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The National Environmental Policy Act and Judicial Review After
Oregon Natural Resources Council

Marion D. Miller*

INTRODUCTION

In enacting the National Environmental Policy Act of 1969 (NEPA), Congress recognized that many federal agencies operate under statutory mandates that may be incompatible with the promotion of environmental values. NEPA was a response to the recognition that existing federal agency decisionmaking processes often lead to environmentally devastating consequences. The “action forcing” provisions of NEPA in section 102 require agencies to consider environmental factors and consequences by mandating the preparation of an environmental impact statement (EIS) whenever agencies propose “major Federal actions significantly affecting the quality of the human environment.” By doing so, NEPA established an environmental overlay on the statutory respon-
sibilities of all federal agencies.\(^5\) This structure requires, at a minimum, a "systematic interdisciplinary approach" to the examination of environmental factors so that data is available in sufficient detail to ensure informed decisionmaking by agencies.\(^6\)

Hundreds of NEPA actions brought by citizens in federal court\(^7\) have contributed substantially to setting standards for agency and judicial interpretation of the EIS requirement.\(^8\) The duties NEPA imposes, to a great extent defined by litigation, have led over time to increased awareness of environmental factors and have changed the approaches to environmental problems taken within federal agencies.\(^9\) Agencies' increasingly sophisticated methods of defining and fulfilling NEPA's procedural requirements, which have been acknowledged by lower courts, may affect the resolution of future scope-of-review questions.\(^10\)

Although no explicit provision of NEPA addresses the scope of judicial review, the lower federal courts took an active role in enforcing the statute soon after its enactment. At the initial stages of judicial review under NEPA, courts recognized that the statute's substantive policy goals were only enforceable through the procedural environmental analysis and impact statement duties of section 102.\(^11\) Even where a lower

\[\text{5. D. Mandelker, NEPA Law and Litigation § 1.01 (1984).} \]
\[\text{7. Kent & Pendergrass, Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation, 5 Temp. Envtl. L. & Tech. J. 11, 12 (1986). The authors conducted a LEXIS search and found approximately 1200 reported cases involving NEPA issues between 1970 and June 1985, 56% of which were filed in district courts and 43% of which were decided in courts of appeal.} \]
\[\text{8. Criticism of the efficacy of a litigation strategy to bring about agency reform characterized NEPA's first decade. Bardach & Pugliaresi, The Environmental Impact Statement vs. the Real World, 49 Pub. Interest 22 (1977) (arguing that the EIS requirement has become a tool for environmental litigants and has failed to promote environmental values within agencies); Fairfax & Andrews, Debate Within and Debate Without: NEPA and the Redefinition of the "Prudent Man Rule," 19 Nat. Resources J. 505, 510 (1979) (NEPA's initial focus on internal reform undermined by "environmentalists' rush to the courts in the early 1970's"). Controversies over NEPA have changed form over time, reflecting the reality that litigation has made NEPA what it is today. See, e.g., Caldwell, NEPA Revisited: A Call for a Constitutional Amendment, Envyl. F., Nov.-Dec. 1989, at 17, 21.} \]
\[\text{11. See, e.g., Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971) ("[T]he reviewing courts probably cannot reverse a substantive decision on its merits."), cert. denied, 404 U.S. 942 (1972).} \]
court suggested that NEPA required agency decisionmaking to reflect environmental concerns, it acknowledged the practical infeasibility of enforcing a substantive NEPA.\textsuperscript{12} Courts became an arena to examine this tension between what NEPA might demand in the way of substantive environmental protection on the one hand and what constituted the minimal level of compliance on the other. The difficulty in wedding the broad policy goals to the narrow statutory mandate is an ongoing theme in the history of judicial enforcement of NEPA.\textsuperscript{13}

In June 1988, the United States Supreme Court granted certiorari to hear two cases from the Ninth Circuit Court of Appeals interpreting NEPA and the regulations promulgated pursuant to NEPA by the President's Council on Environmental Quality (CEQ).\textsuperscript{14} \textit{Robertson v. Methow Valley Citizens Council}\textsuperscript{15} involved a proposed ski development on Forest Service land, and \textit{Marsh v. Oregon Natural Resources Council}\textsuperscript{16} involved the construction of a dam by the Army Corps of Engineers. In both cases, citizen environmental groups challenged on several grounds the adequacy of the agencies' environmental analyses. Specifically, plaintiffs argued that NEPA required the agencies to detail in their EIS's the measures they would take to mitigate harm to the environment and to develop analyses of possible worst case scenarios.\textsuperscript{17} In \textit{Methow Valley}, plaintiffs also argued that the Forest Service failed to disclose mitigation measures as required by its own regulations.\textsuperscript{18} The Ninth Circuit reversed the district court decisions, which held in favor of the government.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{12} \textit{Id}. at 1112.
\item \textsuperscript{13} While it is commonly accepted that NEPA's legislative history is too sparse to guide courts, Professor Lynton Caldwell strongly disagrees. Caldwell points to substantial evidence in the legislative sources that ranks NEPA's policy aims first and its procedural goals second. Caldwell, \textit{supra} note 8, at 19-20.
\item \textsuperscript{15} 490 U.S. 332 (1989).
\item \textsuperscript{16} 490 U.S. 360 (1989).
\item \textsuperscript{18} Methow Valley Respondents' Brief, \textit{supra} note 17, at 43-45.
\item \textsuperscript{19} Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 820 (9th Cir. 1987), rev'd, 490 U.S. 332 (1989); Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1500 (9th Cir. 1987), rev'd, 490 U.S. 360 (1989). The Ninth Circuit had already established a reputation for requiring strict compliance with NEPA. See Keiter, \textit{NEPA and the Emerging Concept of Ecosystem Management on the Public Lands}, 25 \textit{LAND & WATER L. REV.} 43, 47.
Because of the duplicative issues, the Supreme Court consolidated the two cases for review, although it issued separate opinions. The Court disposed of the agency regulation, mitigation, and worst case analysis issues in *Methow Valley*\(^{20}\) and relied on these holdings in deciding *Marsh*.\(^{21}\) The Court in *Marsh* then examined, sua sponte, the appropriate standard of review under NEPA when determining whether an agency must prepare a supplemental environmental impact statement evaluating new information.\(^{22}\) The Supreme Court, as it has in all NEPA cases it has heard,\(^{23}\) held for the agencies on all issues.\(^{24}\)

This Note addresses the collective effect of Supreme Court holdings on judicial review of NEPA claims. Part I of this Note examines the history of NEPA as interpreted by the courts. It analyzes both lower court and Supreme Court treatments of the Act in the context of general doctrines of judicial review that have formed around the Administrative Procedures Act (APA).\(^{25}\) Part II examines the Supreme Court's holding in *Methow Valley*. This section focuses on the Court's treatment of mitigation plans, worst case scenarios, and agency regulations in the context of NEPA. Part III examines *Marsh* and the Supreme Court's discussion of the appropriate standard of review under NEPA. This Note concludes that lower courts still have room to enforce NEPA aggressively despite the constricted judicial role the Supreme Court opinions seem to mandate. However, these cases make clear that environmental litigants must also explore other arenas for the vindication of environmental values.

I

OVERVIEW OF THE JUDICIAL CONSTRUCTION OF NEPA

A. Early Circuit Court Enforcement of NEPA

Early citizen enforcement of NEPA through the courts helped define the aggressive practical operation of the statute. NEPA's premise questioned the wisdom of delegating broad powers to agencies.\(^{26}\) Thus the initial influential NEPA cases in the District of Columbia Circuit

\(20\) *Methow Valley*, 490 U.S. at 353-54, 357.

\(21\) *Marsh*, 490 U.S. at 363, 369.

\(22\) Id. at 375-78.


\(24\) *Marsh*, 490 U.S. at 385; *Methow Valley*, 490 U.S. at 359.


assumed that Congress intended the courts to vigorously oversee agencies in partnership with legislative policy.  

Two principles emerged from these early cases. First, because many agencies would resist compliance with the statute where it might conflict with their perceived missions, the courts' enforcement role was pivotal. This was clearly visible in Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, where Judge Skelly Wright concluded that, pursuant to section 101, lax attention to the procedural duties of section 102 triggered a "responsibility of the courts to reverse." The court thus presented procedural requirements as affirmative duties that were enforceable by the courts. Other early cases similarly mandated judicial enforcement of NEPA's procedural requirements.

Second, early NEPA cases circumscribed the courts' role by differentiating between substance and procedure. A few courts assumed that a judicial decision reached expressly on substantive grounds was possible under NEPA; that is, that a court could reverse or modify an action because of a negative environmental impact statement. Other courts,

27. See, e.g., Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972). In a now famous passage, Judge Skelly Wright stated, "[u]r duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." Id. at 1111; see Leventhal, Environmental Decisionmaking and the Courts, 122 U. Pa. L. Rev. 509, 516-17 (1974) (explicates partnership ideal of congressional policy and judicial enforcement of NEPA); Oakes, The Judicial Role in Environmental Law, 52 N.Y.U. L. Rev. 498, 512 (1977) ("Congress has given the courts a major role that cannot responsibly be ignored.")


29. Id. at 1115. Reversal could be ordered on substantive grounds only if "it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Id.

30. Id. at 1114-15. The agency in Calvert Cliffs claimed that section 101(b) accorded it broad discretion in complying with section 102 duties. The court emphatically endorsed the mandatory nature of the procedural duties, stressing "the necessity to separate the two, substantive and procedural, standards." Id. at 1114 n.10.

31. See, e.g., Scientists' Inst. for Pub. Information v. United States Atomic Energy Comm'n (SIPI), 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("[NEPA's] procedural requirements are not dispensable technicalities, but are crucial if the [EIS] is to serve its dual functions of informing Congress, the President, other concerned agencies, and the public of the environmental effects of agency action, and of ensuring meaningful consideration of environmental factors at all stages of agency decisionmaking.").

