Project Modification: Illegitimate Circumvention of the EIS Requirement or Desirable Means to Reduce Adverse Environmental Impacts?

Eric Glitzenstein*

INTRODUCTION

Section 102(2)(C)1 of the National Environmental Policy Act of 1969 (NEPA)2 requires that an Environmental Impact Statement (EIS) be prepared for any proposal for major federal action "significantly" affecting the quality of the human environment. Courts interpreting NEPA have not reached a consensus on whether a federal agency may avoid the EIS requirement by modifying3 a previously proposed project in order to bring it beneath the "significance" threshold. This Article reviews and critiques current judicial responses to modifications of federal projects, and considers whether allowing agencies to decline to prepare an EIS as a result of a project modification is consistent with the environmental protection scheme established in NEPA.

I
CIRCUMSTANCES WHERE THE MODIFICATION ISSUE ARISES

Typically a federal agency contemplating action that may result in significant environmental impacts follows a well-defined administrative process. The agency first prepares an Environmental Assessment (EA), which provides an evidentiary and analytical foundation that the agency then uses to decide whether to prepare an EIS.4 If, on the basis

Copyright © 1982 by Ecology Law Quarterly.

* B.A. 1978, Johns Hopkins University; J.D. 1981, Georgetown University Law Center; Law Clerk to Judge Thomas Flannery of the United States District Court for the District of Columbia. The author wishes to express his thanks to Professor Steven Goldberg of Georgetown University Law Center for his valuable comments on an earlier draft of this Article.

3. Modification might take the form of altering a project's design or of adding measures designed to mitigate particular environmental impacts.
4. 40 C.F.R. §§ 1501.4(b), 1508.9 (1982). The level of detail in Environmental Assess-
of the EA, the agency determines that the project will not result in
significant environmental impacts, then the agency does not prepare an
EIS, but instead prepares and makes available to the public a Finding
of No Significant Impact (FNSI). Conversely, if the agency deter-
mines that the project may result in significant environmental impacts,
the agency publishes a notice of intent to prepare an EIS in the Federal
Register, and begins to ascertain and define the scope of the issues to
be addressed in the EIS. Once the scope of the issues is determined,
the agency prepares a thorough draft EIS which is circulated for public
review and comment. Finally, after considering the comments of af-
acted parties, members of the public and other agencies, the agency
prepares a final EIS.

When an agency modifies a project to mitigate environmental im-
parts, it may follow a markedly different route from that just described.
The agency may obtain information showing that a specific concrete
project involves potentially significant environmental impacts, but it
may refuse to begin preparing an EIS or an Environmental Assessment
that could serve as the basis for the decision to prepare an EIS. In-
stead, at some point in the decisionmaking process, the agency may
alter the project to decrease otherwise significant impacts. This altera-
tion may take two forms: the agency may decide to alter the actual

ments varies considerably. Some agencies prepare extensive EAs that approximate draft
EISs, while some EAs are little more than conclusory statements of environmental effects.
According to the Council on Environmental Quality (CEQ) regulations, an EA is a “concise
public document” furnishing sufficient information for the decision to prepare an EIS, and
also contains independent assessments of the need for the proposal and feasible alternatives.
40 C.F.R. § 1508.9 (1982).

5. 40 C.F.R. § 1501.4(e) (1982). The FNSI explains the reasoning underlying the
agency’s determination that the project will not have a significant effect on the human envi-
ronment. It usually includes the EA or a summary of it. 40 C.F.R. § 1508.13. While the
courts generally have not expressly required an official agency document containing a find-
ing of no significant impact, most courts have placed on agencies the equivalent burden of
developing a record supporting the decision not to prepare an EIS. See, e.g., Harlem Valley
Transportation Ass’n. v. Stafford, 500 F.2d 328 (2d Cir. 1974); Arizona Pub. Serv. Co. v.

7. Id. §§ 1501.4(d), 1501.7 (1982).
8. Id. §§ 1502.9(a), 1503.1 (1982).
9. Id. § 1502.9(b) (1982). This process is short-circuited when the agency is con-
fronted with the type of proposal that normally requires an EIS. In that situation, agencies
will often immediately trigger the scoping process without bothering to prepare an EA. See id. § 1501.4(a)(1). Similarly, agencies generally promulgate guidelines enumerating actions
for which they do not normally prepare EISs; i.e. categorical exclusions. Id. § 1501.4(a)(2).
10. This awareness may come about as a result of purely internal analysis, comments
from other agencies or comments from the public. The agency may actively solicit the latter
two sources of information by publishing in the Federal Register a notice of the project and
the agency’s intention of preparing an Environmental Assessment. See id. § 1508.22 (1982).
Alternatively the public may learn of the project through less formal means and furnish
uninvited comments.
structure or design of the proposed action, or it may decide to mitigate
the project's impact by modifying the environmental protection scheme
associated with the otherwise intact project. In either case, the agency
ultimately decides, ordinarily in an Environmental Assessment and ac-
ccompanying Finding of No Significant Impact, that an EIS is unneces-
sary because the project has been altered to bring it below the
"significance" threshold.

Simmans v. Grant presents a typical example of project modifica-
tion. There, the Soil Conservation Service (SCS) initially proposed a
project that would have substantially deepened a natural channel. Sev-
eral Texas environmental groups objected to the project on the grounds
that it would significantly harm numerous nearby stands of trees and
thus destroy major animal habitat areas. The SCS responded to these
objections not by preparing an EIS, but by modifying the proposed
action. The agency decided to alter the project design by shifting the
centerline of the proposed channel in order to bypass major habitat
areas. Also, the SCS specifically altered its environmental protection
scheme by agreeing to implement a vegetation restoration plan
designed to mitigate wildlife losses. When an action was brought to
enjoin the project pending SCS's preparation of an EIS, SCS asserted
that the project as modified would not result in significant environmen-
tal impacts and therefore that no EIS was required.

Simmans provides the general factual outline of agency action to
be analyzed in this Article: (1) an agency posits a specific, definable
action; (2) comments from the public, other agencies, or internal ana-
lysts cause the agency to realize that the project entails significant envi-
ronmental impacts, but the agency declines to prepare an EIS or an
EA; (3) at some later time, the agency modifies the proposed action in
order to mitigate particular impacts; and (4) the agency prepares an
EA, concluding that an EIS is not necessary and is not mandated by

12. Id. at 9-10.
13. Id. at 10.
14. Id. at 11.
15. Id. at 20.
16. This factual paradigm must be distinguished from situations where the agency ini-
tially contemplates only some generalized and largely undefined course of action which is
later refined into a more specific project. This situation is more appropriately labeled "pro-
ject evolution" than "project modification."
17. In Simmans v. Grant, the project modification designed to mitigate environmental
impacts occurred soon after the agency's consideration of comments on the original project.
Id. at 11. In some cases, the agency may alter the project substantially later in the process,
following initiation of a NEPA suit, see, e.g., NRDC v. Grant, 341 F. Supp. 356 (E.D.N.C.
1972) (Department of Interior's adoption of mitigation measures for watershed project in
response to NEPA suit) or even after project implementation begins.
18. In some circumstances, the agency may never prepare an Environmental Assess-
ment on the proposed project and the impact of the modification. In particular, where modi-
NEPA. This Article analyzes those situations where, despite the apparent existence of a proposal\(^9\) for a project entailing significant adverse environmental impacts, an agency employs subsequent project modification as the justification for its failure to prepare an EIS.

In one important variation of this scenario, the agency is compelled to modify the proposed action following judicial review of the agency's decision not to prepare an EIS. In this circumstance, the reviewing court conditions an injunction of the project on the agency's development of particular measures designed to mitigate environmental impacts that have come to the court's attention.\(^{20}\) Instead of simply reviewing the agency's decision not to prepare an EIS because of project modification, as in *Simmans v. Grant*, the court authorizes the agency to bypass the EIS process as long as project modifications that the court deems acceptable are implemented.\(^{21}\)

## II

### JUDICIAL RESPONSES TO PROJECT MODIFICATIONS DESIGNED TO AVOID THE EIS REQUIREMENT

Courts have generally allowed agencies to avoid the EIS requirement by modifying projects to bring them below the significance threshold.\(^{22}\) Most courts, however, have not examined whether allowing such project modification is consistent with the intent of NEPA.

