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THE DEVOLUTION OF NEPA: HOW THE APA TRANSFORMED THE NATION’S ENVIRONMENTAL POLICY

SAM KALEN*

INTRODUCTION

The slow development of case law on the subject of man’s right to live in quality surroundings is unfortunate. No matter how good the intentions, actions, and end products of legislative bodies, those bodies cannot legislate on all matters essential to environmental quality. At best, they can state the goals of society with respect to the type of environment we want for ourselves and future generations, and enact policies which appear to maximize the likelihood that those goals will be attained. But there will always be many specific fact situations which the legislative bodies do not anticipate or deal with; in those situations the public interest should not be ignored merely because the situations were not foreseen.¹

As the National Environmental Policy Act of 1969 (“NEPA”) approaches its fortieth anniversary,² it seems only fitting—in a world standing on the precipice of various environmental crises, ranging from climate change to the dramatic depletion of marine resources—to reflect on the past and potential future of NEPA. Shortly after Congress passed

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the Act, the House congressional committee with jurisdiction over NEPA described the law as revolutionary in intent and designed to steer this Nation on a course of environmental management. Early reactions to the Act suggested that it would become the environmental Magna Carta. NEPA has spurred countless lawsuits, put innumerable lawyers and consultants to work, and, by most accounts, produced a much more environmentally informed federal bureaucracy. Yet it has achieved those “successes” at the same time that it has become accepted as yet another “procedural” statute. Courts and commentators alike parrot the common refrain that NEPA is a procedural statute, it does not demand any substantive outcome. Approximately two and half years after President Nixon signed NEPA into law, Justice Douglas predicted what he called the ultimate demise of NEPA. But just how Justice Douglas’s prediction became true is not uniformly known. This article, therefore, explores how NEPA became what it is today, a “procedural” statute.

The need for this exploration is of continuing relevance. At almost forty, NEPA has endured early attacks, years of scrutiny, task forces and congressional oversight—all without any substantial change.

It weathered the 1970s energy crisis battered, but far from beaten. Today, NEPA can help address what is ostensibly the most significant environmental problem in our history—climate change. In its newest application, one fundamental question surfaces: does NEPA have sufficient or additional capacity to ensure that federal activities are governed by the principle of sustainability? Without the inclusion of sustainability, NEPA cannot become a useful tool to blunt any further increase in greenhouse gas emissions generated as a consequence of federal actions.

NEPA may have the power to face the task. Richard N. L. Andrews aptly observed that "U.S. environmental policy today must recover an essential missing element: a broadly shared vision of the common environmental good." That shared vision is what Congress intended to reflect in NEPA, when it sought to establish a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding


In 2002, a Bush Administration task force explored the possibility of infusing the Act with new ideas. See NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION (2003). No action has yet been taken on the Task Force report, and recent congressional hearings on NEPA similarly have left the statute intact. See LINDA LUTHER, CRS REPORT FOR CONGRESS, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION CRS-34 -35 (2008), available at http://www.enviro-lawyer.com/NEPASummary.pdf; see also NATIONAL ENVIRONMENTAL CONFLICT RESOLUTION ADVISORY COMMITTEE, FINAL REPORT: SUMMARY (2005).


10 See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007), opinion vacated and superseded on denial of rehearing 538 F.3d 1172 (9th Cir. 2008)).

of the ecological systems and natural resources important to the Nation . . . .12

Although sustainable development is not explicitly mentioned in NEPA, the principle that development must satisfy the needs not only of the present but also future generations is undoubtedly imbedded in NEPA's directive.13 The Supreme Court's crabbed interpretations of the Act as a procedural statute suggest that the Court did not appreciate or understand the Act itself or what Congress intended.14 Some observers lament the Court's treatment of the Act, particularly during the 1970s,15 and urge that the Act embrace new approaches.16 Only soluble precedent

13 One of NEPA's directives is that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
NEPA's Devolution prevents a critical reexamination of whether NEPA's directive to use all practicable means to ensure harmony between nature and present and future generations is a substantive standard for measuring the appropriateness of agency decisions.¹⁷

If we conclude that the Act provides sufficient flexibility to accommodate the now mainstream acceptance of sustainability as a shared vision and policy that animates decisions by federal agencies, and that NEPA balances values with that policy directive in mind, then the Act could become a more effective mechanism for ensuring that our already stressed natural systems are not unduly compromised.¹⁸ Two reasons illustrate why the Act might be of particular relevance in the context of sustainable development. First, focusing on the environmental policy and

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One way that some believe the Act could be strengthened is with more effective follow-up monitoring of decisions and the use of adaptive management to mitigate unanticipated or incorrectly assumed impacts. See Hodas, supra note 15, at 188-91; Bradley C. Karkkainen, Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance, 102 COLUM. L. REV. 903, 970-72 (2002); Robert B. Keiter, NEPA and the Emerging Concept of Ecosystem Management on the Public Lands, 25 LAND & WATER L. REV. 43, 46-54 (1990); Julie Thrower, Comment, Adaptive Management and NEPA: How a Nonequilibrium View of Ecosystems Mandates Flexible Regulation, 33 ECOLOGY L.Q. 871, 884-95 (2006). Bradley Karkkainen suggests that NEPA requires a shake-up, and he focuses less on the need for any substantive management and more on a need to recognize that the Act demands too much clairvoyance and should instead incorporate empirical testing, follow-up monitoring, and adaptive management. Karkkainen, at 908, 948. His suggestions are consistent with the Council on Environmental Quality's own observations. COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS 32-33 (1997).

While I agree with these observations, such an approach requires identifying, at the outset, some principles generating the need to test, monitor, and adapt. If the Act is simply an information disclosure statute, focused on a public dialogue revolving around the impossible task of predicting the future, then why would there be a need to test, monitor, and adapt?

¹⁷ One of the principals involved in NEPA's development argued many years after the Act's passage, that the purposes of the Act had not yet been fully realized, in large measure because the Act's substantive mandate had been lost. CALDWELL, supra note 8, at 145-72.

goals of NEPA might allow the Act to become malleable enough to address an evolving understanding of how agency decisions affect the environment. Second, acknowledging NEPA's inherent preference for sustainability should force agencies to assign values to the complex interaction among environmental, economic and social equities involved in their decisions. The assignment of values allows for a better understanding of the relative impact of agency actions. In fact, the industry of ecosystem services has developed to perform precisely such a task. Some federal agencies already incorporate such valuations when following other legislative mandates, accordingly, agencies lack neither capability nor expertise to prevent the extension of ecosystem services to NEPA.

