal.\textsuperscript{313}

Seen in this light, NEPA’s greatest significance may lie less in the substantive duties it imposes, and more in the political opportunity it affords. While that political opportunity may be less than environmentalists would like, it may be as much as they deserve in a democratically responsible society.

From this perspective, Weinberger and People Against Nuclear Energy, the two most recent Supreme Court decisions, appear ominous because they both qualify this duty to generate information for the public. To preserve the political value of statements, it is important for the exceptions they have created to be narrowly circumscribed. Future decisions should, therefore, reconfirm that the duty to analyze environmental impacts encompasses all impacts closely connected to the physical environment and that NEPA does not include a “military” exemption but only an exception allowing the government to withhold information that would compromise properly classified material.

VII. Conclusion

The NEPA story recounted in these pages illustrates both the possibilities and the limits of judicial implementation of statutes establishing general environmental mandates. Following Judge Wright’s lead in Calvert Cliffs’, lower federal courts defined the vague terms of NEPA in ways that changed the procedures used by federal agencies (especially development agencies) in making decisions with significant impacts on the environment. Eventually, however, the courts proved unable to establish meaningful standards for restraining substantive decisions that harm the environment. Furthermore, the courts have relaxed their review of procedural decisions now that agencies have begun to comply with their obligations with some regularity and an agency with environmental expertise (the CEQ) has assumed increased regulatory oversight of NEPA’s procedural duties.

The NEPA cases clearly caution those concerned about the environment against overreliance on procedural mechanisms or, more generally, overreliance on the judiciary as the primary instrument for protecting the environment. To the extent that environmentalists wish to use law to restrain government actions harmful to the

\textsuperscript{313} See 12 ENV’T REP. (BNA) 709 (1981).
environment, specific statutory prohibitions against those actions are far more likely to accomplish that object than procedural requirements or general substantive mandates. Drafting such prohibitions requires proceeding on a time-consuming, agency-by-agency basis, but less burdensome approaches are unlikely to be as effective. Perhaps more importantly, the NEPA cases warn environmental activists that ultimate victory on environmental issues is more likely to come from a changed political consensus than from revised statutory formulas. Without strong and constant political encouragement and review, bureaucrats are unlikely to alter development or other agency goals and courts are unlikely to require them to do so. It is unrealistic to expect general statutory exhortations to alter this reality.

A realistic review of the NEPA decisions requires an acknowledgment of the statute's limits as an instrument for controlling environmentally harmful action by the government. On the other hand, that same review reveals that NEPA remains a valuable weapon in the arsenal of environmental opponents of governmental action. By expanding NEPA's terms to establish judicially enforceable requirements, courts forced the government to identify environmental issues and to analyze environmental impacts and alternatives. These analyses have, at least occasionally, affected government proposals at the implementation stage. NEPA also provides the basis for the regulations of CEQ and individual agencies; these regulations, which the courts will also enforce, codify and sometimes expand judicially-imposed responsibilities. Finally, the information generated in the fulfillment of NEPA's "procedural" duties may affect substantive decision making in two other ways by providing grounds for enforcing the substantive duties of other environmental statutes and by providing information and time, two necessary elements of effective political action.

In sum, NEPA has clearly failed to fulfill the hopes generated by Calvert Cliffs' and its early progeny. It has, however, had a greater impact on governmental operations than most of its proponents would have predicted when it was enacted, and it remains an important environmental statute that has practical significance today. Perhaps, therefore, the final appraisal should be a sympathetic one that remains less impressed by the power of the entrenched bureaucracy than by the impact that NEPA has had.