July 2015

Shall We Be Arbitrary or Reasonable: Standards of Review For Agency Threshold Determinations Under NEPA

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SHALL WE BE ARBITRARY OR REASONABLE: STANDARDS OF REVIEW FOR AGENCY THRESHOLD DETERMINATIONS UNDER NEPA

> Why, lad, they tell me, that on the Big-lakes there's the best of hunting and a great range, without a white man on it, unless it may be one like myself. I'm weary of living in clearings, and where the hammer is sounding in my ears from sunrise to sundown.*

In the early nineteenth century, when Cooper's Natty Bumppo ran westward to avoid the encroachment of oncoming settlers, the wilderness and its bounty must have indeed seemed endless. Our pioneers and entrepreneurs did not hesitate to appropriate those resources to gradually develop our present industrialized and highly technical society. Economic growth has been a top objective of our government from the time of Alexander Hamilton to the present. However, in the late 1960's and early 1970's Congress responded to a rising consciousness that there was a need "to control, at long last, the destructive engine of material progress,"[1] and enacted a series of statutes concerned with preserving the quality of our environment.[2]

The National Environmental Protection Act of 1969 (NEPA), went into effect on January 1, 1970.[3] It consists of a declaration of purpose followed by two separate titles.[4] Title I contains both the broad policy statement of Congress "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony,"[5] and the "action-forcing mechanism"[6] of Section 102(2)(c) that requires all Federal agencies to prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment."[7] Title II established the Council on Environmental Quality (CEQ), designed to be an overseer of the NEPA, and to promulgate guidelines for compliance with the Act.[8]

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*J. COOPER, THE PIONEERS (1823).

[1]Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

[2]*E.g.*, Air Quality Act of 1967, 42 U.S.C. § 1857 (1976); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4334 (1976) (NEPA).

[3]42 U.S.C. § 4331 (1976). The origins of NEPA and the course of its enactment are described in THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 221-24 (1972).

[4]*Id.*

[5]*Id.* at 101.

[6]It was first called this by Senator Henry Jackson, sponsor of NEPA in the Senate. *See* Hearings on S.1075, 91st Cong., 1st Sess. 206 (1969).

[7]NEPA at § 102(2)(c).

[8]*Id. See* City of New York v. United States Dep't of Transp., 539 F.Supp. 1237, 1263 (S.D.N.Y. 1982) *rev'd*, 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984). (The CEQ regulations are not themselves binding on other agencies.)

The NEPA has been described as "woefully ambiguous"[9] and its "meager" legislative history has not greatly aided courts in its interpretation.[10] However, this very lack of data on Congressional intent is one factor which has encouraged courts to freely interpret the NEPA.[11] As Justice Marshall has stated, "this vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA. To date, the courts have responded in just that manner and have created such a 'common law'."[12] Clearly, the courts have played the dominant role in enforcing compliance with the procedural requirements of the NEPA, and to the extent that these procedural requirements have been defined and implemented, the courts may be credited with this achievement.[13]

The bulk of litigation under the NEPA has come from the action-forcing mechanism of the environmental impact statement.[14] Section 102(2)(c) of the Act requires all agencies of the Federal government to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement."[15] This procedural mechanism, of a detailed impact statement, was intended to alter the decision making process of federal agencies so that environmental concerns would be given "appropriate consideration in decision making along with economic and technical considerations."[16] In addition, the environmental impact statement serves to advise other interested agencies and the public of the environmental consequences of planned federal action.[17] In this way, the NEPA serves as "an affirmative freedom of information act."[18] This externalization of the agency review process, through inclusion of other agencies and the public, was an innovative method meant to guard against excessive agency bias in considering environmental matters. It was feared that other traditional bureaucratic concerns would tend to receive more emphasis[19] in absence of this requirement.

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[9]Voight, *The National Environmental Policy Act and the Independent Regulatory Agency,* 5 NAT. RESOURCES LAW 13 (1972).

[10]*Calvert Cliffs,* 449 F.2d at 1126.

[11]Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969,* 16 NAT. RESOURCES J. 323, 330 (1976) [hereinafter cited as Cortner].

[12]Kleppe v. Sierra Club, 427 U.S. 390, 421 (1976).

[13]Cortner, *supra* note 11, at 333-34.

[14]F. ANDERSON, NEPA IN THE COURTS (1973).

[15]NEPA § 102(2), 42 U.S.C. § 4332 (1976).

[16]*Id.*

[17]Natural Resources Defense Council v. Grant, 341 F.Supp. 356, 364 (E.D.N.C. 1972).

[18]Murchison, *Does NEPA Matter? An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act,* 18 U. RICH. L. REV. 557, 611 (1984).