32. See, e.g., Calvert Cliffs, 449 F.2d at 1114.

33. D. MANDELKER, supra note 5, §§ 10.07-10.09; see Environmental Defense Fund v. Corps of Engineers of U.S. Army (Gilham Dam), 470 F.2d 289 (8th Cir. 1972). The Gilham Dam court engaged in a two-step review process, first examining whether the agency had "reached its decision after a full, good faith consideration and balancing of environmental factors," and, second, balancing costs and benefits to determine if they were arbitrary or if they underemphasized environmental values. Id. at 300 (citing Calvert Cliffs, 449 F.2d at 1115). The court expressly rejected the trial court's holding that NEPA did not allow substantive review. Id.
including the D.C. Circuit in Calvert Cliffs, speculated that “the reviewing court probably cannot reverse a substantive decision on its merits.”

Even those courts that read a substantive component into NEPA recognized that substantive review was qualified by the application of a rule of reason. This rule required a “pragmatic judgment that modifies the ‘hard look’ courts give to agency decisionmaking that considers environmental values.” As adopted by the Ninth Circuit, the rule of reason allowed a court reviewing procedural compliance to choose from a range of responses depending on the rigor of the agency’s efforts to comply. Thus, early circuit court review of NEPA ranged from mere strict examination of agency compliance with procedure to qualified substantive review of agency decisions.

B. NEPA in the Supreme Court

The Supreme Court has deferred to the judgment of agencies in every NEPA case it has reviewed. The Court has consistently suggested that lower courts have overstepped their authority in interpreting NEPA, and has situated the statute squarely within an analytical framework highly deferential to agency determinations. At the same time, however, the Court has reaffirmed the nondiscretionary nature of the EIS mandate, and recognized that searching review of agency decisions assures adherence to the procedural mandate of NEPA. The Supreme Court thus has sent an ambiguous message to the lower courts: on the one hand, the court states that NEPA’s procedural requirements must be enforced, but on the other hand, the opinions seem calculated to deter lower courts from actively enforcing the statute. Discussion of several of

34. Calvert Cliffs, 449 F.2d at 1115.
35. The court in Gilham Dam ultimately held in favor of the agency, reasoning that the agency had “balanc[ed], on the one hand, . . . the benefits to be derived from flood control, and, on the other, of the importance of a diversified environment.” Gilham Dam, 470 F.2d at 301. The court also noted the length of time the project had been underway, and the sizeable expenditures made. Id.; see Note, Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ’s Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?, 86 Mich. L. Rev. 777, 789 (1988) (NEPA is reviewed through a “reasonableness veneer”) (citing SIP, 481 F.2d at 1092). The SIPI court imposed a strict reading on “reasonable forecasting” so as not to conflict with NEPA’s obligation. Id. at 791. The author of the Note minimizes the SIPI court’s directive by attributing it to the fact that at the time “courts were concerned primarily with lackluster agency efforts to comply with NEPA.” Id. at 789 n.65.
37. See, e.g., Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).
38. Shilton, supra note 23, at 553.
39. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (“Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences. . . .”).
the major NEPA cases decided by the Supreme Court illustrates these conflicting themes.

*Kleppe v. Sierra Club* illustrates the Supreme Court’s approach to judicial review under NEPA. In *Kleppe*, environmental groups challenged the Department of the Interior’s decision not to prepare an EIS assessing the regional impacts of coal leasing and mining development. The plaintiffs argued that the Department’s policy permitted piecemeal coal leasing and mining amounting to regional development without an EIS. The D.C. Circuit Court of Appeals, in an opinion by Judge Skelly Wright, had developed a four-part balancing test to determine when an agency considering an action must prepare an EIS. The circuit court remanded the case, requiring the Department to apply the court’s criteria to the determination of whether a regional EIS was warranted.

The Supreme Court held that the D.C. Circuit’s test contravened NEPA’s language, characterizing it as an impermissible intrusion into agency discretion and an unjustified encouragement of litigation. The Court reasoned that the language of NEPA section 102(2)(C), that agencies prepare an EIS whenever considering “proposals for . . . major Federal actions,” only imposed a duty to have a final EIS for actual proposals. Because the Department had not intended to execute planning on a regional basis, the Court found no “proposal,” and therefore concluded that preparation of an EIS would be premature.

The Court accepted the Department’s decision not to analyze regional effects simply because that determination fell within the sphere of agency expertise. The Court reasoned that NEPA only required courts to check whether the record showed that the agency had considered plaintiff’s environmental concerns. In response to the plaintiff’s asser-
tion that cumulative environmental impacts would in fact result from regional development, the Court added that even if the plaintiff clearly demonstrated environmental interrelationships, “practical considerations of feasibility” might excuse preparation of an EIS.  

The landmark case of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council involved rulemaking procedures at the Atomic Energy Commission (AEC) for granting nuclear power plant operating licenses. The D.C. Circuit held the AEC’s rulemaking proceeding inadequate under NEPA, suggesting the type of procedures necessary to ensure a record fully covering the controversial environmental issue. Justice Rehnquist, writing for a unanimous Supreme Court, reversed the D.C. Circuit, reproving it for “judicial intervention run riot.” This landmark opinion held that courts may not engraft additional procedural requirements onto existing statutory obligations.

Subordinating the environmental group’s NEPA claim to the larger question of the requirements of the Administrative Procedure Act, the Court stressed the limited role of the judiciary in reviewing the actions of federal agencies and dismissed arguments that NEPA’s mandate called for stricter review than the minimum authorized by the APA. Similarly, scholars responding to Vermont Yankee paid little attention to the implications of the case for review of NEPA, focusing instead on the broader issue of judicial review of all agency rulemaking. This perceived dismissal of NEPA disappointed some environmental law observers and fostered speculation about the future enforcement of the statute. The Supreme Court appeared to be sending the message that,

50. Id. at 412.
52. Natural Resources Defense Council, 547 F.2d at 644-46; Aeschliman, 547 F.2d at 628-30.
53. Id. at 548 (“[I]t is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA.”).
54. Id.; see Schoenbaum, A Preface to Three Foreign Views of Vermont Yankee, 55 Tul. L. Rev. 428, 430 (1981) (expressing frustration over the fact that the Supreme Court did not explore NEPA’s statutory requirements or legislative history in Vermont Yankee).
56. See, e.g., Marcel, supra note 26, at 439-40 (discussing whether environmental cases will retain a “preferred status” in the federal courts after the Vermont Yankee decision); Rodgers, A Hard Look at Vermont Yankee, 67 Geo. L.J. 699, 723 (1979) (disagreeing with the opinion in Vermont Yankee and arguing that environmental claims should have “special enti-
absent specific directives from Congress, environmental protection was merely one policy choice among many available to agencies.  

The unanimous opinion in Baltimore Gas & Elec. v. Natural Resources Defense Council 61 once again emphasized NEPA’s subordinate role in the decisionmaking process. The Court held that the Nuclear Regulatory Commission (NRC) acted within its powers when it allowed licensing boards conducting a cost-benefit analysis of nuclear waste storage and disposal to assume, for NEPA purposes, that the storage of nuclear wastes does not have a significant environmental impact. 62 The opinion described the twin overarching aims of NEPA’s procedural requirements: that agencies consider all environmental impacts of proposed actions and that the agencies inform the public of the environmental issues involved. 63 The Court then upheld the agency action, finding that the NRC fully disclosed the uncertainties surrounding the agency’s action, here the promulgation of a generic rule. 64 Mirroring language in Vermont Yankee, the Court noted that the policy decision to pursue nuclear power generation resides with Congress. 65

Justice O’Connor elaborated on a recurring theme, lecturing that “a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to sim-

60. Three contemporary Supreme Court decisions repeated Vermont Yankee’s message that courts should not use NEPA to justify the imposition of judicially created procedures. Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (warning lower courts not to require agencies to place environmental concerns “over other appropriate considerations”); Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 145 (1981) (reversing lower court ruling requiring Navy to prepare a “hypothetical EIS” for nuclear weapons facility and chiding lower court for “engrafting onto the statutory language unique concepts of its own making”); Metropolitan Edison v. People Against Nuclear Power, 460 U.S. 766, 776 (1982) (holding that risk of psychological stress caused by the reopening of one of the Three Mile Island power plants does not come within NEPA’s scope: “[t]ime and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it”).

62. Id. at 89-90.
63. Id. at 97.
64. Id. at 105-06. The Court spoke of the “sheer volume” of proceedings, but only in the context that the Commission had “digested this mass of material and disclosed all substantial risk.” Id. at 98-99. An interesting footnote acknowledges that the EIS in question extensively incorporated by reference to separate documents important pertinent environmental data. Id. at 99 n.12.
65. Id. at 97; see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 557-58 (1978) (“Congress has made a choice to at least try nuclear energy.”). The Court's reasoning on this point has been criticized because in recognizing the congressional mandate to develop nuclear power, the Court ignored the salient question, which is "how far the congressional policy favoring U.S. nuclear energy should be followed without a resolution of the problems surrounding reactor safety and nuclear waste disposal." Marcel, supra note 26, at 445.
ple findings of fact, a reviewing court must generally be at its most deferential." While the Court affirmed that NEPA required licensing boards to consider the environmental effects surrounding the disposal of nuclear fuel, 

Baltimore Gas's "frontiers of science" directive precluded searching review of intricate and environmentally sensitive questions with broad policy implications.

Justice O'Connor concluded the Baltimore Gas opinion by quoting directly from Vermont Yankee, admonishing intervenors to give the agency clear notice of their position at the planning stage. Echoing Justice Rehnquist in Vermont Yankee, Justice O'Connor implied that the plaintiffs exploited the opportunity provided by NEPA, as interpreted in the lower courts, in order to obtain judicial review without a legitimate foundation.

Against this background of opinions deferential to agencies and restrictive of NEPA, the Court has seemed more receptive to the enforcement of environmental values through the executive branch's Council on Environmental Quality. Holding in Andrus v. Sierra Club that NEPA does not apply to agency budget proposals in front of Congress, the Court stated at the same time that "substantial deference" should be given to CEQ regulations.

The detailed CEQ regulations flesh out and strengthen NEPA's section 101 mandate to minimize environmental harm. Although unwilling to validate the regulations definitively, the

66. Baltimore Gas, 462 U.S. at 103; see Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976) ("[A] high level of technical expertise . . . is properly left to the informed discretion of the responsible federal agency.").

67. 462 U.S. at 106-07.

68. See Binder, NEPA, NIMBY's, and New Technology, 25 LAND & WATER L. REV. 11, 41 (1990) (supporting Supreme Court decisions limiting the role of lower courts to deciding "proper procedures" rather than "the acceptability of risks").