Yet, it all starts with the weak foundational base supporting NEPA's relegation to a procedural statute. When the Supreme Court first began to review cases involving an alleged violation of the Act, modern

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19 CALDWELL, supra note 8, at 147. The simple view that proposed federal actions are measured against their impact to a static existing environmental picture—the baseline—is somewhat dated. See Amy Siden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 593 (2007); A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1122-23 (1994); Jonathan Baert Weiner, *Beyond the Balance of Nature*, 7 DUKE ENVTL. L. & POLY' F. 1, 1 (1996). Ecological systems are dynamic and complex, making baseline comparisons rather inept at capturing the true impact of human intervention. Karin P. Sheldon, *Upstream of Peril: The Role of Federal Lands in Addressing the Extinction Crisis*, 24 PACE ENVTL. L. REV. 1, 6 (2007) ("We now know that the equilibrium paradigm is wrong. Ecosystems are dynamic, unpredictable, perhaps even chaotic."). For a discussion of how the current administration of NEPA generally follows a framework that assumes a "balance of nature" theory different than our modern understanding of the non-equilibrium paradigm, see Thrower, supra note 16.

20 Karkkainen, supra note 16, at 909.

21 Hodas, supra note 15, at 185 ("By using estimates of ecosystem service values in project appraisals, the loss of ecosystem services could be weighed against the benefits of a specific project to estimate the true societal cost of the project.").


23 Robert Fischman suggests that the Environmental Protection Agency, through the use of its Clean Air Act § 309 authority, could provide guidance for integrating ecosystem services into NEPA documents. Robert L. Fischman, *The EPA's NEPA Duties and Ecosystem Services*, 20 STAN. ENVTL. L.J. 497, 508-10 (2001). He appears to recognize, however, that the courts' stripping of NEPA's substantive mandate is what potentially makes the application of ecosystem services in the NEPA context somewhat discretionary. Id. at 506.
NEPA's Devolution

principles of administrative law had yet to crystalize. Appreciating this fact is important for two reasons. First, Congress could not have anticipated how the Court would interpret the Administrative Procedure Act ("APA") or NEPA. Congress most likely intended that its newly adopted national policy for the environment would not create a private cause of action against individual polluters. As such, the final language of NEPA only provides that "Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

This language originally would have provided "each person has a fundamental and inalienable right to a healthful environment." This change by today's standards may appear unexceptional, but in the late 1960s, Congress had not passed environmental legislation such as the Clean Water Act, the Clean Air Act or the Endangered Species Act, which include citizen suit provisions. In addition, the developing environmental bar in the late 1960s anxiously explored all avenues for securing judicial relief against industrial polluters.

But, it would be a mistake to confuse Congress's apparent rejection of polluter targeted citizen suits under NEPA with how federal agency

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24 McGarity, supra note 15, at 570.
26 42 U.S.C. § 4331(c) (2000 & Supp. V 2005); see also Liroff, supra note 5, at 27 (explaining how the language became modified).
27 Liroff, supra note 5, at 16 (internal citation omitted).
29 In one of the first environmental textbooks, the authors explored a host of new theories to support a private cause of action, such as the Ninth Amendment to the Constitution, the public trust doctrine, and the Civil Rights Act. VICTOR J. YANNACONE, JR., BERNARD S. COHEN & STEVEN G. DAVISON, ENVIRONMENTAL RIGHTS AND REMEDIES 9-11 (1972). These authors observed that "[t]he basic element is recognition by our courts that the public has an absolute right to a salubrious environment . . . ." Id. at 9. Their observation occurred shortly after parties were generally unsuccessful in bringing qui tam (private attorney general) lawsuits against industrial polluters for alleged violations of the Rivers and Harbors Act. See Sam Kalen, Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands, 69 N.D. L. REV. 873, 884 n.62 (1993). Their focus on the public trust doctrine, however, coincided with Joseph Sax's path-breaking law review article on the doctrine. Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970).
decisions would be reviewed by the courts. Many administrative law concepts that today are second nature had yet to develop, and nothing suggests a prescient Congress. Could citizens challenge governmental action? Would a court afford standing to a party claiming that an agency's decision adversely affected the environment? If courthouses were opened to citizens, what would be legitimate grounds for a challenge? Would a party have to claim that an agency acted contrary to some clear statutory prescription and, as such, acted *ultra vires*? Rather, could a party claim that, while an agency may have had authority to act, it acted in an unreasonable manner? Would an agency have to develop an administrative record, and would it have to issue some document memorializing the reasons for its decision? When would an agency's conduct be challengeable in court? Would the challenge require a typical trial, with testimony and cross-examination of agency witnesses? Moreover, how would a court review the merits of a challenge to an administrative decision? These issues and more were well beyond the horizon when Congress passed NEPA. It would be unreasonable, therefore, to expect that Congress appreciated and addressed each of these questions when it directed a new national environmental policy.

Consequently, the courts had to meld NEPA's application into APA jurisprudence. For the most part, this meant answering three separate questions: first, on what basis could a court review and assess an agency's compliance with NEPA's *procedural* requirements; second, how should courts interpret and apply Congress's *substantive* mandate that agencies use all practicable means to advance the goals of the Act; and third, how could parties challenge an agency's underlying implementation of its statutory program.30

In answering these questions, the 1970's Court would be writing on a clean slate. In one instance, the Court answered these question separately. When applying the Endangered Species Act, the Court concluded that the Endangered Species Act contains a substantive mandate, a procedural mandate, and that those two issues are independent of any review of the agency's implementation of its statutory program.31 But this was not the case with NEPA. Instead, the Court generally conflated all three questions,32 in an effort to cement its view of the

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30 For example, an analogous problem arises as to whether private citizens can challenge an agency decision to build a highway through a park on the grounds that the decision was arbitrary and capricious. See infra Part IV.A.
scope of judicial review under the APA. Although never independently or adequately argued to the Court, the question of NEPA’s substantive mandate became overshadowed by the Court’s insistence on focusing exclusively on the other two questions. This emphasis on the scope of judicial review transformed what could have been a meaningful national goal for environmental protection into a more subdued—albeit important—procedural statute that ensures that decisionmakers recognize the environmental consequences of their actions and articulate their decisions in light of those consequences.