[19]Dreyfus and Ingram, *The National Environmental Policy Act: A View of Intent and Practice,* 16 NAT. RESOURCES J. 243, 247-255 (1976) (However, the authors also say that the inter-agency comment procedure was part of a compromise between Senators Jackson and Muskie, to avoid NEPA intruding upon the authority of the environmental agencies under the jurisdiction of Senator Muskie's Public Works Subcommittee.)

The impact statement has proven to be an important tool which provides valuable information to environmentalists and to other concerned groups, at agency expense.[20] This approach has enabled these groups to more effectively oppose projects which have agency-defined adverse environmental impacts, and this litigation has forced agencies to take environmental concerns seriously.[21]

Under the NEPA, the agency with overall responsibility for the proposed federal action is entrusted with the task of preparing the environmental impact statement.[22] A federal agency may not "rubber stamp" a state or privately prepared impact statement to satisfy the requirements of the NEPA, but instead must itself study the impacts.[23] However, not all federal actions require that an impact statement be prepared; only those actions that are "major" and "significantly" impact upon the human environment call for the preparation of a statement.[24]

The statutory language would seem to indicate a two-prong test looking towards size and significance, but that is not how the greater number of courts have interpreted the statutory language. The current holding seems to be that "significance" is the truly important test, and that "major" merely indicates that size should be an important factor in determining significance.[25] The reasoning is that even if a very minor project still has a profound impact upon the environment, perhaps because of cumulative effect, then an environmental impact statement would still be required.[26]

The agency which would have the task of preparing the environmental impact statement for a proposal is responsible for making the threshold determination of whether the impact statement is necessary.[27] The agency is to evaluate the environmental consequences of a proposal before it, and then decide if those consequences would have any adverse effects upon the environment.[28] If the agency deems these effects significant, then it proceeds to prepare a detailed impact statement which studies these effects so that they may be given serious consideration along with other factors in a cost-benefit

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[20] Friesma and Culhane, *Social Impacts, Politics and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 340 (1976).

[21] *Id.*

[22] Goose Hollow Foothills League v. Romney, 334 F.Supp. 877, 880 (D. Oregon 1971).

[23] Appalachian Mountain Club v. Brinegar, 394 F.Supp. 105, 120 (D.N.H. 1975) (However, an agency may make use of information and findings from state and privately prepared statements).

[24] NEPA § 102(2), 42 U.S.C. 4332 (1976).

[25] *See* Hanly v. Kliendienst, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

[26] *Id.*

[27] Pokorny v. Costle, 464 F.Supp. 1273, 1275 (D. Nebraska 1979); Winnebago Tribe v. Ray, 621 F.2d 269, 271 (8th Cir. 1980).

[28] *Id.*

analysis.[29] On the other hand, if the agency initially finds no significant impact, then it does not prepare an impact statement.[30]

The problem with agency threshold determinations of no significant environmental impact is that other agencies and the public are not allowed the same quality of information and participation they would have if an environmental impact statement were prepared.[31] Adverse effects that might surface from an environmental impact statement are not identified and thus do not enter agency analysis.[32] For some federal projects or proposals, it is clear that an impact statement is necessary. For example, a large hydroelectric project that will involve flooding thousands of acres will obviously have an important effect on the surrounding environment. For other projects and proposals, such as the construction of a high-rise building in a downtown area with other high-rise buildings, it is not clear that there will be any adverse environmental impacts.[33] This is the "grey" area when the courts have played an important role.[34]

The courts have dealt with this problem area in various ways. *Hanly v. Kliendienst*[35] was the first important circuit court decision establishing the requirement that "in making the threshold determination authorized by Section 102(2)(c) of NEPA the agency must affirmatively develop a reviewable environmental record."[36] Other courts followed *Hanly* in requiring a reviewable agency record of the threshold determination.[37] This court-enforced requirement was embodied in the Council on Environmental Quality's (CEQ) regulation recommending the preparation of an "environmental assessment" as a preliminary device to aid in the determination of whether a full impact statement is necessary.[38] The CEQ regulations indicate that the environmental assessment should be comprehensive in its study of the effects of a proposed action before the agency can determine from the assessment whether the action is "significant" for the purposes of the NEPA.[39]

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[29] *Calvert Cliffs*, 449 F.2d at 1113-14.

[30] *See* Hanly v. Kliendienst, 471 F.2d 823 (2d Cir. 1972).

[31] Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 NAT. RESOURCES J. 301, 311 (1976).