---

\(^{9}\) Fications occur extremely late in the project development process, see supra note 17, agencies may not have sufficient time to develop an EA prior to judicial review. This represents a NEPA violation independent of the ultimate failure to prepare an EIS since agencies are required to prepare an assessment furnishing the basis for a negative declaration. See, e.g., Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Arizona Public Service Co. v. Federal Power Commission, 483 F.2d 1275 (9th Cir. 1973); see also 40 C.F.R. §§ 1501.4(b),(c),(e) (1982) (agency must make decision whether to prepare EIS on basis of EA and prepare a finding of no significant impact if no EIS is found to be necessary).

\(^{19}\) Where an agency merely contemplates some general, undefined course of action, a "proposal" will not be deemed to exist and a court may not order EIS preparation. In contrast, where an agency has posited a specific, definable action, the proposal threshold is crossed and the EIS requirement is triggered. See infra text accompanying notes 93-102.

\(^{20}\) In Portela v. Pierce, 650 F.2d 210 (9th Cir. 1981), the district court had decided not to compel HUD to prepare an EIS on a proposal to sell a low-income housing project to a private developer, despite the fact that the project would displace many low-income families. The Court of Appeals affirmed this decision because the lower court had directed the agency to find adequate housing for displaced persons, thereby "assuring itself that all of the individuals directly affected by the action were relocated." Id. at 1232. See also Sadler v. 218 Housing Corp., 417 F. Supp. 348, 356 (N.D. Ga. 1976) (no EIS required because court ensured that HUD took steps to relocate displaced tenants from housing project); Jones v. United States Department of Housing and Urban Development, 68 F.R.D. 60 (E.D. La. 1975).


\(^{22}\) See, e.g., Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); Bosco v. Beck, 475 F. Supp. 1029 (D. N.J. 1979) (upholding addition of measures to mitigate impacts associated
Courts have generally only noted that the project, as described at the time of judicial review, did not entail significant impacts\(^{23}\) and therefore did not trigger the EIS requirement.\(^{24}\)

The most thorough explanation of a decision to permit project modification is contained in *Maryland-National Capital Park and Planning Commission v. United States Postal Service (NCPC).*\(^{25}\) In NCPC, the Post Office proposed construction of a Bulk Mail Center. Various public and private planning groups objected to the original construction proposal because of its potential for various adverse environmental impacts, including excessive stormwater runoff and the overloading of existing sewage systems.\(^{26}\) In response to these criticisms, the Postal Service agreed to adopt numerous mitigation measures, most importantly a runoff control system and additional sewage treatment capacity.\(^{27}\) The Postal Service subsequently prepared an Environmental

---

23. There is no uniform judicial approach to the question of which environmental impacts are “significant” and which are not. The courts have employed definitions of significance ranging “from ‘not trivial’ through ‘appreciable’ to ‘important’ and even ‘momentous’.” Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, C.J., dissenting), cert. denied, 412 U.S. 908 (1973). A huge assortment of factors have been analyzed in making the significance determination, including the level of risk to public health, Soc’y for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915, 917 (D.C. Cir. 1975); whether impacts are primarily on “physical environmental resources” as opposed to social impacts, Nat’l Ass’n of Gov’t Employees v. Rumsfeld, 413 F. Supp. 1224, 1229-30 (D. D.C. 1976); the degree of controversy of a project’s impacts, Nucleus of Chicago Homeowners Ass’n v. Lynn, 524 F.2d 225, 232 (7th Cir. 1975), cert. denied, 424 U.S. 467 (1976); the quantitative level of impact, Wisconsin v. Butz, 389 F. Supp. 1065 (E.D. Wis. 1975); the degree to which the action will cause adverse environmental effects beyond those created by existing uses, Hanly v. Kleindienst (Hanly II), 471 F.2d at 830-31; and the absolute size of the area affected by the contemplated project, Smith v. Cookeville, 381 F. Supp. 100, 111 (M.D. Tenn. 1974).

In light of the broad array of definitions and factors employed by the courts in assessing significance and the inherently subjective character of that assessment, “what the courts do is a better barometer than what they say.” W. Rodgers, *Environmental Law* 755 (1976). What many courts do is defer to agencies’ findings of “insignificance” even when projects are associated with seemingly substantial impacts. See, e.g., Rucker v. Wills, 484 F.2d 158, 163 (4th Cir. 1973) (finding proposed construction of marina, paved parking lot and fishing pier, and excavation of boat basin to be insignificant despite major aesthetic impact on shoreline and acceleration of erosion); Hiram Clarke Civil Club, Inc. v. Lynn, 476 F.2d 421, 425 (5th Cir. 1973) (HUD-insured loan of almost $4 million for 272-unit apartment building on fifteen acre tract in Texas not significant); Friends of the Earth, Inc. v. Butz, 406 F. Supp. 742 (D. Mont. 1975) (Forest Service approval of mining operations including road improvements, bridge construction, drilling and storage of 4000 cubic yards of rock not significant); Dunford v. Ruckelshaus, 3 ELR 20175 (N.D. Cal. 1972) (EPA funding of large-scale combination sewer outfall project reaching 1200 feet into ocean not significant).

24. *See, e.g.*, San Francisco v. United States, 615 F.2d 498 (9th Cir. 1980) (no EIS required because proposed leasing of naval shipyard, as modified, would not cause significant environmental impacts).


26. *Id.* at 1033.

27. *Id.* at 1034.
Assessment finding that all potentially significant impacts had been obviated by project modifications and thus that no EIS was required.

Judge Leventhal, writing for the District of Columbia Circuit Court of Appeals, framed NCPC's legal issue by asking: "What should the approach of the court be to an assessment in which an environmental impact is identified but not thought to require an EIS because the impact itself can be controlled by a change in the mission?" He answered that an EIS is not required in such circumstances as long as the agency can "convincingly" demonstrate that the otherwise significant environmental impacts will be "sufficiently minimized" by alterations in the project.

The NCPC court decided that an agency's ultimate decision not to prepare an EIS for a project is subject to a rigorous standard of review when that project as initially proposed would have entailed significant environmental impacts. The court noted its general agreement with the high standard of review for negative declarations offered by Judge Friendly's dissent in Hanly v. Kleindienst (Hanly II); in other words, an EIS is required whenever environmental impacts are "arguably" significant. Judge Leventhal reasoned that when an agency acknowledges that the project as initially described involves significant impacts, only very convincing evidence will persuade the court that the project as modified will not "arguably" result in significant environmental impacts.

Thus, the court's focus in NCPC was on the sufficiency of the government's evidence that the modified project did not transcend the significance threshold. The court remanded the case to the district court with instructions that the lower court should decline to order an EIS if it found that the proposed modifications or, by implication, any subsequently proposed modifications would be adequate to bring the project below the significance threshold.

The NCPC opinion did not expressly discuss whether program alteration to avoid the EIS requirement is consistent with NEPA's objectives. The court's treatment of the modification issue, however, clearly represents more than a simple application of the NEPA threshold standard for EIS preparation. In a footnote, the court indicated that "in cases of building siting . . . the incremental environmental damage may be . . . successfully minimized and this possibility is en-

28. Id. at 1039.
29. Id. at 1040.
31. 487 F.2d at 1039.
32. Id. at 1040.
33. Id. at 1040-41, 1043.
This statement reveals the court's judgment that agencies will be motivated to mitigate otherwise significant environmental impacts if those agencies are allowed to avoid the EIS requirement by modifying projects. The NCPC decision apparently follows the view that the principal objective of NEPA is to minimize environmental disruption and that this objective can better be attained by furnishing an incentive to mitigate environmental impacts than by requiring the preparation of an EIS.

Therefore, a strong policy judgment, based on the assumption that environmental protection can be maximized by actively encouraging impact mitigation, is cloaked in the guise of a "neutral" standard of review of project modifications. Moreover, this policy judgment necessarily incorporates a strong substantive role for courts in implementing NEPA's objectives. To determine whether "arguably" significant impacts have been sufficiently mitigated, a court must carefully scrutinize specific project alterations and mitigation measures chosen by the agency. Where a court concludes that a particular impact is not adequately mitigated by project modification, the NCPC approach suggests that the court should order specific project alterations.