To illustrate how the Court transformed NEPA, Part I of this article briefly will review NEPA and its passage in Congress. This section does not focus too much on the history, however, because the Court itself never engaged in any critical examination of Congress’s intent. The article hopes to demonstrate that the Act’s broad language provided courts with the opportunity to explore that intent, but they never meaningfully did so. Part II will illustrate how the language of the Act provided a range of possibilities for how the law could be administered and interpreted. Part III will then discuss how the D.C. Circuit, instrumental in developing administrative law principles, interpreted the Act to include a substantive component. Part IV will describe the Court’s path to procedure, illustrating how the Court dodged any meaningful inquiry into NEPA by instead addressing newly emerging principles of standing and judicial review. In each of the cases, the Court conflated the separate questions presented by NEPA’s application to administrative decision making. Finally, Part V of the article will discuss how the Court closed the first decade of the Act with a decision that firmly interred any lingering hope for a substantive mandate under the Act, but it did so with strikingly little reason to believe that its holding warrants avoiding any need for a re-examination. The final section summarizes and concludes that the path for reviving NEPA’s potential runs through the agencies themselves.

34 See id. at 566-67; see infra Part IV.E.
I. THE PINNACLE: CONGRESS PASSES THE NATIONAL ENVIRONMENTAL POLICY ACT

"From all indications 1969 was the magic year for news of the environmental crisis."\(^{36}\) It was the year that Congress passed NEPA, one of the most significant environmental acts ever passed according to many.\(^{37}\) Its transformative nature influenced many states to adopt their own state version of the Act, and several other countries followed suit as well.\(^{38}\) With its passage, the environmental movement gathered momentum.\(^{39}\)

Considerable history presaged the passage of NEPA.\(^{40}\) Throughout the 1950s and 1960s, our society, including Congress, became acutely aware of the growing environmental crisis.\(^{41}\) By 1966, the need for Congress to act prompted Lynton Caldwell, a prominent professor of Public and Environmental Affairs at Indiana University, to write the Senate Committee on Interior and Insular Affairs and urge the passage of a then pending bill that would have facilitated "better organization


\(^{37}\) Karkkainen, supra note 16, at 904 n.1.


and reinforcement of research on conditions of our natural environment."\(^{42}\)

But during these formative years, the critical issue became which committee—or more precisely, which Senator—would carry the cudgel. Senator Henry "Scoop" Jackson’s close advisor, William J. Van Ness, developed a legislative game plan that would vest authority with Senator Jackson, as Chair of the Senate Committee on Interior and Insular Affairs.\(^{43}\) Senator Muskie, by contrast, had been the principal architect of many of the media specific environmental programs, such as for clean air and water.\(^{44}\) Further, both of these Senators would soon be in a race for the Democratic Presidential nomination.\(^{45}\) Van Ness wrote a memorandum outlining the need for environmental legislation.\(^{46}\) In this memorandum, Van Ness explained that "environment" was at least a useful, if not necessary focus of public policy and that the time appeared ripe for a legislative proposal:

The fact that there has not been a comprehensive national environmental policy, and that our past institutional arrangements have been better adapted to exploitation of the environment than to its rational planned use, protective custody and self-renewing development does not mean that there should not or will not in the future be an environmental policy.\(^{47}\)

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\(^{42}\) Shelton, supra note 40, at 77. Caldwell’s letter drew from his seminal article on the role of environmental issues in public policy written three years earlier. Id.; see also Lynton Caldwell, Environment: A New Focus for Public Policy, 23 PUBLIC ADMIN. REV. 132 (1963).


\(^{46}\) 113 Cong. Rec. 36,856 (1967); see also 115 Cong. Rec.3699 (1969) (statement of Sen. Jackson) (discussing influence of Professor Caldwell's scholarship).

\(^{47}\) 113 Cong. Rec. 36857 (1967).
He then attached to the memorandum a draft of proposed legislative language, which he hoped would "bring into focus the overall nature of the environmental quality problems faced by the Nation and provide the research and leadership necessary for their resolution." This memorandum later accompanied Senator Jackson's introduction of proposed legislation in December, 1967.

Although numerous bills were introduced in both the House and Senate during 1968 and 1969, the two principal bills that emerged were S. 1075, introduced by Senator Jackson on February 18, 1969, and H.R. 12549, sponsored by Congressman John Dingell and others on July 1, 1969. During a hearing on S. 1075 in April 1969, Professor Caldwell first introduced the idea of adding a new element into the existing legislative proposals. Professor Caldwell suggested the legislation include some action forcing mechanism, which ultimately became § 102 of the Act.

The Senate passed S. 1075 on July 10, 1969 and referred the bill to the House of Representatives, which had already conducted hearings on Congressman Dingell's bill. The House passed H.R. 12549 on September 23, 1969, after which the two houses convened a conference

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48 Id.
49 113 CONG. REC. 36849-57 (1967). The following year, in 1968, Senator Jackson and others convened a colloquium on the need for developing a uniform approach to national environmental policy, which led to a report drafted by Professor Caldwell, with the assistance of Van Ness and the Legislative Reference Service of the Library of Congress. STAFF OF S. COMM. ON INTERIOR AND INSULAR AFFAIRS, 90TH CONG., NATIONAL POLICY FOR THE ENVIRONMENT. A REPORT ON THE NEED FOR A NATIONAL POLICY FOR THE ENVIRONMENT: AN EXPLANATION OF ITS PURPOSE AND CONTENT; AND EXPLORATION OF MEANS TO MAKE IT EFFECTIVE; AND A LISTING OF QUESTIONS IMPLICIT IN ITS ESTABLISHMENT, TOGETHER WITH A STATEMENT BY SEN. HENRY M. JACKSON IV (Comm. Print 1968). Bill Van Ness had hired Professor Caldwell, through the services of the Conservation Foundation, to assist the Committee and hopefully provide academic clout to the Senator's proposal. Personal Communications with William J. Van Ness, Advisor to Sen. Jackson (on file with author). Russell Train, the then President of the Conservation Fund, recalls that Mr. Caldwell was part of a small Foundation advisory board. Environmental Protection Agency, Russell E. Train: Oral History Interview, http://www.epa.gov/history/publications/print/train.htm (last visited Mar. 2, 2009).
51 See 115 CONG. REC. 9197-200 (1969) (reproducing Professor Caldwell's statement).
52 Id. at 9199. Liroff notes that the committee staff already had been considering the idea of some action forcing mechanism, and that Professor Caldwell "lent new impetus to their considerations." Liroff, supra note 5, at 16.
53 LUTHER, supra note 8, at 3.
committee to reconcile the competing House and Senate proposals. Other Senators, not on the conference committee, raised concerns about the role of agencies policing themselves on environmental matters. The conference recommended solicitation of comments on proposed actions by other air and water pollution control agencies. Ultimately, the conference committee reported its recommendation, and in December, both houses passed the legislation, which President Nixon signed on January 1, 1970.