[32] *Id.* (An example is Environmental Defense Fund v. Tennessee Valley Auth., 468 F.2d 1164 (6th Cir. 1972), where the court ordered T.V.A. to redo its environmental impact statement because it was not sufficiently thorough and contained only "unsupported conclusions." The result of the new and thorough impact investigation was the discovery of the "snail darter," a previously unknown and rare species of fish, which existed only in the Little Tennessee River, and which would be threatened by the proposed project.)

[33] *See* First Nat'l Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973).

[34] *Hanly*, 471 F.2d at 837.

[35] 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

[36] *Id.* at 827.

[37] *See* Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1975); First Nat'l Bank v. Richardson, 484 F.2d 1369, 1381 (7th Cir. 1973); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971).

[38] 40 C.F.R. § 1508.9 (1981).

[39] *Id.*

Judge Friendly, in his dissent in *Hanly v. Kliendienst,*[40] expressed concern that this type of environmental assessment was a "mini-impact" statement which might "come to replace the impact statement in the grey area."[41] However, the courts have come to recognize a substantial difference between the environmental assessment, which is brief, and the environmental impact statement, which must be detailed and is to consider many more factors.[42]

The environmental assessment acts as a screening device to enable the agency to separate those significantly impacting projects from the insignificant ones, and allows agencies with limited resources to focus on truly crucial federal actions.[43] Nevertheless, even with this much of a record of agency consideration there still exists the possibility of agency oversight of important considerations. Also, agency abuse might be present in the process of compiling and reviewing the environmental consequences of actions, when important threshold determinations are made. The impact statement process requires a lengthy period for comment by other agencies and the public,[44] and this costs the agency much in time and resources.[45] The temptation to avoid this "expensive" process may be a factor in areas where it seems possible. Court review of threshold determinations insures that the agency is not avoiding its NEPA mandated responsibilities.[46] Careful court review is important because, "the spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review."[47]

The NEPA gives no indication of the proper standard of review to be employed by courts when examining agency threshold determinations.[48] The circuit courts currently use divergent standards of review in looking at agency threshold determinations which find no significant impact.[49] The United States Supreme Court has declined to decide which standard should be applied,[50] thus leaving the lower federal courts in some confusion over which standard to apply. The amount of discretion allowed the agencies in making threshold determinations varies among the federal appellate courts, although the courts will

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[40] 471 F.2d at 836-40.

[41] *Id.* at 837.

[42] Lower Alloways Creek Township v. Public Serv. Elec. and Gas Co., 687 F.2d 732, 741 (3d Cir. 1982).

[43] Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 858 (9th Cir. 1982).

[44] § 102(2)(c), 42 U.S.C. § 4332 (1976).

[45] Friesma and Culhane, *supra* note 20 at 340-41, (the authors offer an interesting discussion of NEPA used as a delaying weapon, often used to defeat projects by imposing such costly delays that the projects were eventually abandoned).

[46] *Lower Alloways Creek Township*, 687 F.2d at 741.

[47] Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

[48] *See* 42 U.S.C. § 4331 (1976).

[49] The 1st, 2d, 4th, 7th and D.C. Circuit use the "arbitrary and capricious" standard. The 3d, 5th, 8th and 10th use the "reasonableness" standard.

[50] *See, e.g.* Kleppe v. Bevel, 105 S.Ct. 2123 (1985).

usually give substantial weight to agency determinations because their processes involve the analysis of technical data as well as the making of subjective value judgments.[51] This comment focuses on what these standards are, how they differ, and the problems they present.

THE "ARBITRARY AND CAPRICIOUS" STANDARD

As mentioned above, *Hanly v. Kliendienst*[52] was the first important circuit court decision dealing with the issue of what standard of review a court should use in reviewing an agency decision not to prepare an environmental impact statement. In that case the General Services Administration's (GSA) had determined that the construction of a jail in Manhatten posed no problems of environmental impact. The United States Court of Appeals for the Second Circuit had to decide whether the GSA's determination satisfied the procedural requirements of the NEPA.[53] That court outlined its proper function when reviewing agency decisions, which was:

> to determine *de novo* all relevant questions of law . . . and . . . to abide by the Administrative Procedure Act, which limits us in matters not involving an agency's rule making or adjudicatory function to determining whether its findings are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or without observance of procedure required by law.[54]

To apply the Administrative Procedure Act (APA)[55] standards the court must determine whether agency findings are factual, thus discretionary, or instead legal, thus subject to *de novo* review.[56] The more factual in nature an agency decision is, the narrower the scope of review by the courts.[57] This implies great difficulty in deciding mixed questions of fact and law. The *Hanly* court attempted to resolve this dilemma by first stating that the issue in the case involved a question of law in the meaning of the word "significantly," and a question of fact in whether the project would have a signficantly adverse environmental impact.[58]

The *Hanly* court then developed a two-factor test to determine whether an action is environmentally significant. First, the court considered "the extent to which the action will cause adverse environmental effects in excess of those

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[51] Note, *Montana Grizzly Bears Protest Exploratory Drilling in Wilderness Area*, 23 NAT. RESOURCES J. 467 (1983).