Thus, most of the courts that have not required an EIS after some project modification have applied the significance threshold only mechanically, and have apparently ignored any consideration of the underlying purposes of NEPA. In NCPC, on the other hand, the court reaches the same result through a definite policy judgment as to how courts can best ensure environmental protection.

Courts have also failed to analyze NEPA's objectives in decisions requiring an EIS despite some project modification. Some courts have demanded an EIS based on a cursory consideration of when a project becomes a "proposal." For example, the court in NRDC v. Grant.

---

34. Id. at 1040 n.11.
36. This policy position was expressly articulated in Leventhal, supra note 21, at 524: [T]he goal of NEPA . . . may be achieved as well or better by a change in design that minimizes environmental impact . . . Presumably Congress envisioned amendments of a project to curtail environmental impact in the light of an impact statement. Modification in order to avoid an impact statement is a sensible corollary.
37. See supra text accompanying notes 20-21 for a description of this circumstance.
In NCPC, the Court of Appeals indicated that the District Court could devise specific conditions which would sufficiently curtail adverse impacts not obviated by project modifications already implemented by the Postal Service. 487 F.2d at 1042. See also Leventhal, supra note 21, at 524 ("even in case of NEPA violation, of failure to file an impact statement, the appropriate judicial response might not be a total prohibition but a ruling withholding such an injunction upon the condition that the agency make certain project modifications.").
38. See cases cited supra at note 22.
considered modification of a watershed project by the Soil and Conservation Service (SCS) that was intended to lessen adverse impacts on fish and wildlife resources. SCS argued that this modification converted the project from one with arguably significant impacts to one with no substantial adverse impacts. The court concluded that regardless of the effects of the additional mitigation measures, SCS was required to prepare an EIS. The court’s only explanation for this decision was that SCS should have issued an EIS when the project was initially proposed. The court apparently assumed that modification presents no more than a mechanical timing issue. Accordingly, the court did not consider NEPA’s purposes and how they would best be served in project modification situations.

In Citizens for Responsible Area Growth (CRAG) v. Adams, the court required EIS preparation despite modification and at least alluded to policy considerations. In CRAG, the federal Economic Development Association (EDA), in conjunction with the city of Lebanon, New Hampshire, proposed a series of airport construction activities. After the proposals were made, EDA agreed generally with the city to mitigate certain of the projects’ adverse effects in undetermined ways, and EDA then prepared a Finding of No Significant Impact on the construction project. The court held that EDA must prepare an EIS, in view of the agency’s conclusion that “without adjustment” the proposal would meet NEPA’s threshold of significant impact. The court viewed EDA’s proposed modification effort as no more than an attempt to bypass the EIS requirement, and found this strategy to be “blearily inconsistent” with the intent of NEPA.

The CRAG court did not explain why EDA’s prospective project modification conflicted so dramatically with NEPA’s purposes. Some

---

40. *Id.* at 367.
42. *Id.* at 1004.
43. *Id.*
44. *Id.* As this description makes evident, the CRAG case does not conform precisely to the modification scenario upon which this Article focuses. See *supra* text accompanying notes 16-21. First, the court clearly disapproved of EDA’s strategy of bargaining with a private entity so as to avoid NEPA compliance, a strategy not under scrutiny in this Article. Second, instead of reviewing a defined set of modifications designed to minimize particular environmental impacts, the CRAG court was confronted with a vague agreement promising, but not specifying, mitigation measures to be adopted at some future time; the court was faced with undefined prospective modifications rather than tangible modifications already conceived and implemented.

Despite these discrepancies, however, the CRAG decision is instructive on the modification issue that is the core concern of this Article. As noted, the thrust of the court’s discourse on the mitigation agreement between EDA and the city is that agencies must initiate the EIS process at the earliest possible time and that subsequent project alterations do not change this requirement. This theme is just as pertinent to project modifications already undertaken as it is to prospective modifications. Thus, while the CRAG case is not “on all fours” with the factual outline that is the focus of this article, it certainly provides a useful analogy.
insight into the court’s reasoning may be gained, however, from its reference to cases stressing the NEPA requirement for early agency preparation and consideration of an EIS. The implication of this reference is that allowing project modification to avoid an EIS conflicts with NEPA’s emphasis on full consideration of environmental consequences before environmentally beneficial alternatives may be foreclosed.

Under the court’s apparent rationale, not requiring an EIS after modification late in the proposal process might encourage an agency not to incorporate environmental values into the decisionmaking process at an early stage. More specifically, permitting modification to bypass the required EIS furnishes an agency with an incentive to forgo early consideration of the entire range of mitigation measures and project alternatives, including, perhaps, the most environmentally sound strategy. An agency could disregard environmentally preferable alternatives as long as, at some point, it modified the project to bring it below the significance threshold.

Thus, the CRAG decision lends reasoned support to NRDC v. Grant’s mechanical timing approach to the modification issue. As soon as an agency proposes a project with potentially significant environmental impacts, it must prepare an EIS that considers the broad spectrum of alternatives, including all feasible mitigation measures. Allowing subsequent project modification to negate the EIS requirement would, according to this view, effectively undermine NEPA’s objective of requiring agencies to consider environmental factors throughout their decisionmaking processes.

In sum, the courts have not developed a consistent approach to the project modification issue, and two alternative approaches are used by most courts. One approach allows project modifications as a substitute for EIS preparation if an agency correctly determines that a modified project will not have significant environmental impacts. This “significant impacts” approach is apparently based on a perception that allowing agencies to bypass EIS preparation furthers the goal of environmental protection, so long as the agency demonstrates that the modifications to a project have eliminated any potentially significant environmental impacts of that project. A second approach, the “process” approach, requires preparation of an EIS despite modification of the original project. Courts following this approach apparently maintain that allowing agencies to avoid preparing an EIS by modifying a

45. The court cited Massachusetts Air Pollution & N. Abate Com. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974) for the proposition that “it is clear that environmental law requires that a federal agency involve itself early and continuously with EIS’s in considering its programs and projects.” 477 F. Supp. at 1004.

46. See Scientists Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).
project or proposal is inconsistent with the objective of achieving early and full consideration of the environmental impacts of agency actions and, therefore, is contradictory to the legislative scheme of environmental protection set forth in NEPA. The next section of this Article analyzes these approaches in greater detail, focusing on their divergent assumptions concerning NEPA’s principal objectives.

III
ANALYSIS OF THE ALTERNATIVE APPROACHES TO THE MODIFICATION ISSUE

A. The “Significant Impacts” Approach

The response to the modification issue suggested by the NCPC decision\(^\text{47}\) suffers from a number of practical and legal difficulties. First, this approach relies on the willingness and ability of the trial court to scrutinize the precise effects of project alterations. If a court fails to familiarize itself thoroughly with the potential environmental impacts of a project and the effectiveness of project modifications, a federal action causing significant devastation of natural resources could proceed without preparation of an EIS and thus without full consideration of the action’s adverse environmental impacts. Many courts may lack either the desire or expertise to assess adequately whether technical project modifications lessen otherwise significant environmental impacts. Further, the NCPC “significant impacts” approach relies on a strict standard of review of agency determinations to ensure that modified projects fall below the significance threshold. Many courts may not apply such a strict standard of review.

Some courts apply strict standards of review to negative declarations—agency determinations that a project will have no significant environmental impacts and that no EIS is necessary—outside the project modification context and, presumably, would apply the same standards in a case involving modification of a project. For example, the District of Columbia Circuit Court of Appeals, which decided NCPC, has adopted a rigorous standard of review for all agency decisions declining to prepare an EIS: if significant environmental effects could “arguably” result from implementation of a federal action, an EIS is required.\(^\text{48}\) Other courts have adopted a similarly exacting “reasonableness” standard of review, as articulated by the Fifth Circuit Court of Appeals in Save Our Ten Acres v. Kreger.\(^\text{49}\) Under this standard, an

\(^{47}\) See supra text accompanying notes 25-37.