69. 462 U.S. at 107 (citing Vermont Yankee, 435 U.S. at 553).

70. Id at 107-08. In Vermont Yankee, Justice Rehnquist took no pains to hide his irritation with the environmental group plaintiffs, stating:

[A]dmiristrative proceedings should not be a game or forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vermont Yankee, 435 U.S. at 553-54. The litigants were branded as "parties who never fully cooperated or indeed raised the issue below." Id. at 559.


72. Id. at 358. The role of the CEQ regulations in the EIS process has evolved over time. See Bear, supra note 9, at 10,061-62 (succinct history of CEQ's development as it relates to the environmental impact assessment process); Fisher, The CEQ Regulations: New Stage in the Evolution of NEPA, 3 HARV. ENVT'L. L. REV. 347 (1979) (describing the replacement of non-binding regulations with binding CEQ regulations); Murchison, supra note 10, at 591 (emphasizing that the CEQ regulations incorporated NEPA interpretations from the circuit courts).

Court in Andrus at least envisioned a stronger role for the executive branch in vindicating environmental values.74

C. The Larger Context: Judicial Review Under the APA

Because NEPA does not expressly provide a standard of review, the statute’s procedures are categorized under section 706(2)(A) of the Administrative Procedures Act as informal rulemaking.75 The placement of NEPA within the APA framework has two important implications for judicial review of NEPA claims. First, the distinction between law and fact determines which standard of review applies under the APA. The APA allows de novo review of purely legal questions,76 while purely factual questions are presumed to be within the domain of agency expertise.77 Characterizing the dispute as one solely involving facts, therefore, often signals automatic deference to the agency.

Second, even if a decision is characterized as one of law, courts differ in the standard of review they will apply to an agency’s legal determinations. The Supreme Court, in Citizens to Preserve Overton Park, Inc. v. Volpe,78 interpreted the standard of review for courts examining informal rulemaking to encompass two inquiries. A court must consider first whether the agency decision reflects a “consideration of the relevant factors,” and, second, whether the agency made “a clear error of judgment.”79 The use of these two inquiries in Overton Park extended the so-called hard look doctrine into the realm of environmental decisionmaking where an agency was engaged in informal rulemaking.80 Under this doctrine, courts reviewing an administrative agency action must ensure that the agency took a “hard look” at the ramifications of the proposed action.81 The term is also frequently used to describe the task of the reviewing court, which must take a “hard look” at the agency’s decision-making process.82

74. See 442 U.S. at 358.
76. See id. § 706(2).
77. See id. § 706; Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1492 (9th Cir. 1987) (“Purely factual findings are, of course, reviewed for clear error.”), rev’d on other grounds, 490 U.S. 360 (1989).
78. 401 U.S. 402 (1971).
79. Id. at 416.
80. Leventhal, supra note 27, at 512-14.
82. 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.1 (2d ed. 1984) (“Perhaps the present hard look requirement is that both the agency and the court must take a hard look.”). Noting the uneven manner in which the concept is interchangeably applied, Professor Davis has posed the question as simply whether “many degrees of hard look or ordinary look respond to the perceived need for a judicial check in varying circumstances.” Id.
Early NEPA decisions dramatically illustrated the elasticity of the "hard look" doctrine as courts searched for a coherent method of reviewing agency decisions. Divergent standards of review developed around the threshold agency decision whether or not to prepare an EIS. Some circuits applied the rather deferential "arbitrary and capricious" standard of review, while other courts that applied the arbitrary and capricious standard effectively engaged in stricter review by stressing the importance of an adequate record. Other circuit courts used the Overton Park formulation to support a more rigorous "reasonableness" standard in reviewing an agency's decision not to issue an EIS. The flexibility of the reasonableness standard permits the judiciary to counterbalance the occasional overzealousness of agencies attempting to carry out their particular missions. In adopting a reasonableness standard, the Ninth Circuit recognized that NEPA implicitly qualifies agency discretion by requiring an EIS for all actions significantly affecting the environment.

Justice White recognized that the standard of review applied by a court often revealed its attitude toward agency discretion. Arguing that

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84. For a discussion of the various standards of review, see Comment, Shall We Be Arbitrary Or Reasonable: Standards of Review For Agency Threshold Determinations Under NEPA, 19 AKRON L. REV. 685, 689 n.49 (1986); Murchison, supra note 10, at 568.

85. See, e.g., Minn. Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1320 n.20 (8th Cir. 1974) (adopts reasonableness standard and calls attention to Hanly requirement that the agency develop a reviewable record); see also Murchison, supra note 10, at 567 (discussing Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (adopting an arbitrary and capricious standard for NEPA threshold determinations, but requiring an adequate administrative record to substantiate decision), cert. denied, 412 U.S. 908 (1973)). But see Hoskins, Judicial Review of an Agency's Decision Not to Prepare an Environmental Impact Statement, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,331, 10,347 (Sept. 1988) (noting that circuits adopting the arbitrary and capricious standard usually do not go beyond the administrative record in examining whether the ultimate decision is rationally related to the facts contained in the record).

86. See, e.g., Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). One author found that a surprising number of circuit courts did not utilize either the APA or previous case law to define the selected standard of review. Shea, The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions, 9 B.C. ENVTL. AFF. L. REV. 63, 99 (1980) (courts' election of standard of review depends on "the general philosophical outlook of the courts toward environmental protection").

87. D. MANDELKER, supra note 5, § 8.02, at 7-8.

88. See, e.g., Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1177 n.24 (9th Cir. 1982) ("The mandatory nature of [NEPA's EIS requirement] makes the 'reasonableness' standard the more appropriate standard of review."); see also Shea, supra note 86, at 95-96 (discussing leading Ninth Circuit case, City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975), which exemplified "activist attitude of court" in environmental challenges); Comment, supra note 84, at 695.
the split in circuits presented a conflict worthy of Supreme Court review, he stated, "courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the nondiscretionary nature of NEPA's language." 89

D. Anticipating the Supreme Court's Response to Methow Valley and Marsh

The Supreme Court has consistently acknowledged the importance of NEPA's affirmative duties. 90 Nevertheless, the Court stated in Vermont Yankee and subsequent cases that, although NEPA contains substantive goals, "its mandate to the agencies is essentially procedural." 91 By insisting that the substantive goals of NEPA are enforceable in the courts only through the procedural mandate, and then in each case finding the agency's procedures to be adequate, the Court seems to indicate that lower courts should refrain from scrutinizing agency decisions under NEPA. Meanwhile the Court refuses or declines to clarify the task of the reviewing courts beyond situating it within extremely deferential norms of statutory interpretation under the APA. 92 At best, the Supreme Court has indicated that lower courts must thoroughly justify a more searching standard of review.

It is tempting to account for the Court's treatment of NEPA in terms of the government's ability to control which cases filter through to the Supreme Court. 93 Even where other defendants file petitions for certiorari, the Solicitor General is unlikely to recommend filing a petition unless the issues appear likely to yield a government victory. 94 With decreased chances of prevailing, and in light of the costs involved in pur-

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89. River Rd. Alliance v. Army Corps of Eng'rs, 764 F.2d 445 (7th Cir. 1985), cert. denied, 475 U.S. 1055, 1056 (1985) (White, J., dissenting from denial of certiorari); see also Hoskins, supra note 85, at 10,331 (arguing that there is a significant difference between the two standards and that the reasonableness standard is the appropriate standard for threshold decisions under NEPA).
92. See supra notes 38-74, 78-82 and accompanying text.
93. For an interesting discussion of this point of view, see Shilton, supra note 23. Shilton, an attorney with the Appellate Section of the Department of Justice's Environment and Natural Resources Division, lists a number of factors which enhance the government's ability to control which cases were reviewed. Id. at 554-58.
94. Id. at 555-56.
suing litigation, environmental plaintiffs have increasingly adjusted their strategies to deemphasize litigation.95

However, the question remains whether it has been doctrinally necessary for the Court to continue to curtail the lower courts' less deferential enforcement of NEPA. Earlier NEPA cases, including Vermont Yankee, Strycker's Bay, and Baltimore Gas, examined the adequacy of the agencies' record.96 In each case, the Court narrowly framed the issues and declined to specify how courts should review agency decisions under NEPA. NEPA thus remains a lightning rod for conflicting views concerning the degree to which environmental protection should be implemented through federal planning procedures.97 As in previous NEPA cases before the Supreme Court, the challenges in Methow Valley and Marsh involved determining whether a lower court had exceeded permissible bounds in interpreting NEPA to allow judicial intervention when the facts suggested less than enthusiastic agency compliance. Without setting clear standards for lower court review of NEPA questions, the Supreme Court in Methow Valley and Marsh once again sent a forceful cautionary signal.

II
METHOW VALLEY: MITIGATION, WORST CASE ANALYSIS, AND INTERNAL AGENCY REGULATIONS

A. Factual and Procedural Background

Methow Valley involved the issuance of a special use permit to Methow Recreation, Inc. for a "major destination alpine ski resort."98 According to the permit, the Early Winters Ski Resort (Early Winters) would occupy 3900 acres of National Forest land overlooking the Methow Valley in northern Washington State.99 The site of the proposed

96. See supra notes 51-70 and accompanying text.
97. Pollack, Reimagining NEPA: Choices for Environmentalists, 9 HARV. ENVTL. L. REV. 359, 367-68 (1985) (the tensions created by different models of NEPA enforcement reflect different visions of how environmental problems should be solved). For example, the counsel for the intervenors in the influential case of Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 944 (1966), argued against existing review standards in cases where environmental protection is at stake and envisioned the newly enacted NEPA as an "effective instrument for easing the severity" of the existing standards. Sive, supra note 83, at 643.
project is adjacent to the Pasayten Wilderness Area, and the Methow Valley provides winter range for the largest migratory mule deer herd in the state. Under Forest Service regulations, the special permit application process involves three phases before construction may begin on a project. The preliminary stage of the process involves the preparation of an EIS by the Forest Service. The Forest Service Record of Decision conceded that, based on its final EIS, the Early Winters Study (Study), the development would adversely impact air quality and the winter range for mule deer.