[52] 471 F.2d 823 (2d Cir. 1972).

[53] *Id.*

[54] *Id.* at 828.

[55] APA § 10, 5 U.S.C. § 706 (1972).

[56] Peltz and Weinman, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 78 (1976).

[57] *Id.* at 79.

[58] *Hanly*, 471 F.2d at 830.

created by existing uses in the area."[59] Next, the court looked at the "absolute" or cumulative harm resulting from the action's "contribution to existing adverse conditions."[60] The court stated that it would then look to see whether the agency's environmental assessment satisfied that two-part test in matters considered by the agency, and whether the agency observed the procedure required by law in making its assessment and determination of no significant impact.[61] If the agency demonstrated by its record that it made an "informed preliminary decision," rather than an "arbitrary and capricious" one, then the *Hanly* court would not require anything further.[62]

One of the major reasons given by the *Hanly* court for choosing the "arbitrary and capricious" standard is respect for the agencies' expertise in evaluating the technical data and subjective factors.[63] Because these agencies possess expertise which the *Hanly* court felt it lacked, the court stated that it should allow the agencies "to have some leeway in applying the law to factual contexts."[64]

Other circuit courts have followed the lead of *Hanly* by applying the arbitrary and capricious standard, and they have chosen it for similar reasons. The Seventh Circuit has shown its deferential attitude to agency expertise in quantifying areas of uncertain environmental values.[65] The First Circuit has selected the arbitrary and capricious standard because it is "quite narrow in scope,"[66] and only allows the court to "assure itself that the agency has given good faith consideration to the environmental consequences of its actions."[67] The Fourth Circuit has also exhibited this same deferential attitude to agency decisionmaking under the NEPA, stating in one decision[68] that "generally . . . the decision not to prepare an EIS [environmental impact statement] is left to the informed discretion of the agency."[69] None of these courts have accepted the proposition that the policy goals and language of the NEPA call for a stricter approach in the review of agency decisionmaking.

Of course, even under the most deferential standard of reviewing threshold determinations under the NEPA, some of the lower courts in these circuits

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[59] *Id.* at 830-31.

[60] *Id.*

[61] *Id.* at 832.

[62] *Id.* at 835.

[63] *Id.* at 836.

[64] *Id.* at 829-30.

[65] Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1975).

[66] Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1072 (1st Cir. 1980).

[67] *Id.* at 1072.

[68] Providence Road Community Ass'n v. Environmental Protection Agency, 683 F.2d 80 (4th Cir. 1982).

[69] *Id.* at 82.

have nevertheless been inventive in getting around the narrow scope of review. They have invalidated agency decisions which were considered incorrect. In *City of New York v. United States Department of Transportation*[70] the court ordered the Department of Transportation (DOT) to prepare an environmental impact statement for its plan to authorize the transport of hazardous waste through New York City via the city's freeways.[71] Although the DOT demonstrated through complicated scientific data that the likelihood of serious consequences arising from a highway accident was of very low probability,[72] the court nonetheless said that the finding of no significant environmental impact was "insufficiently supported by the present record."[73] The court found the DOT ruling arbitrary and capricious "to the extent the regulation mandates the transport through densely populated areas of other materials — in particular, of spent fuel and other large quantity radioactive material — against the will of local and state legislatures."[74] The court held that even a small chance of a serious adverse effect called for an environmental impact statement.[75]

As can be seen, the line often blurs between questions of law and fact when a court reviews the difficult question of whether an agency has properly considered the environmental impacts of a proposal. Even in a case such as *Hanly v. Kliendienst* where the finding of no significant impact was not clearly arbitrary, the court still ordered further agency consideration of the matter in the form of a more detailed environmental assessment.[76]

These deviations lead to inconsistency in the application of the standard, and demonstrate that it is not a sufficiently flexible standard for the purposes of the NEPA. It is difficult to reconcile the aforementioned *City of New York*[77] and its narrowing of the scope of agency discretion with a case which supposedly applies the same standard, *Providence Road Community Association v. Environmental Protection Agency.*[78] In *Providence Road,* the court upheld the EPA's threshold determination of no significant impact of a wastewater treatment project in a rural area.[79] The court stated that it would "assume that the agencies have exercised this discretion appropriately," unless there was a positive showing of arbitrary action.[80] Overall, this standard has

[70] 539 F.Supp. 1237 (S.D.N.Y. 1982).

[71] *Id.*

[72] *Id.* at 1241.