\(^{48}\) See supra text accompanying notes 28-29.

\(^{49}\) 472 F.2d 463 (5th Cir. 1973); see also Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1319-20 (8th Cir. 1974); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1249 (10th Cir. 1973).
agency must establish that in light of all available information on potential environmental impacts, its failure to prepare an EIS was reasonable.\textsuperscript{50} The agency would have to furnish persuasive evidence to prove that it "reasonably" concluded that otherwise significant environmental impacts would be sufficiently mitigated by project modification.\textsuperscript{51} Thus, courts generally applying the "reasonableness" standard of review, as well as those employing the "arguably significant" standard to negative declarations, would have the legal foundation for carefully scrutinizing the adequacy of agency modifications designed to mitigate significant environmental impacts.

In a number of circuits, however, an extremely deferential standard of review is generally applied to the threshold decision not to prepare an EIS.\textsuperscript{52} In these jurisdictions the determination of environmental significance is viewed as an inquiry within the discretion of the agency, which should not be overturned unless it is patently "arbitrary or capricious," according to the Administrative Procedure Act.\textsuperscript{53} If these courts apply the same deferential standard to an agency's decision not to prepare an EIS for a modified project, they would provide little protection against agency evasion of the EIS process, even if the project modifications do not adequately avoid significant adverse environmental impacts.

Thus, in jurisdictions where a deferential standard of review is generally applied to agency decisions not to prepare an EIS, the significant impacts approach would allow an agency's use of project modifications that would leave substantial environmental impacts intact. Even in those jurisdictions where rigorous review is otherwise employed, the significant impacts approach places excessive reliance on the courts. Courts may not be able to analyze fully the complex and technical project modifications that agencies may propose to avoid potential environmental impacts. As agencies gain awareness of practical and legal constraints on judicial review of project alterations, some may simply incorporate project changes that courts could be persuaded to accept, rather than implementing measures that will genuinely protect the environment. As a result, the significant impacts approach may not even provide agencies with a real incentive to modify projects so as to protect the environment, as the NCPC court assumed. Rather, it may invite agencies to adopt cosmetic and ineffective changes in projects.

\begin{footnotes}
\textsuperscript{50} 23 \textit{Vill. L. Rev.} 1170, 1175 (1978).
\textsuperscript{51} See \textit{Save Our Ten Acres v. Kreger}, 472 F.2d 463 (5th Cir. 1973).
\end{footnotes}
The significant impacts approach is fundamentally flawed in another aspect as well. It misinterprets NEPA's principal objective and, as a result, essentially substitutes a judicially created scheme of environmental protection for that conceived by Congress in enacting NEPA. Two basic purposes of the EIS requirement have generally been recognized. First, the EIS serves as an environmental "full disclosure" statement, permitting Congress and the public to evaluate fully the environmental consequences of projects. Second, and more importantly, the EIS ensures that federal decisionmakers will examine and consider environmental factors before acting. The EIS requirement compels agencies to infuse environmental considerations into decisionmaking prior to the irrevocable commitment of resources. Recently, in Sierra Club v. Andrus, the Supreme Court reaffirmed that the primary purpose of an EIS is the integration of environmental considerations into the initial stages of policy formulation. The Court noted:

The thrust of section 102(2)(c) is . . . that environmental concerns be integrated into the very process of agency decisionmaking. The detailed statement it requires is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions. . . . In the past, environmental factors have frequently been ignored in the early stages of planning. . . . As a result, unless the results of planning are radically reversed at the policy level . . . environmental enhancement opportunities may be foregone and unnecessary degradation incurred. For this reason, the regulations of the . . . CEQ [Council on Environmental Quality] require Federal agencies to integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values. . . .

As this statement reveals, the EIS requirement is intended to institutionalize the consideration of "environmental factors" at the policy-formulation stage of agency decisionmaking. Environmental factors that must be considered involve not only the potential adverse impacts of the proposed action, but all reasonable alternatives to the action that

55. See Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 778 (1976) (NEPA is a deliberate command to consider environmental factors and not shunt them aside in the "bureaucratic shuffle"); Calvert Cliffs Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972) (NEPA demands that environmental factors be considered at every stage in the decisionmaking process where alterations might be made to minimize environmental costs).
57. Id. at 350-51; see 40 C.F.R. § 1501.2 (1982).
would result in less environmental degradation to the area involved.\textsuperscript{59} In fact, the courts have recognized that the consideration of alternatives to the proposed action generally is the "linchpin" of the EIS.\textsuperscript{60} In order to guarantee that environmentally enhancing options are not ignored or unnecessarily foreclosed by project development, the EIS must compare all "feasible" alternatives to the proposed project.\textsuperscript{61} Feasible alternatives necessarily include the option of not proceeding with the project at all, the "no-action" alternative, as well as the entire range of mitigation measures that could be used to minimize potential environmental impacts.\textsuperscript{62}

The NEPA requirement of outside consultation in preparation of an EIS also substantially upgrades an agency's environmental decision-making process. Section 102(2)(C) of NEPA requires that comments from all federal agencies that have jurisdiction by law or special expertise with respect to environmental impacts must be solicited and incorporated into the EIS.\textsuperscript{63} In addition, CEQ regulations require that the agency preparing an EIS request comments from all interested or affected state agencies and members of the public.\textsuperscript{64} The reasonable assumption behind these requirements is that consultation with other agencies and persons with expertise in the issues under consideration will significantly improve the "lead" agency's capacity to assess environmental factors and ultimately choose the most environmentally protective strategy.\textsuperscript{65}

Overall, the principal objective of the EIS requirement is to compel federal decisionmakers to consider environmental factors, including comparative assessments of all reasonable alternatives and comments of other interested agencies, at the earliest possible planning phase, and

\textsuperscript{61} In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551 (1978), the Supreme Court recognized that for an impact statement to constitute more than an "exercise in frivolous boilerplate" the concept of alternatives must be bounded by feasibility.
\textsuperscript{62} See, e.g., Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (EIS must analyze all potential modifications to proposed highway construction); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972) (the role that possible alternatives play in the environmental process is particularly critical because it is "usually through this medium that mitigation measures may be discovered"); see also 40 C.F.R. § 1502.14(f) (1982).
\textsuperscript{63} 42 U.S.C. § 4332(2)(c); see 40 C.F.R. § 1503.1(a)(1) (1982).
\textsuperscript{65} See W. RODGERS, supra note 23, at 727; Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974); Iowa Citizens for Environmental Quality v. Volpe, 487 F.2d 849 (8th Cir. 1974).
certainly prior to the actual commitment of resources. The harm that the EIS requirement seeks to redress is not harm to the environment per se, but, rather, the failure of decisionmakers to take environmental factors into account at all crucial junctures in the policy formulation process. Accordingly, the role of the court overseeing implementation of the EIS requirement is not to compel agencies to make particular substantive decisions favoring environmental protection. Instead, as the Supreme Court recently stressed in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, the reviewing court's responsibility is to insure that agencies comply with the procedural duties imposed by NEPA, particularly the EIS requirement. Presumably, the result will be "fully informed and well-considered decisions" that adequately protect the environment.

In light of this analysis, the NCPC "significant impacts" approach to the modification issue is a judicial displacement of the legislative scheme established in NEPA. By allowing agencies to avoid the EIS requirement through project modification, this approach subverts NEPA's mandate that environmental factors be considered at the earliest stage of decisionmaking. Agencies are invited to disregard NEPA's prescription that, before resources are irrevocably committed, the entire range of feasible, environmentally-enhancing alternatives must be compared with proposals involving potentially significant environmental impacts. Similarly, agencies are invited to forgo the consultation with other federal decisionmakers and members of the public that Congress and the CEQ have determined are essential to effective environmental decisionmaking.