The Methow Valley Citizens Council brought suit in federal district court after unsuccessfully challenging the Study and appealing the issuance of the special use permit through the administrative review process. The plaintiffs attacked the Study's assessment of the proposed project's effects on air quality and wildlife, focusing on the effects of the development on lands outside of the Forest Service's jurisdiction ("off-

100. Id. at 818.
101. Id. at 812.
103. The process first entails an application for a special use permit which includes a project description, including a description of any environmental impacts. 36 C.F.R. § 251.54(e)(3) (1990). The authorized Forest Service official will prepare an environmental analysis and/or an EIS, which is subject to NEPA's notice and comment procedures. 36 C.F.R. § 251.54(f)(1)-(f)(2) (1990). When granted, special use authorizations will contain specific terms and conditions, including preconstruction approval of location, design, and plans. 36 C.F.R. § 251.56 (1990).
104. The Early Winters Study, released in 1984, recommended issuance of a special use permit for Alternative IV, one out of five alternatives considered. Petition for Writ of Certiorari, app. E, at 63a-71a, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (No. 87-1703) [hereinafter Methow Valley Petition] (Forest Service Record of Decision included as appendix E of Methow Valley Petition). The development level of Alternative IV was 8200 SAOT (skiers at one time), while the other alternatives ranged from no action to a development serving 10,500 SAOT. Id. at 64a-65a.
105. The Record of Decision reads:

The secondary effects included: degradation of existing air quality; degradation of existing water quality; reduction of mule deer winter range; and need for increased funding to provide necessary public services. These effects generally increase with each successive alternative. Practical measures to reduce the adverse impacts have been, or are in the process of being, implemented by Okanogan County.

Id. at 67a. A comprehensive study of the mule deer herd was in progress at the time the decision was reached, and therefore the information was not incorporated into the final EIS. See Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 817 (9th Cir. 1987), rev'd, 490 U.S. 332 (1989). The Forest Service, Okanogan County, the Washington Department of Ecology, and the U.S. Environmental Protection Agency had entered into a Memorandum of Understanding to mitigate adverse effects on air quality. Methow Valley Citizens Council v. Regional Forester, No. 85-2124-DA (D. Or. June 25, 1986) (Westlaw, 1986 WL 8595), rev'd, 833 F.2d 810 (9th Cir. 1987), rev'd, 490 U.S. 332 (1989). The lower court's ruling reflected the concern that the agency's decision to proceed was reached without the benefit of critical information about adverse effects. Methow Valley, 833 F.2d at 818.
Plaintiffs argued that the brief discussion of mitigation measures was fatally flawed. A U.S. Magistrate ruled in favor of the Forest Service on the NEPA issues, holding that the EIS was adequate in all respects. The Ninth Circuit Court of Appeals reversed and remanded the case on the grounds that both the range of alternatives and the discussion of mitigation measures fell short of NEPA's requirements, invalidating the EIS as a matter of law. The court stated that when an agency lacks important but unavailable information, NEPA requires the agency to prepare a worst case analysis. The court criticized the magistrate for distinguishing between "primary" and "secondary" impacts, stating that NEPA and the CEQ regulations require discussion of "all significant impacts proximately caused by the proposed action." Referring to the EIS's paucity of data on the development and the effectiveness of proposed measures to mitigate adverse impacts on the mule deer, the court found it was "impossible for the Forest Service to make a reasoned decision in the disposition of a special use permit application." The court also found that

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107. The CEQ regulations define "indirect effects" as those which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8(b) (1990). The adverse environmental effects included a potentially dramatic decrease in ambient air quality resulting from the use of wood stoves and fireplaces, and a potential 50% drop in the population of the deer herd. Methow Valley Respondents' Brief, supra note 17, at 3-5 (citing air pollution studies, including one conducted by Washington State in a nearby area, and correspondence of State Game Director).


109. Id. The district court found that the cursory discussion of mitigation measures concerning the mule deer herd was adequate. The decision rested on the understanding that the Forest Service was still collecting information pursuant to the submission of the master development plan.


111. Id. at 817 & n.11. The court noted that established Ninth Circuit case law requires a worst case analysis even though this requirement was codified and later rescinded in the federal regulations.

112. Id. at 816 (emphasis in original).

113. Id. at 818. The court was clearly influenced by the fact that a comprehensive study was in progress at the time the decision was reached, which explained why the information was not incorporated into the final EIS. See id. at 817. Further, the court stated that if the "comprehensive study" still did not provide complete information, a worst case analysis would be required in the areas lacking information. Id. at 818. However, in a footnote, the court stated:

This court expresses no opinion as to whether a worst case analysis is necessarily required in the absence of an evaluation of the effectiveness of the mitigation measures. However, we do recognize the limitation on a decisionmaker's ability to make a reasoned decision as to the environmental impacts of a proposed action where information contained in an EIS is incomplete or inaccurate.

Id. at 818 n.12.
the EIS inadequately discussed mitigation of the effects on air quality, and that the Study employed incorrect data to assess the effect of air quality on the nearby wilderness area.

The court also interpreted NEPA to require a complete mitigation plan. It began by noting the need for a thorough discussion of mitigation measures as mandated by CEQ and Forest Service regulations. The court disagreed with the government's argument that a general discussion of mitigation was sufficient for this early stage of the project's development and noted the lack of even a minimal showing that mitigation measures would be undertaken. It then noted that the existence of a Memorandum of Understanding between the Forest Service, Okanogan County, the Washington Department of Ecology, and the U.S. Environmental Protection Agency to mitigate adverse effects on air quality did not guarantee that the general mitigation goals would be specified further or carried out if the project proceeded. Finally, the Ninth Circuit opinion quoted from its earlier ruling in Marsh, emphasizing the "importance of the [complete] mitigation plan."

B. Methow Valley in the Supreme Court

The government argued in the petition for certiorari in Methow Valley that the court of appeals had interpreted NEPA to create new, "rigid," substantive requirements for agencies, in conflict with established NEPA common law. The government insisted that the Ninth Circuit opinions clearly deviated from established precedent and improperly burdened agencies. The government characterized a complete mitigation plan requirement as a court-imposed directive that agencies actually mitigate environmental harm. Further, it asserted that the

114. Id. at 819-20.
115. Id. at 818.
116. Id. at 819.
118. 833 F.2d at 819 & n.14; 36 C.F.R. § 251.56(a) (1990) (describing general terms and conditions for special use permits including those which will "minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise [sic] protect the environment").
119. 833 F.2d at 819-20.
120. Id.
121. Id. at 820 (citing Oregon Natural Resources Council v. Marsh, 820 F.2d 1051, 1055 (9th Cir. 1987) (superseded opinion)).
122. Methow Valley Petition, supra note 104, at 12. Justice Marshall used the term "common law" in his separate opinion in Kleppe, making the following observation: "In fact, 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.'" Kleppe v. Sierra Club, 427 U.S. 390, 421 (1975) (Marshall, J., concurring in part and dissenting in part) (citing Sierra Club v. Morton, 514 F.2d 856, 870-72 (D.C. Cir. 1975)).
123. Methow Valley Petition, supra note 104, at 12, 14, 16.
124. Id. at 14-18. The acute problem arose with language from other Ninth Circuit cases cited in both lower court opinions. See, e.g., Methow Valley Citizens Council v. Regional
Ninth Circuit mistakenly interpreted NEPA common law to require a “worst case analysis” distinct from any requirement imposed by CEQ.\textsuperscript{125}

The respondent citizen groups tried to deflect the government’s line of attack by emphasizing that in the cases below neither party briefed the substantive duty to carry out a complete mitigation plan or the duty to prepare a worst case analysis.\textsuperscript{126} They argued that the agency’s decision to proceed was based on an analysis of mitigation measures that did not adequately disclose or consider environmental effects as NEPA requires.\textsuperscript{127} Respondents argued that the language in the Ninth Circuit \textit{Marsh} opinion referring to a “complete mitigation plan,” which was repeated in \textit{Methow Valley}, referred solely to this duty to disclose.\textsuperscript{128}

In its decision in \textit{Methow Valley}, the Supreme Court reversed the Ninth Circuit decision and remanded the case. The Court repeated that the EIS requirement performs only two functions: it enables the agency decisionmaker to consider carefully the environmental effects of its action, and it expands potentially fertile information sources by involving interested parties.\textsuperscript{129} The Court reaffirmed that NEPA in practice applies to the “process” of looking at environmental consequences, and that NEPA prohibits only “uninformed — rather than unwise — agency action.”\textsuperscript{130} The Court quickly disposed of Ninth Circuit concerns about worst case analysis and mitigation.\textsuperscript{131} The Court also rejected the Ninth Circuit’s related holding that the Forest Service had an affirmative duty under its own regulations to develop mitigation measures.\textsuperscript{132} Each of these issues is discussed below.

\textbf{1. \textit{Worst Case Analysis}}

The outstanding feature of the Court’s worst case analysis ruling is the affirmation of the Court’s earlier holding in \textit{Andrus v. Sierra Club}\textsuperscript{133} that the CEQ regulations are entitled to substantial deference.\textsuperscript{134} The

\begin{footnotesize}
\textsuperscript{125} Forester, 833 F.2d 810, 819 (9th Cir. 1987) (NEPA “requires that ‘action be taken to mitigate the adverse effects of major federal actions’” (quoting Stop H-3 Ass’n v. Brinegar, 389 F. Supp. 1102, 1111 (D. Haw. 1974), rev’d on other grounds, 533 F.2d 434 (9th Cir. 1974), cert. denied, 429 U.S. 999 (1976))).

\textsuperscript{126} Respondents’ Brief in Opposition to Petition for Certiorari at 9, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (No. 87-1703) [hereinafter Methow Valley Opposition to Cert.] (“[T]he issue was not briefed or argued below; and the court of appeal’s holding does not rest on such a duty.”).

\textsuperscript{127} \textit{Id.} at 17-19.

\textsuperscript{128} \textit{Id.} at 37-38.

\textsuperscript{129} \textit{Methow Valley}, 490 U.S. at 349.

\textsuperscript{130} \textit{Id.} at 350-51.

\textsuperscript{131} \textit{Id.} at 353-56.

\textsuperscript{132} \textit{Id.} at 357.