[73] *Id.* at 1242.

[74] *Id.* at 1261.

[75] *Id.* at 1242.

[76] *Hanly,* 471 F.2d at 826.

[77] 539 F.Supp. 1237 (S.D.N.Y. 1982).

[78] 683 F.2d 80 (4th Cir. 1982).

[79] *Id.*

[80] *Id.* at 82.

not proven workable, nor have the courts who use it developed a consistent approach in its application.

THE FOUR-PART TEST

Circuit Court of Appeals for the District of Columbia has adopted the arbitrary and capricious standard as its method of review.[81] However, it has modified this to include a four-part test to review an agency's finding of no significant impact to the environment.[82] The court would, in this test, determine:

(1) whether the agency took a 'hard look' at the problem;

(2) whether the agency identified the relevant areas of environmental concern;

(3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and

(4) if there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.[83]

The agency's threshold determination must meet all of these factors to pass review in this circuit.[84]

In *Sierra Club v. Peterson,*[85] the court reviewed a finding of no significant impact made by the United States Forest Service before it issued oil and gas leases in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming.[86] The *Sierra Club* court applied its four-part test and found that the Forest Service had taken a "hard look" at the problem and had identified the relevant areas of environmental concern.[87] However, the court found that the record did not support a finding of no significant impact, because of a small possibility that some of the leases might permit a level of exploratory activity that could produce significant adverse impacts.[88]

This case demonstrates a stricter standard of review than the arbitrary and capricious standard usually employed in the First, Second, Fourth and Seventh Circuits. It places less trust in agency discretion and more closely scrutinizes agencies charged with carrying out the procedural mandates of the NEPA. By looking at whether "relevant areas" were studied, and whether the agency made a "convincing case" of insignificant impact, the *Sierra Club* court

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[81] Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983).

[82] *Id.* at 1413.

[83] *Id.*

[84] *Id.*

[85] 717 F.2d 1409 (D.C. Cir. 1983).

[86] *Id.* at 1410-11.

[87] *Id.* at 1413.

[88] *Id.* at 1413-14.

indicates that it will allow the agency much less discretion in its appraisal of what constitutes an insignificant impact.

However, Circuit Court of Appeals for the District of Columbia has not been consistent in its approach, and this inconsistency has produced confusion. Earlier, in 1982, this same circuit decided *Cabinet Mountains Wilderness v. Peterson.*[89] In that decision, the court reviewed another threshold determination of no significant impact made by the Forest Service.[90]

The Forest Service had approved a plan for exploratory mineral drilling in the Cabinet Mountains Wilderness Area of northwestern Montana.[91] The area is one of only six ecosystems in the United States that supports grizzly bears, a threatened species.[92] Although the Forest Service found that the exploratory drilling activity could adversely affect the bears, it proposed mitigating measures which it stated would reduce these effects so that no significant impact on the bears would result.[93] The effectiveness of these mitigating measures was disputed, yet the court chose to uphold the decision of the Forest Service not to prepare an impact statement.[94] The court stated that the fourth criterion of its four-part test was satisfied by the mitigating steps proposed by the Forest Service, despite evidence offered to the contrary.[95] This court did not subject the agency's determination to the same level of scrutiny that it later exercised in *Sierra Club v. Peterson,* where a minimal showing of a possible adverse environmental impact caused that court to require the agency to prepare the impact statement before the leases were approved.[96]

Neither the *Sierra Club* decision nor the *Cabinet Mountains* decision, in using the arbitrary and capricious standard, (modified as it is), seems to be in line with the spirit of the "seminal" NEPA case,[97] *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission.*[98] Although that case did not discuss the issue of the standard of review to be used in examining agency threshold determinations, it did give some indication that a strict standard of review would be in order. The court there stated, "this language does not provide an escape hatch for foot-dragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not

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[89] 685 F.2d 678 (D.C.Cir. 1982).

[90] *Id.*

[91] *Id.* at 679-80.

[92] *Id.* at 679.

[93] *Id.* at 680.

[94] *Id.* at 680.

[95] *Id.* at 682.

[96] *Sierra Club,* 717 F.2d at 1413.

[97] Murchison, *Does NEPA Matter? An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act,* 18 U. RICH. L. REV. 557, 563 (1984).

[98] 449 F.2d 1109 (D.C. Cir. 1971).

intend the Act to be such a paper tiger."[99] The court went on to say that Section 102 sets a high standard for the agencies and must be "rigorously enforced by the reviewing courts."[100]

The District of Columbia Circuit's confusion exemplifies in a nutshell the problem of differing review standards. Until the United States Supreme Court issues a definitive opinion on what the standard should be, the lower federal courts will continue to render different and confused decisions when reviewing agency decisions under the NEPA. Federal agencies will not be able to make threshold determinations of no significant impact and have them received in the same fashion throughout the United States. The propriety of the agency decision may rest at times on the location, jurisdictionally speaking, of the proposed project.