In concrete terms, an environmentally enhancing project modification finally chosen by an agency and accepted by a court may be inferior to those that would have been selected had the agency been fully informed of all environmental impacts by an EIS at the earliest possible stage. In the absence of an EIS, an agency might never discover mitigation measures that would effectively protect the environment, or the agency might discover such measures only after the measures have become impossible or difficult to implement. Moreover, an agency confronted by an EIS detailing all environmental impacts might opt for

69. Id. at 227.
70. Id. at 228.
the "no-action" alternative. Allowing project modification, no matter how late in the process, to negate the EIS requirement renders these options obsolete. Agencies can pursue projects with potentially significant impacts, without considering feasible alternatives or the continuum of possible mitigation measures. As long as modifications are implemented at some point that, in the view of the particular reviewing court, bring the project below the significance threshold, the EIS mandate can be ignored.

In essence, the NCPC approach replaces NEPA's procedurally oriented scheme for achieving environmental protection with a scheme based on judicial compulsion of substantive agency decisions. The court in NCPC expressly acknowledged that allowing modification to circumvent the EIS requirement is intended to "encourage" agencies to implement environmentally protective measures. Thus, the clear intention behind sanctioning modification is to compel agencies to make substantive decisions determined by the court to be sufficiently environmentally protective. The approach incorrectly assumes that

---

71. The benefit of having an agency consider environmentally preferable alternatives to a project that may be found to fall beneath the significance threshold following modification is far from a theoretical one. As noted earlier, see supra note 23, the determination of whether impacts are significant is an extremely subjective one; inevitably, many projects are found to be "insignificant" that seemingly involve substantial environmental ramifications. For such projects, it is clear that a full consideration of feasible environmentally-protective alternatives, including the no-action alternative, could have important practical benefits.

An excellent recent example involves the Federal Energy Regulatory Commission's decision not to prepare an EIS prior to issuing a preliminary permit to the Appalachian Power Company in connection with feasibility studies to be performed at Bromley Gap, Virginia (FERC Project No. 2812, preliminary permit issued January 25, 1982). The permit authorizes the power company to undertake extensive drilling, boring and construction activities for periods of up to three years, id. at 22, at over 200 individual sites. Id. at 5. The testing process may have substantial impacts on the quality of the human environment, including destruction of historic and archaeological resources, id. at 8-10; erosion and runoff from test sites which could affect the quality of nearby water resources, id. at 7; temporary loss of vegetative cover on over 50 acres, id. at 7; displacement of wildlife, id., including possible threats to several endangered and threatened species and their habitats, id. at 10-12; and extreme deterioration of the aesthetic quality of the region, id. at 14.

In a Staff Environmental Assessment and Finding of No Significant Impact approved by the Commission (FERC Project No. 2812, Jan. 31, 1980), the agency determined that the potentially significant impacts described could be adequately mitigated through the attachment of permit conditions. Id. at 12. Most of the conditions were proposed by the utility itself and focus upon restoration and reclamation of disturbed areas, rather than means to avoid environmental disruption in the first instance. See, e.g., id. at 6. Moreover, the agency never thoroughly considered any alternatives to the extensive geotechnical studies, such as conducting more limited studies or not proceeding with the project at all. Regardless of the validity of FERC's ultimate conclusion that the permit conditions selected will bring the proposal for permit issuance below the amorphous "significance" threshold, it is evident that a thorough analysis of the entire continuum of feasible mitigation measures and alternatives could result in considerably greater environmental protection than will be afforded by the permit that has been issued.

72. See supra text accompanying note 34.

73. This is most clearly seen in the circumstance where the court, instead of ordering
NEPA's essential purpose is the prevention of particular environmentally harmful impacts and therefore concludes that judicial compulsion of particular environmentally beneficial decisions is appropriate. This approach disregards the fact that NEPA is primarily concerned with the failure of federal decisionmakers to consistently incorporate environmental factors into the policy formulation process. The NCPC response undermines the proper role of the court in overseeing NEPA's implementation, to insure that the statute's procedural requirements are met "to the fullest extent possible" so that the federal agencies themselves can make decisions completely informed about environmental factors at a sufficiently early stage of the decisionmaking process. The NCPC approach bargains away the requirement of early EIS preparation, the Congressionally mandated mechanism for the achievement of "well-considered" agency decisions, in exchange for piecemeal project modifications found to be acceptable by the particular reviewing court.

The NCPC subversion of the NEPA process reaches beyond those agencies that achieve judicial endorsement of a particular project modification. The NCPC approach invites agencies to delay EIS preparation in the hope that before the project reaches the stage where it is vulnerable to judicial scrutiny the agency will think of some modification that is adequate to pass judicial scrutiny and enable the agency to dispense with the EIS Process. Thus, even though some agencies may ultimately select environmentally sound modifications, many more agencies may succumb to the temptation to delay the EIS, with the result that Congress's plan for early, comprehensive, and fully integrated environmental planning will be defeated.

B. The Process Approach

The "process" approach to the modification issue, alluded to in the CRAG decision, is considerably more consistent with NEPA's objectives than is the significant impacts approach. According to the process analysis, subsequent project modifications cannot undo the preexisting obligation to prepare an EIS that attaches as soon as there is a proposal for major federal action significantly affecting the environment. This approach properly identifies NEPA's principal goal of early integration of environmental factors into agency decisionmaking. The process approach recognizes that allowing project modification as a device to cir-
cumvent the EIS requirement encourages agencies to devalue NEPA's procedural obligations and to delay substantially the consideration of environmental factors. In particular, the process approach appropriately reflects NEPA's concern with thorough assessment of all feasible environmentally enhancing alternatives and consideration of outside agency comments prior to the irreversible commitment of resources. Before this approach can be accepted as the correct response to the modification problem, however, certain criticisms must be analyzed.

The most obvious criticism of the process approach is that it prevents the courts from employing NEPA's mandates in a way that tangibly promotes environmental protection. The process approach exalts form over substance; courts can compel agencies to comply scrupulously with NEPA's procedural requirements, yet courts cannot encourage substantive project modifications that in fact benefit the environment. An agency may prepare an EIS at an early stage of the decisionmaking process but will be free to make final decisions that in no way reflect concern for environmental values. The end result may be a procedurally correct decisionmaking process that completely fails to preserve environmental quality.78

There are three responses to this argument. First, assuming it is factually correct that courts may best improve the environment by imposing particular substantive obligations on agencies, they are simply not authorized to do so by NEPA.79 As suggested earlier, the principal role of the courts, as established by Congress, is to ensure that federal agencies comply with NEPA's procedural mandates.80 The courts cannot exchange this legislatively prescribed role for one directly encouraging specific agency decisions, even if the latter role is clearly superior for preventing environmental degradation.

Second, the NCPC significant impacts approach does not necessarily promote environmental protection more effectively than does the process approach. Congress reasonably concluded that, in the long run, environmental protection will be maximized if agencies thoroughly integrate environmental factors into ordinary decisionmaking processes. If federal agencies consistently consider the entire range of environmentally preferable options along with other technically complex factors, the agencies should eventually make "well-reasoned" decisions that adequately reflect environmental values.81

---

78. Supporting this view are evaluations of agency policymaking processes which suggest that many agencies follow NEPA's procedural mandates in mechanical fashion while, in reality, failing to integrate environmental considerations into final decisions at all. See generally, Leed, The National Environmental Policy Act of 1969: Is the Fact of Compliance a Procedural or Substantive Question?, 15 SANTA CLARA LAW. 303 (1975).
79. See supra notes 66-74 and accompanying text.
80. See supra notes 68-70 and accompanying text.
81. See generally Note, Cost-Benefit Analysis and the National Environmental Policy Act
evidence already exists to substantiate the assumption that faithful compliance with the EIS requirement produces important substantive changes, as measured in terms of projects modified or abandoned. Moreover, the validity of Congress’s reasoning regarding the best method for promoting environmental protection is not undermined by the fact that the policies of many agencies do not yet sufficiently protect the environment. If anything, courts should increase their vigilance in enforcing NEPA’s procedural mandates so that recalcitrant agencies will truly integrate environmental concerns into their decisionmaking. Modification of projects in order to bypass the EIS requirement demonstrates that some agencies have not yet succeeded in incorporating NEPA processes into their standard operating procedures. Until courts ensure that agencies rigorously comply with the EIS requirement and NEPA’s other procedural obligations, there is no basis for the conclusion that these obligations cannot, in fact, promote environmental protection. On the other hand, encouraging agencies to bypass or postpone the procedures required by NEPA virtually guarantees that these procedures will not be satisfactorily integrated into agency decisionmaking and, therefore, diminishes NEPA’s effectiveness. Accordingly, the process approach to the modification issue cannot justifiably be criticized as ineffective until it is uniformly employed as a mechanism for achieving agency compliance with the EIS requirement.