\textsuperscript{133} \textit{Id.} at 355-56; see Mandelker, \textit{NEPA Alive and Well: The Supreme Court Takes}

\textsuperscript{134} 442 U.S. 347 (1979).

\textsuperscript{135} 490 U.S. at 355-56; see Mandelker, \textit{NEPA Alive and Well: The Supreme Court Takes
ruling will help quiet critics who still question CEQ's authority to pro-
mulgate binding regulations.\textsuperscript{135} On the other hand, Justice Stevens re-
jected the proposition that the CEQ regulation requiring a worst case
analysis was a codification of existing NEPA case law;\textsuperscript{136} the worst-case
requirement was formally rescinded in 1986 and replaced with a revised
regulation.\textsuperscript{137} Aside from determining that the rescinded requirement
did not apply, however, the \textit{Methow Valley} opinion failed to address the
content of the new regulation. Some observers believe that the new regu-
lation also requires analysis of severe, low-probability environmental ef-
effects.\textsuperscript{138} Thus, the agency on remand still must determine what
constitutes a sufficient analysis.

2. Mitigation

The Court emphatically affirmed NEPA's disclosure requirement
with respect to mitigation measures, basing its discussion on the statu-
tory command that an impact statement discuss "any adverse environ-
mental effects which cannot be avoided should the proposal be
implemented."\textsuperscript{139} The ruling in \textit{Methow Valley} therefore left intact

\textsuperscript{135} See, e.g., Brief of the Institute of Law and Public Health Protection as Amicus Curiae in Support of Appellants at 2-3, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (No. 87-1703) (President has neither constitutional nor statutory authority to promulgate legally binding rules to enforce NEPA through the CEQ). Legislation considered by the Senate in 1989 would have put an end to the "ongoing low-level dispute surrounding CEQ's regulatory authority." Telephone interview with Stephanie Clough, staff member, Senate Committee on the Environment and Public Works (Feb. 16, 1990). The bill described was S. 1089, 101st Cong., 1st Sess., 135 CONG. REC. S5990-91 (daily ed. June 1, 1989).

\textsuperscript{136} 490 U.S. at 355 (citing Note, supra note 35, at 789, 800-02, 813-14).

\textsuperscript{137} Council on Environmental Quality, National Environmental Policy Act Regulations, 51 Fed. Reg. 15,618, 15,621 (1986) (regulations regarding incomplete or unavailable inform-


dence" will still be reviewable by the courts to determine procedural compliance); Note, supra note 35, at 815 (\textit{Marsh} and \textit{Methow Valley} Ninth Circuit opinions could have utilized probability threshold of new regulation to analyze facts and reach same result as under the superseded regulation); Note, \textit{The National Environmental Policy Act and the Revised CEQ Regulations: A Fate Worse than the Worst Case Analysis?}, 60 ST. JOHN'S L. REV. 500, 519-20 (1986) (rule of reason for agency analysis has governed previous judicial interpretation and new regulation will not signal any change).

\textsuperscript{139} 490 U.S. at 351 (citing 42 U.S.C. § 4332 (C)(ii)); see also D. MANDELLER, supra note 5, § 10.38 (discussing NEPA's "implicit requirement" of a discussion of mitigation measures in impact statements implemented by the CEQ regulations at 40 C.F.R. §§ 1502.14(f),
Ninth Circuit holdings exacting strict compliance with NEPA's disclosure mandate, but gave no guidance as to what NEPA required between a "mere listing"\textsuperscript{140} of mitigation measures and the "complete mitigation plan"\textsuperscript{141} repudiated by the opinion.

Although the Court observed that the lack of a "reasonably complete" discussion of mitigation would be inconsistent with NEPA's "action forcing" function,\textsuperscript{142} it held nonetheless that it would be "incongruous" to conclude that the Forest Service cannot act until the local agencies finally have decided which mitigating measures they consider necessary.\textsuperscript{143} The Court clearly rejected any substantive duty to mitigate specific adverse environmental effects.\textsuperscript{144}

Although it is unclear whether the Ninth Circuit opinion in fact imposed a duty to mitigate, the circuit court's imprecise language allowed the government to raise a red flag. The respondent citizen groups and amici argued that the government constructed a blind by focusing on the "complete mitigation plan" language in the lower court opinions and ignored the fact that the appellate court rulings were based on a determination that the agency had failed to comply with NEPA's procedural mandate.\textsuperscript{145} For example, respondents pointed out that the court used the term "complete mitigation plan" only in response to the agency's argument that "mitigation measures would be developed later."\textsuperscript{146} They also emphasized that in both cases the agency's decision to proceed in the

\textsuperscript{1502.16(h) (1990)). Additionally, 40 C.F.R. § 1505.2(c) requires "inclusion of mitigation measure discussion in [the agency's] record of decision." \textit{Id.} § 10.38 n.2. In identifying the pertinent CEQ regulations, the Court listed these sections and 40 C.F.R. § 1508.25(b) (1990), which provides that an agency must discuss mitigation measures in defining the scope of the EIS. \textit{Methow Valley}, 490 U.S. at 352.

\textsuperscript{140} The "mere listing" language was used by the district court in both \textit{Methow Valley} and \textit{Marsh}. \textit{Methow Valley} Citizens Council v. Regional Forester, No. 85-2124-DA (D. Or. June 25, 1986) (Westlaw, 1986 WL 8595) ("[I]n this EIS there is more — not much more — but more than a mere listing of mitigation measures as to the deer herd."); Oregon Natural Resources Council v. Marsh, No. 85-6433-E (D. Or. Apr. 3, 1986) (Westlaw, 1986 WL 13440); \textit{see also} Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986) (requiring discussion of environmental impacts to set forth enough information to permit reasoned decisionmaking), rev'd on other grounds sub nom. \textit{Lyng} v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

\textsuperscript{141} \textit{Methow Valley}, 490 U.S. at 357.

\textsuperscript{142} \textit{Id.} at 352.

\textsuperscript{143} \textit{Id.} at 352-53.

\textsuperscript{144} \textit{Id.} at 353 ("[I]t would be inconsistent with NEPA's reliance on procedural mechanisms — as opposed to substantive, result-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.").

\textsuperscript{145} \textit{See, e.g.}, Brief of Amicus Curiae for International Association of Fish and Wildlife Agencies at 13-14, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (No. 87-1703) (arguing that "generic discussion of mitigation measures, 'cookbook' mitigation, is inadequate under NEPA"); \textit{Methow Valley} Respondents' Brief, \textit{supra} note 17, at 37-39.

\textsuperscript{146} \textit{Methow Valley} Respondents' Brief, \textit{supra} note 17, at 38 n.34.
face of significant adverse impacts assumed that unspecified mitigation measures would be completed.\textsuperscript{147}

The Supreme Court clearly intended to reverse any part of the lower court opinion which conceivably represented a substantive duty to mitigate. According to the Court, NEPA only requires that mitigation be discussed “in sufficient detail to ensure that environmental consequences have been fairly evaluated.”\textsuperscript{148} Given the Court’s exclusive focus on the offending doctrinal language in the Ninth Circuit ruling, it would be speculation to say whether the Forest Service’s EIS met the threshold identified by the Court.

3. Forest Service Regulations

Finally, the opinion examined the related Ninth Circuit holding that the Forest Service’s own regulations required the development of a “complete mitigation plan.”\textsuperscript{149} The issue presented to the Court was whether the agency must adhere to independent standards of environmental protection under its own regulations when fulfilling NEPA’s requirements. The Court summarily held that the agency’s decision about the sufficiency of mitigation was within its discretion and did not violate its own regulations.\textsuperscript{150} The Supreme Court’s brief discussion and holding on the agency’s regulations in the context of NEPA raises some serious questions and reveals inconsistencies in the Court’s analysis.

Forest Service regulations require the special use applicant to prepare an environmental protection plan detailing “proposed measures and plans for the protection and rehabilitation of the environment” for the duration of the project.\textsuperscript{151} The Supreme Court examined this requirement because the circuit court held peripherally that the Forest Service’s own regulations condition permit issuance on the submission of an environmental protection plan including both on- and off-site effects.\textsuperscript{152} The Ninth Circuit found that the Forest Service under its own regulations had an “affirmative duty” to develop the necessary mitigation measures before it grants a permit.\textsuperscript{153}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} Id. at 7.
\item \textsuperscript{148} Methow Valley, 490 U.S. at 352.
\item \textsuperscript{149} Id. at 357; see 36 C.F.R. §§ 250.54-251.65 (Forest Service regulations governing special use permits); see also supra note 103.
\item \textsuperscript{150} 490 U.S. at 358-59.
\item \textsuperscript{151} 36 C.F.R. § 251.54(e)(4) (1990).
\item \textsuperscript{152} See 490 U.S. at 357-58. The circuit court required the agency to evaluate all “significant” environmental effects. Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 817 (9th Cir. 1987) (citing Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 783 (9th Cir. 1980); Trout Unlimited v. Morton, 509 F.2d 1276, 1238 n.9 (9th Cir. 1976); Environmental Defense Fund v. Hoffman, 566 F.2d 1060, 1067 (8th Cir. 1977)), rev’d, 490 U.S. 332 (1989).
\item \textsuperscript{153} Methow Valley, 833 F.2d at 819.
\end{enumerate}
\end{footnotesize}
Respondents argued, and convinced the Ninth Circuit, that the agency’s interpretation violated the plain language and legislative history of the regulations. The respondents argued that the regulations imposed substantive obligations on the agency to “prescribe suitable terms and conditions” as part of the agency’s permitting process. In response to the respondents’ allegations, the government simply asserted that the minimal mitigation requirements resembled those “routinely imposed” by the Forest Service in issuing special use permits to developers of ski areas.

The Supreme Court upheld the government’s actions under the Forest Service regulations. In doing so, the Court made two pivotal assumptions about the agency’s interpretation of the regulation. First, the Court appeared to assume that the agency could reasonably interpret “environment” to encompass only Forest Service lands. Thus in the Court’s view, the project complied with the Forest Service’s own regulations because the on-site effects of the development disclosed in the EIS would be minimal and easily mitigated.