As passed, NEPA contains three principal parts. First, Title I of the Act declares a national environmental policy and establishes goals. Congress declared, in part:

> it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Congress also “authorize[d] and direct[ed], to the fullest extent possible,” that all policies, regulations and laws of the United States be interpreted and administered in accordance with the policies of the Act. Congress separately required agencies to “identify and develop methods and procedures” for ensuring that “presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations.” In § 103 of

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54 Id. at 5-6.
56 Id. at 29054-56.
57 115 CONG. REC. 39701 (1969); 115 CONG. REC. 40415 (1969); see Daniel A. Dreyfus & Helen M. Ingram, The National Environmental Policy Act: A View of Intent and Practice, 16 NAT. RESOURCES J. 243, 243 (1976). One of NEPA’s draftsmen on Senator Jackson’s committee later recounted that “[t]here are few clues in the legislative history concerning what NEPA’s Congressional authors expected impact statements to look like.” Id. at 256.
60 42 U.S.C. § 4332(B) (2000 & Supp. V 2005). Agencies also are instructed to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man’s environment.” 42 U.S.C. § 4332(A) (2000 &
the Act, Congress directed agencies to review their statutory authorities and policies to determine if any "deficiencies or inconsistencies" existed with NEPA.\textsuperscript{61} Agencies had to report any authorities or policies which might "prohibit full compliance with the purposes and provisions" to the President by July 1, 1971, along with "measures . . . necessary to bring their authority and policies into conformity with the intent, purposes, and procedures" of the Act.\textsuperscript{62}

Second, Title I contains an action-forcing mechanism, requiring the preparation of a "detailed statement," now referred to as an Environmental Impact Statement ("EIS"), for any "proposals for legislation [or] other major federal actions significantly affecting the quality of the human environment . . . ."\textsuperscript{63} As part of any EIS, an agency must address:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between the local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.\textsuperscript{64}

Third, Title II of the Act authorized the establishment, in the Executive Office, of a Council on Environmental Quality ("CEQ").\textsuperscript{65} The establishment of the CEQ illustrates the unique political circumstances

\textsuperscript{62} Id.
\textsuperscript{64} Id. Congress directed that, prior to any EIS, agencies consult with and solicit the views of Federal, State and local environmental agencies, and provide any such comments to the public and to the Council on Environmental Quality. Id. Independent of any EIS, agencies also must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E) (2000 & Supp. V 2005).
surrounding the passage of NEPA. To begin with, President Nixon established an interagency Environmental Quality Council and a Citizens Advisory Committee on Environmental Quality, in an Executive Order issued on May 29, 1969. The House appropriators, however, refused to fund the council or the committee, noting that such a patchwork effort by the President to address environmental issues would not be productive and it would be better to wait for Congress. Congressman Dingell steadfastly believed that the CEQ needed a statutory mandate.

The concept of a CEQ was reportedly modeled after the Council of Economic Advisors, established by the 1946 Employment Act. The existing Citizens Advisory Committee, however, was concerned about its fate; as such, it requested that Senator Jackson include language in NEPA supporting the Advisory Committee, in addition to the CEQ. Senator Jackson agreed, and this became § 205(1) of the Act.

The CEQ gathered strength through other legislation. This additional legislation made 1970 appear to be the year of the environment. Although Congressman Richard L. Ottinger criticized these efforts as nothing more than “rhetoric without commitment” lacking any real detail or substance, President Nixon’s 1970 State of the Union

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66 Exec. Order No. 11,472, 34 Fed. Reg. 8693 (May 29, 1969). The Advisory Committee was chaired by Laurance Rockefeller and it superseded the earlier President’s Council on Recreation and Natural Beauty. Shelton, supra note 40, at 220. Senator Jackson allegedly opposed this effort by the President, and at least delayed the President’s issuance of the order for several months. LIROFF, supra note 5, at 21.


68 LIROFF, supra note 5, at 22-23. Liroff notes earlier bills creating a CEQ had been introduced in the 91st Congress. Id. at 24.


Address praised these enactments and discussed the need for further efforts to protect our environment. On March 5, 1970, the President issued Executive Order No. 11514, entitled “Protection and Enhancement of Environmental Quality,” conferring upon the CEQ the authority to coordinate NEPA and develop guidelines for the appropriate agencies. In a Saturday Review article in 1970, Barry Commoner wrote that “[t]he sudden public concern with the environment has taken many people by surprise,” adding further that “it is not so clear how the movement came about and where it is going.” But how courts would respond to this mushrooming concern for environmental protection when presented with a case involving NEPA was an open question.

II. NEPA: A STATUTE WHOSE MEANING HAD TO BE WRITTEN

As the government began implementing NEPA, nothing dictated how the Act would be applied or interpreted. The CEQ’s early guidance lacked executive mandate. Judge Friendly aptly observed that it is “so broad, yet opaque, that it will take even longer than usual fully to comprehend its impact.” Not surprisingly, different views of what the statute

78 Early guidance from the CEQ was not particularly helpful. The CEQ’s first interim guidelines, issued in April 1970 primarily reaffirmed NEPA and focused on the production of “detailed statements,” they also required strict and immediate compliance with the Act and added the concept of a draft environmental statement. ANDREWS, supra note 5, at 29-30. Other guidelines followed in 1971 and 1973. Id. at 34-38.
meant quickly surfaced. In May of 1970, Senator Jackson published a short article proclaiming that the “[t]he Act makes a concern for environmental values and amenities a part of the charter of every agency of the federal government.” Some observers believed that this meant that NEPA would become an environmental bill of rights, or at the very least expand agencies’ statutory mandates and perhaps force substantive outcomes. This approach arguably would have been consistent with Congress’s directive in 1972 to explore the possibility of an environmental court.