THE "REASONABLENESS" STANDARD

A "reasonableness" standard is the least deferential standard which courts have applied in reviewing agency determinations of no significant impact. The courts that apply the reasonableness standard have expressed a belief that the NEPA calls for a stricter standard than the "arbitrary and capricious" one used under the APA.

Save Our Ten Acres v. Kreger states that the "spirit" of the NEPA requires that the threshold decision not be "too well shielded from impartial review,"[101] and that the "usual fact determination review rule ought not to be applied to test the basic jurisdiction-type conclusion involved."[102] The Tenth Circuit in *Wyoming Outdoor Coordinating Council v. Butz*,[103] stated that the NEPA's requirements in Section 102 "clearly speak in mandatory terms, and do not leave the determination to administrative discretion."[104] According to that court, the "mandatory requirements and high standards" set by the NEPA considerably narrow the scope of agency discretion.[105] The Ninth Circuit agrees with the assertion that the mandatory nature of the NEPA's procedural requirements remove the decision of whether to prepare an impact statement from the agencies' sole discretion. Courts may review, *de novo*, the agencies' findings to determine if they are reasonable.[106]

The courts employing this standard of reasonableness review an agency's decision and determine whether it was reasonable under the circumstances for

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[99] *Id.* at 1114.

[100] *Id.*

[101] *Save Our Ten Acres*, 472 F.2d at 466.

[102] *Id.*

[103] 484 F.2d 1244 (10th Cir. 1973).

[104] *Id.* at 1249.

[105] *Id.* at 1249-50.

[106] Foundation for N. Am. Wild Sheep v. United States Dep't. of Agriculture, 681 F.2d 1172 (9th Cir. 1982).

the agency to conclude that a project had no significant environmental impacts.[107] In order for a court to implement this stage of review, it requires that the party opposing the agency decision raise a "substantial environmental issue" concerning the proposed project. In other words, the plaintiff must allege "facts which if true, show that the recommended project would materially degrade any aspect of environmental quality."[108] If the plaintiff meets this initial burden, then the court will examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that there were no significant environmental impacts.[109] Unlike the arbitrary and capricious standard, under which the courts usually confine themselves to an examination of the agency record,[110] courts employing the reasonableness standard may admit evidence extrinsic to the agency record if the plaintiff makes a prima facie demonstration of incomplete development of the written agency record.[111]

For example, in *Save Our Ten Acres v. Kreger*,[112] plaintiffs were an association of employees of the Corps of Engineers formed to oppose the selection of a downtown site in Mobile, Alabama for construction of a federal office building.[113] They challenged the decision of the General Services Administration (GSA) not to prepare an environmental impact statement for this project.[114] The GSA had determined that there would be no significant environmental impact. Their decision had been upheld in the district court which had applied the arbitrary and capricious standard.[115] The Fifth Circuit declined to apply that standard, choosing instead to use the reasonableness standard.[116]

First, the *Save Our Ten Acres* court looked to see if plaintiffs' alleged facts that raised a substantial environmental issue.[117] The court held that plaintiffs' charges that the construction would create severe urban parking and traffic congestion problems, aggravate an already existing air pollution problem, and be improperly located on the Mobile River's floodplain, satisfied this initial

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[107] *Save Our Ten Acres*, 472 F.2d at 467, (court should examine the evidence to determine whether the agency reasonably concluded that the particular project would have no effects); *Foundation for N. Am. Sheep*, 681 F.2d at 1177, (an agency's determination that a particular project does not require the preparation of an EIS is to be upheld unless unreasonable); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973), (the proper standard is whether the negative determination was reasonable).

[108] *Save Our Ten Acres*, 472 F.2d at 466.

[109] *Id.* at 466-67.

[110] *See e.g.*, Nucleus of Chicago Homeowners, 524 F.2d at 232.

[111] *Save Our Ten Acres*, 472 F.2d at 467, (this extrinsic evidence may consist of supplemental affidavits, depositions and other proof).

[112] 472 F.2d 463 (5th Cir. 1973).

[113] *Id.* at 464.

[114] *Id.* at 464-65.

[115] *Id.* at 465.