Finally, if limited substantive review of final decisions is permissible with respect to the agency’s inclusion of environmental considerations, the process approach may actually facilitate such review. Some commentators have suggested that while NEPA itself does not authorize courts to reverse substantive agency decisions, the Administrative Procedure Act permits courts to overturn decisions that are arbitrary and capricious in their failure to reflect environmental considerations. For example, if an agency fails to adopt an important mitigation measure that would involve negligible costs, its ultimate decision may be arbitrary and capricious. A court will ordinarily be able to assess the validity of the agency’s substantive decision following preparation of an EIS. A properly prepared EIS will discuss all relevant environmental factors, including the entire spectrum of feasible alternatives and

---

84. See *Environmental Defense Fund v. Army Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972).
mitigation measures. The EIS should furnish a thorough factual foundation for reviewing whether an agency’s environmental decisions are arbitrary and capricious. Thus, even assuming there is some scope for substantive review of agency decisions on environmental issues, the effectiveness of this review is inevitably enhanced by the process approach. By ensuring rigorous compliance with the EIS requirement, this approach guarantees the existence of a detailed factual record with which to review substantive agency decisions, a record that would not otherwise exist.

In contrast, the NCPC approach compels the court to review the sufficiency of technically complex modifications without the benefit of a developed record. The court will be presented with only the modification actually selected by the agency; there will be no thorough description of other possible modifications that could be even more environmentally protective. In such circumstances, substantive review can be expected to be largely ineffectual.

Thus, the process approach can achieve something more than mere mechanical compliance with procedural requirements. It can stimulate thorough and integrated environmental planning by federal decisionmakers and, to the extent that judicial review of agency decisions is necessary and permissible, can provide a solid basis for sound judicial intervention.

Another criticism of the process approach is that it purposefully disregards NEPA’s distinction between actions that are sufficiently threatening to the environment to require EIS preparation and those that are not. In NEPA, Congress clearly determined that only federal projects with impacts above the significance threshold warrant the expenditure of resources that an EIS requires. If projects are modified so as to fall below this threshold, the benefits of preparing an EIS are arguably outweighed by its costs, just as if a project as initially proposed did not entail significant environmental effects. Thus, a reviewing court should not require EIS preparation on a modified project any more than it should require EIS preparation on a project deemed from the start to have no significant impacts.

This argument has superficial appeal but it fails to account for crucial distinctions between a project determined to be environmentally insignificant when originally put forth and one that is modified so as to become arguably insignificant. The latter situation involves a project that had significant environmental impacts when it was first proposed. Instead of initiating EIS preparation, as required by NEPA, the agency chose to circumvent the prescribed process by modifying the

85. See supra notes 58-62 and accompanying text.
86. See supra notes 54-65 and accompanying text.
project at some point. Thus, unlike the situation where a project as first proposed is insignificant, the modification circumstance involves a deliberate statutory violation. The only effective deterrent to such agency violations is to require EIS preparation despite the modification. As stressed by Judge Skelly Wright, NEPA's procedural requirements "set a high standard for the agencies, a standard which must be rigorously enforced by reviewing courts."87

Viewed in a somewhat different fashion, the modification circumstance adds a factor to the EIS cost-benefit formula. Congress decided that a project that is insignificant from the start does not require an EIS because the costs of the EIS exceed any likely benefit from its preparation. In the modification context, an additional benefit from EIS preparation accrues: the value derived from instructing federal agencies that they must scrupulously comply with NEPA's procedural mandates.88

There is another important distinction between a project that undergoes modification and a project that has no significant impact as initially proposed. Projects that undergo modification are considerably more likely to involve important, unresolved environmental issues.89 Because these actions as originally proposed have potentially significant impacts, there would generally be close questions as to whether particular alterations sufficiently obviated such impacts.90 There would

87. See Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (1971).
88. Even in Simmans v. Grant, 370 F. Supp. 5 (S.D. Tex. 1974), where the court accepted project modification as a justification for failure to prepare an EIS, the court conceded the importance of enforcing procedural requirements even where, in the court's opinion, the modified project has no significant impact. In that case, the agency had not only failed to prepare an EIS but had not even prepared a more limited Environmental Assessment. Id. at 18. The court, having earlier characterized the Environmental Assessment as a "'mini' environmental analysis," id. at 17, stated that "normally," failure to prepare an Assessment would justify an injunction against the project until the Assessment was prepared, id. at 18. The court expressed concern that the agency's failure to prepare even an Environmental Assessment had presented the court with no reviewable environmental record and noted that "[a] court should not be obligated to do by hearing what the agencies are legally obliged to do in documentary form." Id. It is apparent, however, that the court was concerned with something more than judicial efficiency. The court noted that one benefit of agency preparation of an Assessment is that the agency's conclusions are precisely spelled out in a form that may be reviewed by the public and other agencies. Id. Also, the court expressed dismay at the "significant lack of familiarity on the part of key SCS officials with the requirements of NEPA," and at the methods used by SCS to determine environmental impact. Id. at 19. Thus, from the court's warning that future failures to prepare proper Assessments may result in immediate injunctions, one may readily infer a concern that inadequate enforcement of NEPA procedural requirements will undermine the NEPA planning process.
89. This realization provided the basis for the close scrutiny of project modification prescribed in NCPC. 487 F.2d at 1040-41.
90. NCPC illustrates how a project modification that creates a close question on the significance issue can undermine the NEPA process. In NCPC, the court of appeals was not convinced that the project modifications would reduce the project's impact below the signifi-
often be increased controversy and uncertainty surrounding a modified project, as contrasted with an insignificant one. Thus, an EIS would tend to be of considerably more concrete assistance to decisionmakers in the project modification circumstance than in the context of an action determined to be environmentally insignificant from the start. Combined with the supplemental benefits from EIS preparation just discussed, this added potential for concrete assistance in decisionmaking clearly suggests that there are compelling justifications for preparing EIS's in the project modification context that do not exist when a project is initially proposed. Thus, a court faced with a project modification situation should order EIS preparation and enjoin the project in the interim.

91. In many cases involving modifications, a simple order directing the agency to prepare an EIS without an accompanying injunction of the project would produce no tangible environmental benefits. Where the project will be substantially completed by the time the EIS is prepared, the order will have negligible practical impact, if any. See Romulus v. Wayne, 392 F. Supp. 578, 596 (E.D. Mich. 1975) ("Unless enjoined the Court, on ultimate review, may be faced with a fait accompli insofar as construction of the runway is concerned. . . . "). Thus, for the process approach to be effective, courts must be willing not only to require EIS preparation but also to enjoin projects that have been modified so as purportedly to decrease environmental impacts.

For some courts, the simple failure to comply with the EIS requirement would entail sufficient injury to trigger an injunction. See, e.g., Environmental Defense Fund v. Froehlke, 477 F.2d 1033 (8th Cir. 1973); Lathan v. Volpe (I), 455 F.2d 1111, 1116 (9th Cir. 1971); Sierra Club v. Coleman, 405 F. Supp. 53 (D. D.C. 1975). Even courts balancing hardships under traditional equitable principles generally conclude that an injunction maintaining the status quo is appropriate during the time an EIS is being prepared. See, e.g., Scenic Rivers Ass'n of Oklahoma v. Lynn, 520 F.2d 240 (10th Cir. 1975), rev'd on other grounds, 427 U.S. 390 (1976) (enjoining agency approval of private filings); Rankin v. Coleman, 394 F. Supp. 647 (E.D.N.C. 1975) (enjoining agency acquisition of rights of way). Because NEPA's principal objective is improving decisionmaking, all work on a project should cease until necessary information is produced in an EIS. See Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1975). Moreover, because the modification circumstance involves a deliberate effort to avoid NEPA's requirements, a balancing of equities should almost always favor injunctive relief. See Brooks v. Volpe, 350 F. Supp. 269, 287 (W.D. Wash. 1972).