Second, it assumed that a statement in the permit that the applicant intended to comply in the future satisfied the applicant’s obligation to engage in early planning. Thus the Supreme Court found that the Forest Service evidently could defer specific planning mandated by its own regulations because permits for ski areas fell within the broad scope of the Forest Service organic statute. The Court relied on the broad administrative law principle that an agency’s interpretation has controlling weight unless it is “plainly erroneous or inconsistent with the regulation.” The Court concluded that the Forest Service’s interpretation of its own regulations, as not requiring off-site mitigation standards in the permit, was reasonable.

On the more important issue of how NEPA and the regulations interact, the Supreme Court did not even acknowledge respondents’ arguments that the regulations imposed independent substantive duties.

154. Methow Valley Respondents’ Brief, supra note 17, at 45 n.40 (“[e]ven consistent agency practice that is contrary to the plain language of the regulation is unlawful”) (citing Yellin v. United States, 374 U.S. 109 (1963); Vitarelli v. Seaton, 359 U.S. 535 (1959)); see Amicus Brief of National Wildlife Federation, Natural Resources Defense Council, and the Wilderness Society at 6-7, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) (No. 87-1703) (agency commentary at time of promulgation showed that the clear purpose of the regulation was to ensure specific planning at the time the permit was issued, particularly with regard to wildlife) (citing 44 Fed. Reg. 29,107, 29,110-11 (1979)).

155. Methow Valley Respondents’ Brief, supra note 17, at 44; see also Methow Valley Opposition to Cert., supra note 126, at 10.

156. Methow Valley Petition, supra note 104, at 48-49.

157. See 490 U.S. at 357-59.

158. See id. at 358 & n.20 (noting that the Forest Service permit requires the developer to submit more specific plans during the project’s construction).

159. Id. at 359 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

160. See id. at 358-59.
Rather, the Court invoked the purposes of the underlying statute in isolation and found that the regulations "were promulgated pursuant to [the Forest Service's] broad grant of authority"\textsuperscript{161} and "were not based on [NEPA's] more direct concern for environmental quality."\textsuperscript{162}

Earlier in the opinion, the Supreme Court acknowledged that the duty to disclose significant environmental effects was one of NEPA's primary commands.\textsuperscript{163} Absent a detailed discussion of mitigation measures, the Court pointed out that neither the agency nor other interested parties can evaluate properly the severity of the adverse effects.\textsuperscript{164} However, as to the agency's regulations, the Court stated, in a somewhat different vein, "[in spite of NEPA and CEQ regulations] requiring detailed analysis of both on-site and off-site mitigation measures . . . there is no basis for concluding that the Forest Service's own regulations must also be read in all cases to condition issuance of a special use permit on consideration (and implementation) of off-site mitigation measures."\textsuperscript{165}

The Supreme Court previously has held that NEPA does not apply where its dictates would make implementation of the underlying statute impossible.\textsuperscript{166} 
\textit{Methow Valley,} however, did not involve such a conflict. Nevertheless, given the Court's view that NEPA does not impose substantive requirements, increased environmental safeguards in the NEPA process will only occur when another statute with substantive environmental provisions or regulations applies.\textsuperscript{167} The Court cited sections of the Endangered Species Act\textsuperscript{168} and the Department of Transportation

\textsuperscript{161.} \textit{Id.} at 358.
\textsuperscript{162.} \textit{Id.} (citing H.R. REP. NO. 709, 99th Cong., 2d Sess., pt. 1, at 2 (1986)).
\textsuperscript{163.} \textit{See id.} at 349.
\textsuperscript{164.} \textit{Id.} at 352.
\textsuperscript{165.} \textit{Id.} at 358.
\textsuperscript{166.} United States v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669, 694 (1973) (NEPA "was not intended to repeal by implication any other statute"); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 777, 788 (1973). The Court in \textit{Flint Ridge} reversed an appellate court ruling that the Department of Housing and Urban Development (HUD) must prepare an EIS in conjunction with disclosure statements pertaining to planned subdivisions. The disclosure statute had a 30-day filing deadline, which was clearly an insufficient amount of time to prepare an EIS. The Court held that it would create "a fundamental conflict" with the underlying statute to enforce NEPA in this context. \textit{Id.} at 791. While stating that the impact statement requirement was "neither accidental nor hyperbolic," requiring NEPA compliance here would make it physically impossible to comply with the HUD statute. \textit{Id.} at 787. "[W]here a clear and unavoidable conflict in statutory authority exists, NEPA must give way." \textit{Id.} at 788.
\textsuperscript{167.} Rodgers, \textit{supra} note 59, at 710-11 ("NEPA litigation with substantive aims rarely proceeds without the supporting presence of complementary federal legislation supplying an unmistakable substantive component."); see also Thatcher, \textit{Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act}, 20 ENVTL. L. 611, 616 n.18 (1990) (noting that the Supreme Court holding in \textit{Kleppe} foreclosed a judicial interpretation of NEPA as requiring comprehensive planning, unless the agency in question has a separate statutory obligation to plan).
Act\textsuperscript{169} as examples of such statutes.\textsuperscript{170} Yet in this case the Court declined to extend environmental safeguards based on agency regulations which arguably contained the specific duties NEPA lacks.

Beginning with \textit{Vermont Yankee}, the collective Supreme Court holdings suggest not only that NEPA does not repeal by implication any other statute,\textsuperscript{171} but that courts should not enforce NEPA whenever the agency interprets NEPA obligations as an obstacle to discretionary actions governed by the agency's underlying organic statute.\textsuperscript{172} Like the holdings on mitigation and worst case analysis, this part of the \textit{Methow Valley} opinion raises more questions than it provides answers about how an agency's own environmental planning procedures mesh with NEPA obligations. Despite the Court's endorsement of NEPA's broad aims, the manner in which the Court interprets the statute overlooks the fact that compliance with NEPA's procedures may often require fundamental changes in an agency's mode of operation.

\section*{III}
\textbf{MARSH: STANDARD OF REVIEW}

\textbf{A. Factual and Procedural Background}

\textit{Marsh} involved a dam project on the Elk Creek tributary of the Rogue River in southwestern Oregon. The tortuous history of the Elk Creek Project began in 1962 with the congressional authorization of a trio of flood control dams to be built by the Army Corps of Engineers (Corps), one to be located on Elk Creek.\textsuperscript{173} The other two dams were completed.\textsuperscript{174}

However, after the final Elk Creek EIS in 1971 recommended inundation of 1290 acres of land, and after construction of the dam had begun, the Corps halted work on the project in 1975 to consider the dam's

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\textsuperscript{170} \textit{Methow Valley}, 490 U.S. at 351 n.14.
\textsuperscript{171} \textit{See supra} note 166.
\textsuperscript{172} The Court in \textit{Vermont Yankee} held that the lower court impossibly had required procedures not provided for by statute, stating that "it is clear NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the APA." \textit{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council}, 435 U.S. 519, 548 (1978). Academic commentators have disagreed with the Court's analysis. \textit{See}, \textit{e.g.}, Rodgers, \textit{supra} note 59, at 715 n.120 ("[o]thers have found it not nearly so clear"); Schoenbaum, \textit{supra} note 57, at 430. Professor Schoenbaum notes the inconsistency in the \textit{Vermont Yankee} opinion between the holding that NEPA does not require "additional procedures in the very limited class of cases involving rulemaking with important environmental consequences," and the Court's concession that APA procedures can be supplemented by other specific statutory requirements. \textit{Id.}
\textsuperscript{174} Marsh Petition, \textit{supra} note 173, at 3.
\end{flushleft}
effect on water quality and the fishery resources of the Rogue River. The Corps prepared a supplemental environmental impact statement (SEIS) based on information relating to levels of turbidity, or disturbed sediment, extrapolated from data gathered from one of the other completed dam projects. The Corps revised the SEIS a number of times before it was finally released in 1980.

Oregon Natural Resources Council, a nonprofit environmental group, filed suit challenging the SEIS on NEPA grounds. Specifically, the plaintiffs attacked the adequacy of the mitigation analysis, the lack of worst case scenarios, the Corps' failure to prepare an additional SEIS, and the failure to consider the cumulative impacts of all three dams. After an evidentiary hearing, the district court ruled in favor of the Corps, affirming the substantive adequacy of the environmental analysis.

The Ninth Circuit Court of Appeals reversed the lower court's decision, finding the mitigation analysis inadequate, and held that the project merited another SEIS and a worst case analysis.

The court found unreasonable the agency's determination that new information from two studies did not necessitate preparation of a new SEIS.

175. Id.
176. Id.
177. Id. at 3-4.
179. Id. at 1493, 1494, 1496-97.
181. Marsh, 832 F.2d at 1493, 1494, 1497. The ruling also reversed the lower court's treatment of the plaintiff-appellants' claim that the EIS did not consider cumulative impacts. Id. at 1497-98. This issue was not considered by the Supreme Court. The circuit court affirmed the district court's ruling on three other NEPA claims, also not at issue in the final adjudication. Id. at 1498.
182. Id. at 1492-93. The court cited a number of Ninth Circuit cases and the CEQ regulation setting out the purpose of an EIS. The regulation reads in part: "It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1 (1990).
183. The Oregon Department of Fish and Wildlife prepared one study on possible effects of the dam project on fishery resources, and the United States Soil Conservation Service prepared another, arriving at figures showing more soil turbidity than shown in the SEIS. The final SEIS did not include the latter study, and other agencies, including the EPA, challenged the Corps' conclusions remaining in the final document. Marsh Respondents' Brief, supra note 17, at 4-9.
184. 832 F.2d at 1495.
B. Marsh in the Supreme Court

The Supreme Court reversed the Ninth Circuit's ruling. It began the opinion in *Marsh* by simply stating that *Methow Valley* disposed of the mitigation and worst case analysis issues.\(^{185}\) As in the *Methow Valley* opinion, the Court in *Marsh* proceeded to recount legislative and political history demonstrating approval of the project at numerous junctures.\(^{186}\)

On the question whether the new information merited another SEIS, the Court noted that although NEPA does not specifically address post-decision supplemental environmental impact statements, the statute clearly extended to cover them under some circumstances.\(^{187}\) Justice Stevens, again writing for a unanimous Court, observed that it would be "incongruous" with NEPA's "manifest concern with preventing uninformed action for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to completion of agency action simply because the relevant proposal has received initial approval."\(^{188}\)

The Court agreed with both parties that an agency in evaluating supplementation is required to take a "hard look" throughout the planning process.\(^{189}\) The agency's decision should depend on the "value of the new information to the still pending decisionmaking process."\(^{190}\)

The Court narrowed the area of dispute to the legal standard a court must apply when reviewing an agency's decision not to supplement the EIS.\(^{191}\) The Court dismissed the respondents' argument that the agency's decision whether the new information is "significant" enough to require an SEIS was a legal question and thus subject to a more strict standard of review.\(^{192}\) On the contrary, according to the Court, the case was a classic example of a "factual dispute" implicating "substantial agency expertise."\(^{193}\) Justice Stevens' conclusion that the conflict over the dam in *Marsh* "involves primarily issues of fact"\(^{194}\) signaled deference to the agency under the APA. Accordingly, the Court held that the arbitrary and capricious standard governs review of the agency's analysis of "significance" when deciding whether to prepare a supplemental

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\(^{186}\) Id. at 363-65, 367.