Others believed that NEPA might simply foster more environmentally informed decision-making than in the past, but not much else. In 1972, Chief Justice Burger presaged this approach, when he reviewed and reluctantly denied an application to stay a preliminary injunction in one of the earliest NEPA cases, observing:

Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These

World of Environmental Legislation, 6 NAT. RESOURCES LAW. 44 (1973) (discussing several important court decisions which give insight to some of NEPA’s unclear provisions and analyzing the administrative processes NEPA provides for).

81 Jackson, supra note 1, at 1079.

82 See Ronald B. Robie, Recognition of Substantive Rights Under NEPA, 7 NAT. RESOURCES LAW. 387, 387 (1974); see also Richard S. Arnold, The Substantive Right to Environmental Quality Under the National Environmental Policy Act, 3 ENVTL. L. REP. 50028, 50031-32 (1973) (noting that the first cases construing NEPA concluded that the Act provided a clear mandate for environmental protection reviewable in courts); Virginia F. Coleman, Possible Repercussions of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits, 3 NAT. RESOURCES LAW. 647 (1970) (arguing that NEPA might provide grounds for federal claims against polluters because it formally recognizes an interest in a healthy environment); Hanks & Hanks, supra note 35; Victor J. Yannacone, Jr., National Environmental Policy Act of 1969, 1 ENVTL. L. 8, 14 (1970) (asserting that NEPA’s most important aspect was the requirement that agencies’ policies, regulations and statutes be interpreted, “to the fullest extent possible,” in accordance with NEPA’s policies).


84 See Friedman, supra note 80, at 44 n.2.
developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task.

By 1974, an Environmental Law Institute author blandly stated that "NEPA does not guarantee that the course which is shown by the impact statement to be the least environmentally damaging will be followed." He noted that the lack of any standard, other than the APA's general standards for review, is what "leads to NEPA being termed a 'procedural' rather than a 'substantive' statute."

When Congress passed NEPA, general principles about the development of an agency administrative record and assurance of reasoned agency decision-making had yet to evolve. It is unlikely that those involved in the development of NEPA could foresee the future and predict the path that the Supreme Court would take in articulating such doctrines as the scope of review and standing. Aspects of then existing administrative law were discussed when NEPA was passed, but since

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87 Id. Huffman nevertheless observed that courts disagreed over the scope of review, with some courts allowing judicial review under the APA and others not allowing any review. See id. at 50002 n.5 (comparing cases which denied review such as Nat'l Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) and Conservation Council of N.C. v. Froehlke, 473 F.2d 664 (4th Cir. 1973) with those that allowed review like Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972), Envtl. Def. Fund v. Corps of Eng'rs, 470 F.2d 289 (8th Cir. 1972), cert. denied, 409 U.S. 1072 (1973); and Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971)). The availability of judicial review was an outstanding question during the 1970s. The Supreme Court had only recently decided Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), and whether compliance with NEPA was "committed to agency discretion" remained debatable. Indeed, during the second annual conference on NEPA sponsored by the Environmental Law Institute, political scientist Helen Ingram (Ms. Ingram worked with one of the Senate staffers who assisted Bill Van Ness in drafting NEPA, Daniel Dreyfus) suggested that perhaps there should be no judicial review of whether processes of NEPA are followed. Nan Stockholm, Verdict on EIS, 4 EPA J. 24, 25 (1978). Gus Speth, then at CEQ, rejected the idea. Id.
then what occurred was "a very intensive development" of those principles.\textsuperscript{88} Some, such as a co-chairman of the Sierra Club Legal Committee, although favoring a broad application of NEPA, nevertheless urged caution.\textsuperscript{89} Concerned that courts might react negatively if pressed too quickly, the co-chairman explained:

NEPA is what the courts and the environmental lawyers, governmental and private, will make of it. There is tremendous potential there. I hope—probably vainly—that the cases reaching the federal courts in the next two years will not immediately strain the outermost possibilities of the act. Judges feel a little more comfortable doing something that is only a little more than what the last Judge has done. If the courts are asked to make the leap all at once, I doubt they will do so. I am hopeful, however, that gradual common-law case-by-case type of development can make NEPA into something like an environmental Magna Charta.\textsuperscript{90}

III. THE D.C. CIRCUIT & \textit{CALVERT CLIFFS}

The development of NEPA did follow a common-law case-by-case approach, but only as a side show to the D.C. Circuit's and the Supreme Court's ultimate articulation of the role of the courts in reviewing agency actions under the APA. Prior to the 1970s, the D.C. Circuit had exercised jurisdiction over cases that are now tried in the District of Columbia court system (the equivalent state court system), and it was mostly known for its criminal law decisions.\textsuperscript{91} Congress finally removed its jurisdiction over local matters in 1970 and, as a court uniquely experienced to address challenges to federal agency decisions,\textsuperscript{92} it became poised to influence the course of administrative law.

\textsuperscript{90} Id.
\textsuperscript{92} Id. at 388-89; \textit{see also} Matthew Warren, \textit{Note, Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit}, 90 GEO. L.J. 2599 (2002).
Its rising prominence in the field of administrative law coincided with the emergence of federal agencies' greater reliance on new forms of administrative decision-making, such as rulemaking in lieu of adjudicatory hearings. The APA directed reviewing courts to explore whether, when rendering any final agency action, the agency acted arbitrarily or capriciously, abused its discretion, or otherwise acted contrary to law. The D.C. Circuit engaged in a campaign during the 1970s to afford meaning to this language and developed the "hard look" doctrine to provide courts with the justification for ensuring that an agency examined the relevant factors and articulated a satisfactory explanation for its decision.