[116] *Id.*

[117] *Id.* at 467.

burden.[118] The court then remanded the case to the district court and required that it weigh the evidence of both the plaintiff and the agency, to decide if the agency's determination that no impact statement was necessary was a reasonable conclusion.[119]

This same analysis appears in *Foundation for North American Wild Sheep v. United States Department of Agriculture.*[120] Here the court held that the Forest Service's determination of no significant impact was unreasonable because the Service had failed to address certain crucial factors which plaintiff had raised. These factors related to the issue of whether opening a mining road in a canyon area would have an adverse impact on a herd of bighorn sheep.[121] Specifically, the Forest Service had failed to consider the amount of traffic and the effect it would have on the sheep's breeding habits and use of a mineral lick.[122] The court also decried the Forest Service's "speculation" about the sheep's tolerance of human intrusion.[123] The court stated that the purpose of the NEPA's requirement that an environmental impact statement be prepared "is to obviate the need for such speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action."[124] This is the basic tenet of the reasonableness standard: that an agency not make a decision concerning the environmental impact of a project until it has fully considered the environmental issues involved. If those issues demonstrate conflicting evidence and a myriad of variables, then the agency should prepare an impact statement.

Currently, approximately five of the twelve circuits have used the reasonableness standard to review agency threshold determinations.[125] The Eleventh Circuit indicated that it will follow the decisions of the Fifth Circuit,[126] thus it will presumably also follow the reasonableness standard should it need to decide such a case.

The decisions employing "reasonableness" are consistent in their application of the standard. They all utilize the basic approach of requiring a plaintiff to raise a substantial environmental issue, followed by a weighing of the evidence of both plaintiff and agency to determine if the threshold finding was reasonable in view of this substantial environmental issue.[127] Of course, the

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[118] *Id.* at 466.

[119] *Id.* at 465.

[120] 681 F.2d 1172.

[121] *Id.* at 1175-76.

[122] *Id.* at 1176.

[123] *Id.* at 1179.

[124] *Id.*

[125] Those are the 3d, 5th, 8th, 9th, 10th.

[126] Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

[127] *See e.g. Save Our Ten Acres*, 472 F.2d 463; *Foundation for N. Am. Sheep*, 681 F.2d 1172.

"weighing" process depends on the plaintiff's ability to raise the environmental issue, and if the plaintiff fails to do this, then the court will not consider the reasonableness of the agency decision.[128] A plaintiff's inability to meet this burden probably suggests "insignificance" as originally determined by the agency.

Agency threshold determinations have been upheld by courts using a reasonableness standard. In *Lower Alloways Creek Township v. Public Service Electric and Gas Co.*,[129] the Third Circuit found that the Nuclear Regulatory Commission had satisfied the requirements of the NEPA in its approval of a plan to enlarge the storage facilities for spent fuel at a nuclear generating plant.[130] The court held that the Township had failed to satisfy its burden of raising a substantial environmental issue, and that this "proved fatal" to its cause.[131] That court stated, "judges are neither scientists nor technicians; if judicial review of agency decisionmaking is to be productive and profitable, courts must insist that litigants provide them with sufficient information and analysis to assess critically the validity of the allegedly improper agency action."[132]

In *Winnebago Tribe v. Ray*,[133] the Eighth Circuit ruled for an agency's determination of no significant impact in an action involving crossing the Missouri River with power lines.[134] Here the plaintiff's allegation was not of "sufficient significance to warrant shifting the burden of proof."[135] The plaintiffs had alleged that the power lines would prove harmful to bald eagles.[136] The court said that there was no evidence that eagles nested in the area, and that throughout the United States few eagles were electrocuted each year, making harm extremely unlikely.[137]

Both of these cases illustrate that plaintiffs' allegations of harm to the environment must be specific and backed up with facts, and have some possibility of occurring. This makes it less likely that the reasonableness standard will be abused by plaintiffs who seek to delay projects for reasons other than environmental ones.

One author has suggested that a policy of concern for the environment is the motivation for the adoption of this stricter standard of reasonableness, and is not legally justified, asserting that the APA should be used unless there is

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[128] Winnebago Tribe v. Ray, 621 F.2d 269 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980).

[129] 687 F.2d 732 (3d Cir. 1982).

[130] *Id.* at 734-35.

[131] *Id.* at 743.

[132] *Id.*

[133] 621 F.2d 269 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980).

[134] *Id.* at 270.

[135] *Id.* at 271.

[136] *Id.* at 274.

[137] *Id.*

clear and convincing evidence of contrary legislative intent.[138] However, environmental lawsuits are unique because of the highly scientific and technical data involved and the valuation difficulties of assessing the worth of scenery and degree of harm. Also, and more importantly, they are exceptional because of the irreversible consequences of an environmental decision if harm is realized.[139] These are compelling reasons to require very careful consideration of the consequences to the environment that could arise due to erroneous agency decisions. The NEPA mandates such care, and its policy goals should be addressed as well as can be through strict compliance with the impact statement process. To require the use of an arbitrary and capricious standard because the NEPA does not expressly call for something else is "overly formalistic,"[140] and ignores the purpose of the NEPA's procedural requirements.