\(^{187}\) Id. at 370-71. The Court reiterated the principle of deference to the CEQ regulations set forth in *Methow Valley*. Id. at 372 (citing 40 C.F.R. § 1502.9(c) (outlining circumstances in which agency should prepare a supplement to a draft or final EIS)).

\(^{188}\) Id. at 371.

\(^{189}\) Id. at 373-74.

\(^{190}\) Id. at 374.

\(^{191}\) Id. at 375-76.

\(^{192}\) Id. at 376; see also id. at 374 n.20 (citing 40 C.F.R. § 1508.27 (describing definition of term "significantly" in NEPA as requiring consideration of both "context and intensity")).

\(^{193}\) Id. at 376.

\(^{194}\) Id. at 377. In a footnote, the Court states that "under the APA some legal standard is involved. Otherwise there would be 'no law to apply' and thus no basis for APA review." Id. at 377 n.22 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).
Justice Stevens went on to say that a reviewing court's central task is to ensure that the agency has made a "reasoned decision based on its evaluation of the significance — or lack of significance — of the new information." Despite this, the opinion stated that courts should not automatically defer to the agency's interest in finality without carefully reviewing the record. To demonstrate this principle, the remainder of the opinion meticulously examined the facts. The Court concluded that the Corps' position was "perhaps disputable" but not "arbitrary and capricious." By concluding that the dispute in this case was purely factual, the Court declined further analysis. The Court failed to answer the criticism that the agency fell short of NEPA's full disclosure mandate by failing to address differences of opinion about the dam's environmental effects.

Commentators had speculated for some time that a likely NEPA issue for the Supreme Court's attention would be the appropriate standard of review. Before Marsh, the Court declined three times to grant certiorari to decide the question of which standard applies to the initial decision of whether an EIS should be prepared (the so-called threshold determination). The Court's opinion in Marsh failed to settle the entire issue. The Court did not directly state whether the baseline arbitrary and capricious standard it applied to the supplementation question also applies to threshold determinations and other contexts under NEPA. At least one commentator believes that the opinion in Marsh indicates that the arbitrary and capricious standard would apply to initial EIS de-

195. Id. at 375-77.
196. Id. at 378 (relying on the Court's observations in Overton Park, 401 U.S. at 416).
197. Id.
198. Id. at 378-85.
199. Id. at 385.
200. Id. at 376-77.
201. See Marsh Respondents' Brief, supra note 17, at 14-16.
202. One author had stated that "recent Supreme Court decisions make it possible to argue that some of the early NEPA cases were wrong and should be abandoned" and "the most obvious candidate is the 'reasonableness' standard for reviewing threshold determinations." Murchison, supra note 10, at 604.
203. Morningside Renewal Council, Inc. v. United States Atomic Energy Comm'n, 482 F.2d 234 (2d Cir. 1973), cert. denied, 417 U.S. 951 (1974) (Douglas, J., dissenting); Gee v. Hudson, 746 F.2d 1471 (4th Cir. 1984), cert. denied, 471 U.S. 1058 (1985) (White, J., dissenting); River Rd. Alliance v. Army Corps of Eng'rs, 764 F.2d 445 (7th Cir. 1985), cert. denied, 475 U.S. 1055 (1985) (White, J., dissenting). NEPA challenges are often divided into three categories: challenges based on an allegation that an EIS should be prepared in the first instance, a so-called threshold determination; others based on claims that an EIS which has been prepared is inadequate; and finally, challenges based on the merits of the decision to proceed with a project. A further distinction is made between the remedies involved, which in threshold determinations and adequacy challenges usually either initiate or prolong the EIS process as opposed to halting the project altogether. See F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION, LAW AND POLICY 752-53 (1984).
204. See Marsh, 490 U. S. at 375-76.
terminations as well. Nevertheless, there is room to argue that a different standard should be applied. Courts could more easily engage in stricter review of agency decisions that occur during the early stages of a project. As the project moves forward, gaining momentum, courts understandably are reluctant to halt or delay a large project. However, according to some, the point is not worth laboring. Justice Stevens asserted in a footnote that distinctions between standards of review are “not of great pragmatic consequence.”

Since Kleppe v. Sierra Club, where the Supreme Court first invoked the hard look doctrine in the context of NEPA, the Court has continually emphasized deference to agency discretion, increasingly interpreting standard of review doctrine against the backdrop of agency expertise. NEPA, with its insistent demands for an ongoing process, arguably provides a competing framework to the APA. The environmental policy underlying the impact statement requirement gives the full disclosure mandate its force and justifies elevated scrutiny. A doctrine advocating perfunctory review of NEPA prohibits courts from probing the entire record to identify the choices made by the agency, asking whether the agency disregarded legislative intent, or inquiring whether the agency, in the words of Judge Leventhal, has made a “reasonable assessment of the interrelated policy and legal questions.”

CONCLUSION

In an era increasingly characterized by a credo of judicial restraint, the Methow Valley and Marsh cases seem to complete Vermont Yankee's relegation of judicial review of NEPA decisionmaking to a narrow APA

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205. See Mandelker, supra note 134, at 10,386-87.
206. Justice Stevens cites several cases in a footnote which seem to indicate that courts engage in different levels of review at various stages in the life of a project. Marsh, 490 U.S. at 377 n.23. The circuit court cases he cites for applying a reasonableness test involved supplementation, whereas when Stevens discusses standard of review more generally, he cites to language in cases dealing with questions other than supplementation. Id. One could deduce that courts implicitly recognize meaningful differences between review of proposed or ongoing projects under NEPA. However, the cases Justice Stevens cites reveal an odd pattern: they apply a stricter standard at a late stage, when most of the environmental analysis should theoretically be complete. In any case, the Supreme Court has not explicitly recognized the distinction, and Justice Stevens himself dismissed the issue as academic. See id.
207. Cases decided by the Ninth Circuit illustrate this pattern. See infra note 220.
208. 490 U.S. at 377 n.23 ("Moreover, as some of these [circuit] courts have recognized, the difference between the 'arbitrary and capricious' standard and the 'reasonableness' standard is not of great pragmatic consequence.").
209. 427 U.S. 390, 410 n.21 (1975) ("The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' “ (citing Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972))).
210. See supra notes 66-68 and accompanying text.
211. See supra note 27 and accompanying text.
212. Leventhal, supra note 27, at 541.
Agencies will waste no time in arguing that courts should apply the arbitrary and capricious standard in all NEPA cases, and will attempt to equate it with automatic deference to agency decisionmaking. The Court nevertheless has reaffirmed the full disclosure mandate necessary to implement the broad policy goals of the statute, and emphasized the important role for public involvement in realizing NEPA’s aims. Further, it has stressed the importance of agencies applying a “hard look” to questions of environmental impact.

According to one view, the Court was simply anxious to slap the Ninth Circuit’s hand for reaching too far into the facts, raising the specter of a substantive NEPA. Like past Supreme Court NEPA holdings, Methow Valley and Marsh can be confined to their particular facts. Also, the Court did not overrule any existing case law beyond the issues heard in each case. NEPA’s procedural mandates of full disclosure and public participation remain the enforceable expression of NEPA’s substantive goals. However, the Court still has declined to clarify how far the Ninth Circuit and other courts may expand or constrict those procedural requirements.

Several avenues remain open for courts seeking to enforce NEPA’s requirements. First, even the most deferential formulations demand “adequate” administrative records. Second, although courts have been

213. But see Sheldon, NEPA in the Supreme Court, 25 LAND & WATER L. REV. 83, 89 (1990) (arguing that Vermont Yankee was out of sync with developments within the field of environmental law). The author asserts that Vermont Yankee did not reverse the trend of Congress and the courts to look outside the narrow APA framework when analyzing issues involving environmental concerns. Id. at 90.

214. See, e.g., Federal Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, Nat’l Wildlife Fed’n (NWF) v. Western Area Power Admin. (WAPA), No. 88-C-1175-G (D. Utah 1989) (challenge to WAPA’s Finding of No Significant Impact in connection with promulgation of regulations governing power marketing criteria). The brief is replete with references to the “heavy burden” of plaintiffs challenging government action pursuant to NEPA under the arbitrary and capricious “deferential standard of review dictated by Marsh.” See id. at 15, 30. However, the court ruled that the agency could not proceed until it completed an EIS. NWF v. WAPA, No. 88-C-1175-G (D. Utah 1989) (court order).


216. The Court in Marsh and Methow Valley did not use the term “hard look” when discussing judicial review of agency action, but instead used the term to describe the agency’s duty under NEPA. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989); Methow Valley, 490 U.S. at 352.

217. The facts in Marsh highlight one of the most important recurring criticisms of NEPA in the courts: that judicial “interference” in the EIS process raises the specter of unending review. The message of the decision could therefore be characterized as a warning, with an unquantifiable effect: “drawing a line in the sand [where] judicial inquiry is over at some point.” Telephone interview with Mike Gippert, Deputy Assistant Counsel, Office of General Counsel, U.S. Department of Agriculture (Dec. 19, 1989).

more wary of requiring agencies to supplement, they more rigorously enforce initial EIS preparation. Finally, judges still must determine whether the agency "fairly evaluated" environmental consequences and if the agency has made a "reasoned decision." Since the Supreme Court decisions were handed down, they have engendered varied if not inconsistent application of NEPA doctrine in the lower courts, reflecting the ambiguities and opportunities for more active review contained in the Court's decisions. The greatest disparity in analysis predictably emerges in discussions of standards of review.