Two opposing trends virtually assured that NEPA would play a prominent role in the court's effort to strengthen the APA. On the one hand, NEPA became an instant tool for plaintiffs intent on preventing environmentally harmful projects. By 1972, the Justice Department reported that NEPA cases "increasingly dominated the kinds of litigation handled by the General Litigation Section." NEPA produced more cases than any other environmental program in the 1970's.

Also, that a need would arise to interpret the breadth of NEPA became acutely necessary as a backlash against the statute surfaced in some of the Federal agencies. In a June 1971 speech, the Interior Department's Commissioner for the Bureau of Reclamation warned that...
NEPA was "being utilized . . . to build up a curtain of blind and unthinking opposition which could swamp the agencies . . . ."\textsuperscript{100} The Nixon administration arguably became hostile to the Act, nearly suggesting Congress amend NEPA.\textsuperscript{101} Gus Speth, then with the Natural Resources Defense Council, reported that "environmentalists have been greatly disturbed for the last six months about the decline of CEQ; it is no longer truly representing environmental interests."\textsuperscript{102}

This reluctance to embrace the law fully arguably intensified during the early 1970's energy crisis.\textsuperscript{103} The energy crisis either offered "cover" or a justification for the Nixon and Ford Administrations to focus on energy independence in lieu of promoting even further environmental programs.\textsuperscript{104} The Justice Department presciently observed that "[the] energy crisis will ultimately have some impact upon the future of environmental litigation."\textsuperscript{105}

Commenting in 1974 on environmental litigation, the Associate Editor of the Environmental Law Reporter observed that "[i]t is important to underline that a number of the developments that we see as being environmental developments really are developments in administrative law generally."\textsuperscript{106} The D.C. Circuit, in large measure, precipitated these developments.\textsuperscript{107} Its influence became apparent in \textit{Calvert Cliffs' v. AEC}, where the court provided the opening salvo for how courts should respond to allegations that an agency violated NEPA.\textsuperscript{108}

\textsuperscript{101} Id. at 336.
\textsuperscript{102} Id. at 345.
\textsuperscript{103} \textit{See} Cortner, \textit{supra} note 502, at 328-29; LIROFF, \textit{supra} note 5, at 58.
\textsuperscript{105} 1974 ATT'Y GEN. ANN REP. 124. The Department observed that:

\textit{The development of the energy crisis during the last fiscal year has added a new dimension to the problem of protecting the environment. Since the measures which may be taken to increase production of energy, including the development of new resources, frequently are not consistent with the protection of the environment, a balancing of priorities became essential.}

\textit{Id.} at 124-25.
\textsuperscript{107} \textit{See Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n}, 449 F.2d 1109 (D.C. Cir. 1971); \textit{see infra} Part IV.
\textsuperscript{108} \textit{Id.} at 1111-12.
Not surprising, the Atomic Energy Commission ("AEC") emerged as a defendant in one the first seminal cases under NEPA. Historically, the AEC had conceived of its mission in the licensing of nuclear facilities as limited to ensuring against the special hazard of radiological safety, and that it exercised exclusive jurisdiction over such matters and lacked authority to consider any other issues.\(^{109}\) Prior to NEPA, the First Circuit had held, despite considerable reservations, that the AEC lacked the authority to consider a nuclear power plant's potential impact on the environment caused by thermal pollution.\(^{110}\) The AEC, therefore, expressed concern about the legislation when it was being drafted and aggressively attempted to blunt its impact.\(^{111}\) Approximately a year after NEPA became law, the AEC developed its first interim and then final procedures for complying with the newly enacted statute.\(^{112}\) CEQ sent mixed messages on these rules, indicating some disagreement while simultaneously praising AEC's efforts.\(^{113}\)

A coalition of national environmental organizations led the fight to challenge the AEC's implementation of NEPA in court.\(^{114}\) They focused on the AEC's licensing of Baltimore Gas & Electric's Calvert Cliffs nuclear facility on the shores of the Chesapeake Bay, only sixty miles

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\(^{110}\) Id. Justice Douglas dissented from the denial of certiorari. New Hampshire v. AEC, 395 U.S. 962, 962 (1969). Though no opinion was published, Justice Douglas most likely dissented believing that his opinion for the Court in Udall v. Fed. Power Comm'n suggested a contrary result. There, the Court held that the Federal Power Commission had to consider environmental values when licensing a hydroelectric facility. 387 U.S. 428, 450 (1967).


\(^{113}\) See Liroff, supra note 5, at 65-66.

from Washington. The petitioners challenged four principal aspects of AEC's rules, which together they claimed effectively limited "full consideration and individualized balancing of environmental values in the Commission's decision making process." They objected to the prohibition in the rules that the hearing board could not conduct "an independent evaluation and balancing of certain environmental factors if other responsible agencies already have certified that their own environmental standards are satisfied by the proposed federal action." One of the principal environmental concerns centered around the plant's withdrawal of approximately 2.4 million gallons of water per minute from the Chesapeake Bay and its subsequent discharge back into the Bay at a higher temperature. Indeed, while Congress actively debated NEPA, the Act's supporters explained that one of its principal purposes would be to "help avoid governmental kinks that hamper antipollution efforts," such as "the Atomic Energy Commission's refusal to take thermal pollution into consideration in licensing nuclear power plants—on grounds that it has no legislative mandate to do so." The AEC's new rules allowed a certification of compliance from an appropriate federal or state agency to be dispositive of environmental impacts, such as water quality effects.

Next, they objected to the AEC's decision that environmental factors did not have to be considered by the hearing board conducting a review of staff recommendations on the licensing, unless the staff or another party affirmatively raised the need to consider environmental factors. This, of course, meant that the ultimate decision making body

115 The court consolidated two cases, one involving a general challenge to AEC's rules, and one challenging the rules as applied to the Calvert Cliffs licensing. Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1116 n.14 (D.C. Cir. 1971). The court opted to address the efficacy of the rules generally rather than review any particular challenge. Id. The facility was located in Calvert Cliffs, Maryland. Tarlock, supra note 114, at 89.
116 Calvert Cliffs, 449 F.2d at 1116.
117 Id. at 1117.
119 A Fight Over Who Cleans Up, BUS. W., July 12, 1969, at 46 (discussing Senator Jackson's comments).
121 Calvert Cliffs, 449 F.2d at 1117.
would consider environmental issues and perhaps balance environmental factors only if the staff or a third party affirmatively required that the board do so. This rule became even more problematic for projects that had been noticed in the Federal Register prior to March 4, 1971, because for such projects, the rules prohibited the board from considering nonradiological environmental issues even if raised by a third party.122