Some courts, however, might refuse to enjoin projects precisely because agencies have modified projects so as to mitigate environmental impacts. These courts may reason that because the agency has already minimized impacts, there is insufficient justification for enjoining the project. See Committee for Green Foothills v. Froehlke, 3 ENV'TL L. REP. 20,861 (N.D. Cal. 1973) (50 acre wildlife mitigation area pertinent in denying injunction against the use of marshland as a sanitary landfill). This reasoning fails to account for the possibility that the EIS will divulge superior mitigation measures to those chosen by the agency or may reveal alternatives that simply render the proposed project a comparatively undesirable option. See supra note 71 and accompanying text. Overall, then, courts con-
A more substantial criticism of the process approach is that it may conflict in some cases with Supreme Court pronouncements on the proper timing for EIS preparation. Despite the large body of authority stressing the importance of EIS preparation as early as possible, the Court has taken a rather mechanical approach toward the timing issue. On two occasions the Court has held that NEPA does not command an agency to prepare an impact statement until the project achieves the status of a "proposal."

In Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP II), the Court considered a challenge to the ICC's failure to prepare an EIS prior to a hearing on the request of railroad companies for permanent, across-the-board rate increases. The Court rejected this challenge, holding that the ICC's consideration of the rate increases had not become a "proposal" until well after the hearing, when the ICC prepared a report holding the rate increases lawful. Only then did the agency lend its official support to what were previously private proposals.

In Kleppe v. Sierra Club, the Court reemphasized its narrow view of the timing issue. That case involved the Department of Interior's coal leasing program. DOI had refused to prepare a regional EIS on a four-state area identified as rich in coal reserves. The Court determined that an EIS was not required because no formal proposal had emerged from agency deliberations. The fact that DOI was "contemplating" regional action was insufficient to trigger EIS preparation. Moreover, the Court implied that an agency should ordinarily be granted wide latitude to ascertain when a proposal exists.

fronted with project modification should almost always enjoin projects pending the agency's completion of an EIS.

92. See supra notes 54-62 and accompanying text.
94. See infra text accompanying notes 95-102. This threshold timing standard is derived from NEPA's command that EIS's be included in "every recommendation or report on proposals for legislation and other major Federal actions." 42 U.S.C. § 4332(2)(c) (1976) (emphasis added).
95. 422 U.S. 289 (1975).
96. Id. at 320.
99. Id. at 414-15.
100. Id. at 406.
101. That agencies are to be accorded substantial discretion in determining when a proposal exists can be inferred from the Court's discussion of whether DOI was obligated to prepare a programmatic EIS on coal development in the four-state region. The Court noted that the determination of whether individual coal projects are interrelated requires "a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies." Id. at 412. Similarly, the Court stated that the evaluation of whether
"SCARP II" and Kleppe establish a lenient standard for the timing of EIS preparation. An EIS is required only when an agency develops something resembling an official proposal for action. Further, the agency's determination of when this proposal exists is generally conclusive.102

These restrictive timing principles are arguably inconsistent with the process approach to project modifications. Arguably, if an agency modifies a project, it could not have earlier "proposed" any particular action—the very fact of project modification proves that the agency was merely contemplating some type of action and did not formulate a concrete proposal at least until after project modification.103

This argument fails to recognize that the time when an officially authorized proposal emerges is ordinarily unrelated to project modification. As defined previously,104 the typical modification situation involves a concrete project that the agency alters only in response to particular environmental objections. The agency may have officially proposed the action long before implementing any modifications. This is demonstrated by the fact that alteration may occur long after project implementation begins and resources are irreversibly committed.

Thus, prior to modification, projects are not necessarily only in "contemplation" by the agency. Officially recognized proposals may exist when the project is initially defined or, at least, substantially before the agency even entertains the possibility of modification. The environmental effects distributed over a large area have a cumulative effect "is a task assigned to the special competency of the appropriate agencies." Id. at 414. Accordingly, DOI's decision not to prepare a comprehensive EIS was only tested against the extremely deferential arbitrary or capricious standard. Id. at 412. Because respondents could not demonstrate that DOI's failure to prepare a regional statement was arbitrary, the Court was obliged to "assume that the agency . . . exercised [its] discretion appropriately." Id. at 412; see also, National Wildlife Federation v. Appalachian Regional Comm'n, 677 F.2d 883 (D.C. Cir. 1981) ("the arbitrary and capricious standard also applies to segmentation of environmental review that avoids overall, programmatic evaluation.").

Thus, at least with respect to agency decisions not to prepare programmatic EIS's, Kleppe teaches that courts should accord an agency significant freedom to ascertain when an official proposal exists. Because agencies have unique capabilities for analyzing the relationships among distinct actions, or the lack thereof, accepted principles of administrative law compel a broad grant of discretion. This line of reasoning may be far less relevant to the determination of when an agency proposal exists with respect to decentralized, individual actions, such as licensing, permitting, construction activities and rulemaking. Unlike programmatic decisionmaking, these more mundane projects require no reliance on the agency's technical expertise to understand the basic contours of the action under consideration. Thus, Kleppe may suggest that the courts should be less deferential to agency timing decisions when ordinary, everyday projects are under scrutiny.

102. See W. Rodgers, supra note 23, at 773.

103. See, e.g., No East-West Highway Comm., Inc. v. Whitaker, 403 F. Supp. 260 (D. N.H. 1975) (although a plan to construct a highway existed it lacked sufficient definition for the court to require an EIS).

104. See supra text accompanying notes 10-15.
project cannot retroactively lose its status as a proposal simply because the agency implements modifications.

The view that potential projects may be proposals despite subsequent modification is reinforced by the CEQ regulations elaborating on Kleppe's interpretations of NEPA. These regulations state that a proposal exists when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." If an agency initially promotes a particular project for adoption, it clearly "has a goal" and is preparing to make a decision on a "means of accomplishing that goal." Moreover, the agency is then able to evaluate meaningfully the effects of the particular project promoted. The project's ultimate modification to mitigate environmental harms, therefore, does not negate the project's prior status as a proposal under the CEQ's definition. In fact, according to this definition, a project's subsequent modification is convincing evidence that a proposal materialized earlier in the process. Project modification to decrease environmental effects strongly suggests that earlier the agency was preparing for a decision on "alternative means" to accomplish a goal. Modification may logically be viewed as the selection of one alternative over another. In addition, the fact of modification is evidence that at an earlier time, the agency could meaningfully evaluate the project's effects. The agency generally modifies a project because of detailed assessments of environmental impacts.

Of course, the CEQ regulations appropriately do not suggest that modification of a concrete project necessarily establishes the prior existence of a proposal. Before modification the agency may not have been "actively preparing to make a decision." In Kleppe's terms, the agency may simply have been "contemplating" action throughout the entire process. Nevertheless, the CEQ regulations, at a minimum, support the conclusion that project modification does not negate the prior existence of a proposal.

In general, then, recent pronouncements in Kleppe and in the CEQ regulations on the timing of EIS preparation are consistent with the view that project modification should not be permitted as a device for circumventing the EIS requirement. Instead, these decisions establish criteria for the timing of EIS preparation that are largely independent of the fact of modification. Under the Supreme Court's partially developed standards, concrete, officially-sanctioned proposals may materialize both before and after modifications designed to reduce

105. For a discussion of how the CEQ regulations on timing of EIS preparation are consistent with Kleppe, see Note, supra note 97, at 857.
106. 40 C.F.R. § 1508.23 (1982).
107. See supra text accompanying note 10.
environmental impacts. If proposals gel before modification, *Kleppe* and *SCRAP II* do not independently authorize agencies to bypass an EIS through project modification. On the other hand, if the proposal develops after modification the agency is not required to prepare an EIS. Nevertheless, under CEQ's more complete criteria, the fact of modification may substantiate the earlier existence of a proposal and, therefore, the agency's prior obligation to prepare an EIS.