Acknowledging that "the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs" does not answer the question in any given case of how well the agencies and the


219. See, e.g., Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988) (unsuccessful challenge to adequacy of final EIS on Arizona water project); No Gwen Alliance of Lane County, Inc. v. Aldridge, 855 F.2d 1380 (9th Cir. 1988) (unsuccessful challenge to Air Force environmental assessments of radio tower construction; plaintiffs claimed that generic assessments failed to address impacts of nuclear war). In Animal Defense Council, the court did not require supplementation of the EIS when "the administrative record was fully developed and open for public comment prior to the [agency's] decision." 840 F.2d at 1436.

220. See, e.g., Save the Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988) (requiring preparation of EIS to address roadbuilding in the Kootenai National Forest in Montana); Sierra Club v. U.S. Forest Service, 843 F.2d 1190 (9th Cir. 1988) (granting preliminary injunction to halt timber sales and remanding to district court to determine adequacy of forestwide EIS); LaFlamme v. Federal Energy Regulatory Comm'n, 852 F.2d 389 (9th Cir. 1988) (holding unreasonable agency's decision not to prepare an EIS for a hydroelectric project). The Forest Service in Sierra Club failed to address numerous issues in nine timber sales which had sparked considerable public controversy. 843 F.2d at 1195 ("testimony raises substantial questions as to whether the sales may significantly affect [sic] the human environment"). The threshold determinations at issue in Save the Yaak and LaFlamme triggered the EIS requirement without much discussion beyond the acknowledgement that plaintiffs questioned why the agency failed to address the "significance" of the action. Save the Yaak, 840 F.2d. at 717; LaFlamme, 852 F.2d at 1069.


223. See supra notes 139-41, 196-201 and accompanying text. For example, one extreme and presumably anomalous opinion held that there is no duty to describe mitigation measures. Collin County, Tex. v. Homeowner's Ass'n, 716 F. Supp. 953, 970 (N.D. Tex. 1989) (citing Methow Valley, 109 S. Ct. at 1847).

224. See, e.g., Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1422 & n.4 (9th Cir. 1989) (applying arbitrary and capricious standard to decision whether to supplement an EIS, and interpreting Marsh as equating reasonableness standard with lesser degree of deference to agency); Morgan v. Walter, 728 F. Supp. 1483, 1487 & n.7 (D. Idaho 1989) (holding that Marsh did not change reasonableness standard as applied to threshold NEPA decisions, and conceding result would be different if arbitrary and capricious standard were to apply); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 & n.20 (11th Cir. 1990) (applying arbitrary and capricious standard to review of agency NEPA action and agreeing with dicta in Marsh opinion that there is little discernible difference between the two standards).

public are kept informed of, and understand, those costs. NEPA’s disclosure mandate should not only work to generate particularized data at the project level, but should also reveal the tradeoffs in which the decisionmaker engages along the way. If NEPA does set enforceable standards of environmental protection through its procedural disclosure mechanisms, it is still up to the judiciary to give those standards expression. In this sense, even though the Supreme Court pointedly emphasizes that NEPA is “essentially procedural,” courts cannot entirely avoid review of substantive agency decisions where procedural compliance is defined as consideration of environmental effects.

Although lower courts may continue to enforce NEPA if they tailor decisions to the Supreme Court’s recent cases, what concerns critics is the emergence of an alternative vision of NEPA, one in which conformity to procedure replaces sound environmental planning. They fear that by consistently confining NEPA review within general administrative law principles, the Court is stifling expression of the statute’s underlying goals. If the legal analysis of NEPA compliance is no different from review of any agency action under the APA, then NEPA may become superfluous. However, because strong constituencies still seek vindication of NEPA’s policy goals in the courts, competing visions of NEPA will continue to permeate the judicial response.

Criticisms raised shortly after NEPA’s enactment, that the statute would fail to promote environmental values because it lacked appropriate


227. Caldwell, supra note 8, at 18. Professor Caldwell argues that because the executive branch has abrogated its responsibility to enforce NEPA, the public has been forced to turn to the courts. Id. at 21. According to Caldwell, beginning with Vermont Yankee, the Supreme Court ignored the “to the fullest extent possible” language in NEPA, thereby narrowing the scope of the statute. Id. Therefore, the statute has only served as a damage control mechanism, and “environmentally destructive projects are still being proposed.” Id. at 22. Others worry that the recent cases may render NEPA toothless. France, NEPA — the Next Twenty Years, 25 LAND & WATER L. REV. 133, 134 (1990) (recent decisions undermine NEPA as a tool to protect the environment); Sheldon, supra note 213, at 96 (characterizing the Methow Valley holdings on mitigation as “trivializing” core aspects of NEPA).


229. An October 1990 LEXIS search for references to Methow Valley and Marsh in lower court decisions found that many courts cited the two cases in support of general propositions of deference to agency decisionmaking unrelated to NEPA. For example, Methow Valley is cited for the principle that an agency’s interpretation of its own regulations is controlling. See, e.g., Armstrong v. Palmer, 879 F.2d 437, 440 (8th Cir. 1989); Quang Van Han v. Bowen, 832 F.2d 1453, 1458 (9th Cir. 1989); Citizens for Fair Utility Regulation v. United States Nuclear Regulatory Comm’n, 898 F.2d 51, 54 (5th Cir. 1990). Marsh was cited in reference to its recitation of the Overton Park test, where it considered whether there had been a consideration of the relevant factors or a clear error of judgment. See, e.g., Michigan Consol. Gas Co. v. Fed. Energy Regulatory Comm’n, 883 F.2d 117, 121 (D.C. Cir. 1989). Marsh has also been cited to support a holding based on the rationale of agency expertise. National Fisheries Inst., Inc. v. Mosbacher, 732 F. Supp. 210, 223 (D.D.C. 1990).
incentives for agency compliance, are perhaps even more cogent now.\textsuperscript{230} But, as a first attempt to incorporate an environmental ethic into public decisionmaking, NEPA may have constituted the best politically feasible solution.\textsuperscript{231} Ideally, with a structure of environmental planning in place, Congress could make implementation of that planning dependent on the attainment of substantive environmental goals. Particularly where NEPA functions in conjunction with other environmental laws, that ideal is to some degree realized.\textsuperscript{232} However, in cases where no other law reinforces NEPA's planning ethic, the Supreme Court has weakened NEPA's thrust.

Congress so far has allowed the turmoil over NEPA to occur in the judicial arena and has remained essentially silent since the statute was enacted.\textsuperscript{233} Recent efforts to infuse more substantive environmental protections into NEPA show that congressional interest may be reawakening.\textsuperscript{234} There are also indications that the CEQ may take on a revitalized role, including a new focus on the President's role in enforcing NEPA.\textsuperscript{235} The detailed CEQ regulations flesh out and in many respects give a concrete voice to the section 101 mandate to minimize environmental harm, and since \textit{Andrus v. Sierra Club}\textsuperscript{236} the Court has been receptive to a stronger role for the executive branch. Finally, proposals to amend the Constitution to create a right to environmental protection have resurfaced as a source of political pressure.\textsuperscript{237}

\begin{footnotesize}
\begin{enumerate}
\item See Sax, \textit{The Unhappy Truth About NEPA}, 26 \textit{Okla. L. Rev.} 239 (1973). Professor Sax doubted whether NEPA would accomplish rational, environmentally sound planning because the statute did not provide any incentive for full compliance, such as tying agency action to the appropriations process. \textit{Id.} at 240-41.
\item Marcel, \textit{supra} note 26, at 459 (ambiguity of environmental statutes reflects difficulties inherent in anticipating problems) (citing K. Davis, \textit{Administrative Law Treatise} § 3.3 (2d ed. 1978)); Note, \textit{supra} note 91, at 740.
\item Keiter, \textit{supra} note 19, at 47, 60 (NEPA procedures can implement laws with substantive environmental mandates).
\item See Leventhal, \textit{supra} note 27, at 515-16. Judge Leventhal discusses the courts' balancing act in supervising compliance while not intruding into the agency's area of discretion, where, as in the case of NEPA, Congress has been loath to assume a primary review function. \textit{Id.} at 516, 542-43.
\item See, e.g., \textit{Senate Comm. on Env't and Pub. Works, Authorizing Appropriations for the Office of Environmental Quality for Fiscal Years 1987-89}, S. Rep. No. 502, 100th Cong., 2d Sess. 2 (1988). The report accompanied S. 1792 and proposed a "status-quo requirement" to enforce "substantive" duties created by NEPA. \textit{Id.} at 2-3. It also proposed an amendment to eliminate the need for further judicial balancing where the procedural commands have been violated and the harm is to the decisionmaking process itself. \textit{Id.}
\item See \textit{CEQ to Work Closely With White House, EPA To Define Its Focus, New Chairman Deland Says}, 20 \textit{Env't Rep. (BNA)} 688 (Aug. 18, 1989) (increased funding for CEQ and presidential reassurance that would "rejuvenate" CEQ).
\item 442 U.S. 347 (1979).
\item As early as 1969, in a joint resolution, several representatives and Senator Gaylord Nelson proposed an environmental rights amendment to the Constitution. Presently, an effort to determine the feasibility of a grassroots campaign is underway. See \textit{National Wildlife Federation, The 1990's: The Decade of the Environment}; \textit{Time for Constitu-}
\end{enumerate}
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Public commitment to values of environmental protection certainly will not abate. Judge Skelly Wright in the early 1970's referred to agency decisionmaking in environmental matters as having "a special claim to judicial protection." Beyond embracing NEPA's policy goals in very general terms, the Supreme Court's reception of the statute can be expressed as lukewarm at best. Marsh and Methow Valley leave open the question of what remains of the link early appellate court decisions forged between a somewhat inchoate congressional purpose and active judicial enforcement. The courts still will play an important role in enforcing NEPA. However, the Marsh and Methow Valley decisions may teach that the center of gravity in the effort to infuse environmental values into federal policies already has shifted unalterably from the judiciary to other branches of government. Adding substantive provisions to NEPA is an obvious first step towards heightened protection of the environment.

TITIONAL ACTION (1990) (pamphlet); see also Caldwell, supra note 8, at 22.