Lastly, petitioners challenged aspects of the rules that allowed the AEC to defer consideration of environmental issues until the consideration of an operating license, at least for projects that had received a construction permit prior to the passage of NEPA.123 One of the AEC’s own later characterized the agency’s review of environmental issues as “minimal,” and applicants [generally] supplied the background environmental material in the form of a report, and we used this material with little or no independent evaluation. The environmental Statements prepared by the Commission at that time were based solely on the material submitted by the applicants but placed in the format desired by the AEC.124

The court began its opinion by articulating the requirements of the new law.125 It emphasized that Congress intended to mandate that agencies follow the procedures of § 102, with little inherent flexibility to deviate from those requirements.126 Judge Wright, however, also opined that NEPA contains a separate and “explicit” substantive duty under § 101(b), for agencies to use all practicable means to protect environmental values, although in doing so the Act “leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances.”127 This duty effectively undermines

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122 Id. at 1117.
123 Id.; see also Thomas B. Stoel, Jr., Energy, in FEDERAL ENVIRONMENTAL LAW 928, 968 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974) (describing the two step facility approval process).
125 Calvert Cliffs, 449 F.2d at 1112-13.
126 Id.
127 Id. at 1112. Consistent with the court’s separation of these two duties, the court rejected the AEC’s attempt to conflate the two duties and suggest that the discretion inherent in the substantive duty applies to the procedural obligations as well. See id. at 1114 n.10.
an agency's otherwise crabbed view of its authority, such as that advanced by the AEC, making "environmental protection a part of the mandate of every federal agency and department." Judge Wright added that the AEC's "hands are no longer tied" and it not only may but must "take environmental values into account." This obligation becomes manifest in how an agency complies with its obligation, under § 102, to engage in a "rather finely tuned and 'systematic' balancing" of environmental values and other "economic and technical benefits." Preparation of a detailed environmental statement, now referred to as the EIS, accomplishes such a balancing. Responding to the AEC's references to §§ 103, 104 and 105 of the Act, Judge Wright rebuffed any suggestion that adherence to § 102 was somehow conditioned upon an agency's decision regarding practicability.

Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it can be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.

When reviewing the AEC's specific regulations, the court observed the AEC's apparent lack of enthusiasm for complying with NEPA. Judge Wright's framing of the question regarding the AEC's regulations left no doubt about the outcome of the case: "whether the Commission is correct in thinking that its NEPA responsibilities may 'be carried out in toto outside the hearing process'—whether it is enough that environmental data and evaluations merely 'accompany' an application through the

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128 Id. at 1112.
129 Id.
130 Calvert Cliffs, 449 F.2d at 1113 (citing a floor statement from Senator Jackson on the "requirement of a balancing judgment.") Later in the opinion, Judge Wright would suggest that the agency must engage in a "rigorous balancing" and "rigorous consideration of environmental factors." Id. at 1128; see also id. at 1129 ("All we demand is that the environmental review be as full and fruitful as possible.").
131 Id. at 1114.
132 Id. at 1114-1115. See supra note 59 (discussing § 103).
133 Id. at 1115.
134 Calvert Cliffs, 449 F.2d at 1116. At another point, Judge Wright commented that the AEC should implement NEPA "at a pace faster than a funeral procession." Id. at 1122.
review process, but receive no consideration whatever from the hearing board.” He forcefully answered the question in the next sentence, indicating that the AEC’s “crabbed interpretation of NEPA makes a mockery of the Act.” Environmental factors had to be considered throughout the agency’s review process, at all important stages, to ensure that an “overall balancing of environmental and non-environmental factors” could “minimize environmental costs.” The court added that such consideration and balancing by the Commission must occur even if not raised by any party.

The court found other aspects of AEC’s rules equally troubling. To begin with, AEC’s cut-off for not applying NEPA to any projects noticed before March 4, 1971 inappropriately delayed by more than two years the Act’s effective date. Next, Judge Wright dispatched AEC’s argument that § 21 of the Water Quality Improvement Act of 1970 applied and, per NEPA § 104, obviated the need for the AEC to address water quality issues by reasoning that § 21 established a minimum floor for agency compliance but did not constrain the agency from imposing even greater controls. An agency, such as the AEC, had an independent duty to consider and balance environmental and nonenvironmental factors, and it could not abdicate that responsibility by merely looking to another agency’s certification regarding water quality impacts.

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135 Id. at 1117.
136 Id.
137 Id. at 1118.
138 Id.
139 Calvert Cliffs, 449 F.2d at 1119.
141 Calvert Cliffs, 449 F.2d at 1125. Although Judge Wright dismissed AEC’s reliance on § 104, § 511(c)(2) of the Federal Water Pollution Control Act Amendments of 1972 overruled part of Judge Wright’s analysis. Frederick R. Anderson, Jr., The National Environmental Policy Act, in FEDERAL ENVIRONMENTAL LAW. 238, 290 (Erica L. Dolgin & Thomas G.P. Gubler, eds., 1974). Reportedly, AEC had not pushed this amendment, although it had indicated that NEPA threatened to halt the nuclear power plant licensing process. Barfield & Corrigan, supra note 100, at 342. At the insistence of Senator Howard Baker (R-Tenn.) and perhaps others, Senator Muskie, therefore, included an amendment in a contemporaneous water pollution act to remove water quality issues from the scope of environmental issues that the AEC would need to examine. Id. The lead plaintiff’s lawyer in the Calvert litigation opposed this amendment and suggested that it would offend environmentalists. Id. at 337. One aspect of Calvert Cliffs that Senator Baker apparently never questioned was that NEPA entailed a balancing of environmental and non-environmental values, and the only question was whether the underlying scientific assessment of the impact on water quality had to be performed by the agency or EPA. Id. Some commentators suggest that Judge Wright misunderstood the import of
The AEC opted to comply with Judge Wright's sweeping decision rather than take any appeal. Less than two months after the decision, the AEC published revisions to its Appendix D regulations.\textsuperscript{142} Congress also responded by providing the AEC with the authority to issue temporary operating licensees upon expedited review procedures.\textsuperscript{143}