The reasonableness standard is more flexible and works to better serve the requirements of the NEPA. It gives a court more leeway when met with a situation where an environmental impact statement should be prepared, yet there is no clearly arbitrary action by an agency. A reasonableness standard is not overly strict since it requires that there be a substantial environmental issue raised before a court will consider the basis for an agency's determination.[141] Even when the burden shifts to the agency, the agency still has an opportunity to give its reasons for its threshold determination so that the court can determine if there was a rational basis.[142]

The courts using the reasonableness standard, or any other, do not address the question of whether a project is or is not desirable.[143] An agency may prepare an adequate environmental impact statement which demonstrates serious adverse impacts, and still proceed to approve the project.[144] The courts cannot overturn that decision by reason of the NEPA.[145] The NEPA mandates only that the "environmental effects of the project be given appropriate consideration."[146] As one court stated, "an agency may be free to decide that the public should be subjected to grave risks."[147]

The United States Supreme Court has said that the NEPA is "essentially

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[138]Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENVIRONMENTAL AFFAIRS L. REV. 63, 77 (1980).

[139]Kelly, *Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969*, 10 B.C. ENVIRONMENTAL AFFAIRS L. REV. 79, 83-4 (1982).

[140]*Save Our Ten Acres*, 472 F.2d at 466.

[141]*Id.* at 466-67.

[142]*Id.*

[143]*Id.* at 467 ("it is not the province of the courts to review any actual decision on the merits").

[144]*City of New York*, 539 F.Supp. at 1261.

[145]*Id.* ("NEPA . . . does not . . . prescribe substantive results").

[146]*Save Our Ten Acres*, 472 F.2d at 467.

[147]*City of New York*, 559 F. Supp. at 1261.

procedural,"[148] and this demonstrates the limited role which the courts may play in enforcing the policy goals of the NEPA. The Supreme Court has also ruled that an appellate court cannot require an agency to give determinative weight to environmental factors, favoring them above other factors.[149] This forecloses the possibility of substantive judicial review under the NEPA.

The only teeth in the NEPA are the procedural requirements of Section 102(2)(c). Without that section the courts would have no basis to require agencies to introduce environmental considerations into the balancing analyses involved in decisionmaking. The NEPA would indeed be a "paper tiger."[150] This presents a strong argument that the NEPA must therefore be enforced through its procedures, in the strictest way possible. A "reasonableness" standard currently represents the best way to do that.

CONCLUSION

The NEPA expresses Congress' desire to have agencies incorporate environmental considerations into their decision making process. It does this with the action-forcing mechanism of Section 102(2)(c), which requires the preparation of a detailed environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." This statement must be made public so that all have access to the information and may comment upon it.

Not all federal actions significantly affect the environment, and Federal agencies therefore need not prepare impact statements in all situations. The agency makes the initial determination of significance, and threshold determinations of no significant impact have sparked a great deal of litigation. The lower federal courts have applied, with variations, basically two standards of review, the arbitrary and capricious standard of the APA, and the reasonableness standard. The District of Columbia employs a four-part test to determine whether an agency determination was arbitrary and capricious.

The courts that use the arbitrary and capricious standard do so because of their willingness to rely on agency expertise. Therefore, these courts allow agencies much more discretion in making their threshold determinations. However, the standard is not used consistently in the courts that employ it, indicating that these courts do not necessarily find it ideal for the purposes of the NEPA.

Confusion in the District of Columbia Circuit's decisions leaves unclear how that circuit wishes its four-part test to work.

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[148] Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 558 (1978). For an interesting discussion of this case, *See* Raymond, *A Vermont Yankee in King Burger's Court: Constraints on Judicial Review Under NEPA*, 7 B.C. ENVIRONMENTAL AFFAIRS L. REV. 629 (1979).

[149] Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980).

[150] *Calvert Cliffs*, 449 F.2d at 1114.

The "reasonableness" standard is the least deferential and most flexible standard. The courts that use it do so due to their belief that the NEPA mandates strict compliance with its procedural requirements, and leaves little room for agency discretion. This standard is the most consistently applied, and encourages maximum enforcement of the NEPA's policies. Given the limitations of the NEPA, it is perhaps the more effective and flexible standard.

The Supreme Court has declined to end the conflict among the circuits. Until it gives the final word on the issue and establishes a uniform standard, the decisions in lower courts will continue to be confused and divergent. Furthermore, federal agency determinations will not be subjected to the same level of scrutiny throughout the federal courts.

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