Despite the theoretical consistency between timing jurisprudence and a process approach to EIS preparation, it is clear as a practical matter that the deference *Kleppe* extends to agencies to pinpoint the emergence of proposals may severely limit the usefulness of the process approach. Agencies could use this discretion to withhold the label of "proposal" until final project modifications are implemented.108 Agencies would have the same incentive for tardy recognition of proposals that they have for modifying projects in the first place, namely the avoidance of EIS preparation.

*Kleppe* contains some protection against this type of conscious subversion of the EIS process. First, at a minimum, an agency assessment of when a proposal materializes may be overturned if it can be demonstrated that the determination is arbitrary.109 If an agency clearly withholds the designation of proposal, despite official commitment to a project, until after the project is modified, a court could find the action arbitrary. For example, if an agency actually begins work on a project but does not supply the designation of proposal until additional mitigation measures are devised, this should certainly be considered arbitrary.

Second, as suggested earlier,110 the extreme deference to agency timing decisions espoused in *Kleppe* may be limited to the recognition of broad, programmatic proposals. The principal rationale behind the broad discretion afforded in *Kleppe* is that agencies are uniquely vested with the technical expertise needed to evaluate the interrelationship between individual actions and the cumulative environmental effects of those actions.111 This rationale does not necessarily justify deference to agency timing decisions on individual segmented proposals, e.g., licensing, permitting, construction and rulemaking. With respect to these decentralized, everyday decisions, the courts are far more competent to determine independently whether a proposal has emerged. Armed

---

109. 427 U.S. at 414. See Environmental Defense Fund, Inc. v. Higginson, 655 F.2d 1244 (D.C. Cir. 1981) (remanding to district court for determination of whether Department of Interior's decision not to prepare comprehensive environmental impact statement covering all proposed water projects in the Colorado River Basin was "arbitrary and capricious").
110. See supra note 101.
111. 427 U.S. at 411, 414.
with an understanding of internal agency processes, the courts can analyze agency actions in order to determine the point at which a particular project ripens into an official agency proposal. While some deference should be accorded the agency's explanation of its own procedures, there is no need to rely on specialized agency expertise in making the ultimate finding of when a proposal has emerged.

Kleppe itself, therefore, may suggest that a more rigorous standard of review is applicable to agency timing decisions on individual, everyday projects, in contrast to comprehensive policy activities. Furthermore, the modification issue has much greater practical significance in ordinary agency decisionmaking. Major programmatic decisions almost invariably are significant both before and after modification. Only in rare instances will a modification even arguably bring a proposal for comprehensive, programmatic action below the significance threshold. The modification issue generally arises in the context of everyday agency decisionmaking, where agencies can plausibly maintain that modifications have rendered discrete impacts less than significant. Since Kleppe may suggest that timing decisions on ordinary agency projects are subject to a more rigorous standard of review than is applicable to programmatic projects, agencies may have far less freedom than appears at first glance deliberately to postpone declarations of proposals until after modifications are adopted.

The CEQ regulations more fully articulate the authority of the courts to counteract deliberate efforts to bypass EIS preparation by withholding the designation of proposal. The regulations state that "a proposal may exist in fact as well as by agency declaration that one exists." This phrase makes it clear that reviewing courts may independently determine that a proposal exists. As indicated earlier, courts may actually employ the fact of project modification as evidence that the CEQ criteria for a proposal were met at an earlier time.

Thus in some instances the courts can use the CEQ regulations to undercut purposeful agency decisions to withhold the designation of proposal until after project modifications. Even so, agencies will retain some discretion to specify the point at which proposals materialize, and this discretion may occasionally be used to delay the declaration of proposal until after project alterations are adopted. As a result, the power of courts to police the use of modifications as devices for avoiding EIS preparation may be practically limited by Kleppe's analysis of the proper timing for EIS preparation.

112. See McGarity, supra note 35, at 801, 810.
113. 40 C.F.R. § 1508.23 (1982).
114. This notion is not inconsistent with Kleppe. It simply articulates the "exception rather than the rule" for the emergence of a proposal. See Note, supra note 97, at 858.
115. See supra text accompanying note 107.
One final potential problem with the process approach that is closely related to the timing issues is the possible incentive it may provide for agencies to formulate projects in secret. By shielding their decisionmaking processes from public scrutiny, agencies may hope to postpone the designation of prospective actions as "proposals" until after project modifications are incorporated into them. The potential for such a result does exist for broad policy decisions. As a general matter, the public has difficulty gaining access to the internal agency processes that generate comprehensive, long-term policies.116 As noted earlier,117 however, the modification issue almost never arises in the context of broad, programmatic decisionmaking because such actions are normally too massive to be brought below the significance threshold through alteration.118 As a practical matter, therefore, agencies would rarely have an additional motivation to conduct policymaking activities in secret if courts adopted the process approach to modification.

With respect to more ordinary agency actions, where the modification problem does materialize, the risk that the process approach will drive decisionmaking underground is also slight. The agencies have little choice in revealing their consideration of everyday projects to public view. Private applications for permits or licenses are virtually always required to be a matter of public record, as are private or state requests for federal funds. Similarly, proposed informal rulemakings must be published in the Federal Register for public comment.119 In fact, agencies often decide to modify projects in the first place because of comments from private citizens who have had legal access to project descriptions.120

116. See McGarity, supra note 35, at 811 ("Members of the public can rarely penetrate the bureaucratic process deeply enough to discover policy decisions prior to implementation."); see also Lazarus & Onek, The Regulators & the People, 57 VA. L. REV. 1069 (1971); Reich, The Law of the Planned Society, 75 YALE L.J. 1227 (1966).
117. See supra text accompanying note 113.
118. The far more basic inquiry in the broad policymaking context is whether the public can ever have sufficiently early knowledge of bureaucratic processes to make an EIS useful, even when one is prepared. See McGarity, supra note 35, at 811.
120. See supra note 10.

There are various ways that public citizens could counter an agency’s efforts to keep its deliberations secret. First, citizens could file Freedom of Information Act, 5 U.S.C. § 552 (1976), requests to uncover projects being considered. Cf. Weinberger v. Catholic Action of Hawaii, 50 U.S.L.W. 4027 (Dec. 1, 1981) (documents relevant to environmental decisionmaking generally releasable to public, although information implicating national security concerns can be withheld under exemptions 1 and 5, 5 U.S.C. §§ 552(b)(1), (5)). Second, private citizens can petition agencies to engage in notice and comment rulemaking if the agency is suspected of considering a rule of general applicability. See 5 U.S.C. § 553; Nader v. Butterfield, 373 F. Supp. 1175 (D. D.C. 1974) (requiring FAA to conduct notice and comment rulemaking for x-ray baggage inspection program following discovery of nonpublic memorandum describing contemplated criteria and standards). Finally, OMB Circular A-95 provides for distribution of important agency decisions to state and regional distribution
CONCLUSION

Two distinct but largely unexplored approaches to the modification issue have emerged in the courts. The significant impacts approach, suggested in *NCPC*, permits project modification as a means to avoid EIS preparation if the agency can convincingly demonstrate that the modified project's impacts fall below the significance threshold. The process approach, hinted at in the *Crag* case, focuses on whether a proposal for federal action existed prior to modification. If such a proposal existed, this approach forbids the use of modification to circumvent the EIS requirement.

The significant impacts approach is based on a misanalysis of NEPA's objectives. The approach excessively involves courts in substantive decisions appropriately within the province of federal agency decisionmakers. Further, it undermines NEPA's primary emphasis on the thorough integration of environmental factors in early stages of agency decisionmaking.

In contrast, the process approach correctly assumes that NEPA's principal objective is the greatest possible improvement of agency decisionmaking processes. Accordingly, this approach properly identifies the judicial function as rigorous enforcement of NEPA's procedural requirements. In modification cases, this means requiring EIS preparation if a project with potentially significant impacts is proposed, regardless of subsequent project alterations designed to reduce environmental impacts below the significance threshold. Unfortunately, while Supreme Court decisions on the timing of EIS preparation are not fundamentally inconsistent with the process approach, the discretion they afford to agencies to designate the emergence of proposals may limit the courts' ability to ensure that agencies do not circumvent the EIS requirement through project modification.