Judge Wright’s interpretation of NEPA offered considerable latitude for future courts to address the scope of the new Act. Indeed, while the opinion required strict compliance with NEPA’s procedures, it also suggested and emphasized Congress’s goal of environmental protection. In short, the opinion articulated NEPA's \textit{substantive command} and \textit{required an adequate balancing} of environmental and nonenvironmental values which the court further suggested might be judicially reviewable.\textsuperscript{144} John Holdren and Philip Herrera appropriately observed in a 1971 Sierra Club publication that

the court has defined procedures that NEPA imposes on all federal agencies. Now there is ample opportunity for citizens to combat power plants in a way which, while not promoting a final solution, certainly helps protect the environment. Perhaps the most important aspect of the Calvert Cliffs decision is the suggestion that if a project’s adverse environmental effects outweigh its economic benefits, it ought to be stopped. That conclusion, however, remains to be tested in another case, maybe—why not?—somewhere in the continuing litigation over Storm King.\textsuperscript{145}

How this invitation to afford the new Act a substantive aspect became blunted by the Supreme Court is then the true story of NEPA's devolution.


\textsuperscript{144} See \textit{Calvert Cliffs}, 449 F.2d 1109.

\textsuperscript{145} \textsc{John Holdren & Philip Herrera}, \textit{Energy: A Crisis in Power} 189-90 (1971).
IV. THE SUPREME COURT'S PATH TO PROCEDURE

While lower courts grappled with NEPA's implications, the Supreme Court adroitly avoided addressing fundamental questions about the Act for several years. NEPA, instead, arose in the context of the Court's consideration of the doctrines of standing and scope of judicial review. Before the Court could even begin to interpret a new law, such as NEPA, it had to first articulate the now accepted modern doctrines that would allow parties to challenge agency decisions. To begin with, not until 1970 did the Court abandon the "legal interest" test for standing, and allow parties the ability to challenge agency actions if they could establish an injury in fact that was "arguably within the zone of interest[ ]" protected by the statutory provision at issue. Indeed, not until 1972 did the Court confirm that injury in fact could include non-economic harm, such as environmental harm. Along with allowing citizens access to the courthouse, the Court also had yet to address the role of courts in reviewing agency decisions: would agencies need to issue findings, would courts distinguish between a review of facts and law, would courts permit discovery and conduct hearings? These issues and more would all command courts' attention throughout the 1970s, as a "new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts" emerged.

The Court's first principal foray into an agency's treatment of the environmental consequences of its action occurred in what has become a seminal case in the development of administrative law—Citizens to Preserve Overton Park v. Volpe. From 1941 until 1971, Supreme Court law forbade courts from examining "deciding officers to determine how


and why decisions were made." In presenting the compelling story of Overton Park, Peter Strauss explains that the "Court's decision in Overton Park marks the expansion of lawyers' targets from claims of ultra vires action to assertions that a discretion decisionmakers possessed had not been reasonably exercised." Ultimately, the issue in Overton Park, and throughout the rest of that decade, including how cases involving NEPA would be treated, was how courts would review alleged claims of agency noncompliance with the increasingly expanding environmental programs.

A. Prelude: Overton Park

Overton Park involved the nation's rapidly expanding highway system. Responding in part to environmental concerns, Congress passed legislation, like the Department of Transportation Act, in response to concerns about the nation’s blossoming highway system, establishing new procedures for any highway projects that might require the use of public parks. The role that this legislation would play surfaced soon thereafter as Memphis and Tennessee State officials proceeded with their controversial proposal to develop a highway through Overton Park, in Memphis. Although federal officials appeared more sensitive to—but apparently not understanding of—the values of Overton Park than state and local officials, those federal officials nevertheless concluded that the highway could be constructed through the park. In making their decision, however, they were undoubtedly influenced by political concerns and failed to issue any written findings addressing the issues contained in § 4(f) of the Department of Transportation Act. Section 4(f) provided that, before the Secretary could approve a project that affects a park, she would first need to determine that "(1) there is no feasible and prudent

153 WENNER, supra note 98, at 10.
154 Strauss, supra note 151, at 274-78.
155 See id.
156 Id. at 294, 296-97.
157 See id.
alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.\textsuperscript{5}

A group of dedicated citizens challenged the government's action in federal court.\textsuperscript{159} This group sought to enjoin the Secretary of Transportation from allowing any federal money to be used to help construct the proposed expressway through Overton Park.\textsuperscript{160} They claimed that the Secretary had not acted in accordance with the highway act's procedures, and that he acted arbitrarily and capriciously in determining that the route through the park was the only feasible and prudent corridor.\textsuperscript{161} On a motion for temporary injunction filed by the plaintiffs and cross-motions submitted by the defendants for dismissal and for summary judgment, the lower court ruled in the government's favor.\textsuperscript{162} It found that, on the procedural issues, the government either had "substantially" complied with the requirements or that any deviations from those requirements resulted in "harmless error."\textsuperscript{163} It next concluded that section 4(f) did not require that the Secretary make any finding or articulate its rationale for why no other feasible and prudent alternative existed.\textsuperscript{164} The court then added that it would be impossible, based upon the affidavits submitted in the case, for it to conclude that the Secretary, in its exercise of discretion, had acted arbitrarily when concluding that no feasible route existed.\textsuperscript{165} The Sixth Circuit affirmed the judgment,\textsuperscript{166} and the Supreme Court granted \textit{certiorari}.\textsuperscript{167}

\textsuperscript{159} Overton Park, 309 F. Supp. at 1191.
\textsuperscript{160} Id. at 1191. Plaintiffs originally filed the lawsuit in U.S. District Court for the District of Columbia, but the court transferred it to the Western District of Tennessee. \textit{Id}.
\textsuperscript{161} \textit{Id}.
\textsuperscript{162} \textit{Id}. at 1195.
\textsuperscript{163} \textit{Id}. at 1194.
\textsuperscript{164} Overton Park, 309 F. Supp. at 1194.
\textsuperscript{165} \textit{Id}. at 1194-95.
\textsuperscript{166} Citizens to Preserve Overton Park, Inc. v. Volpe, 432 F.2d 1307, 1309 (6th Cir. 1970). The court reviewed the lower court under a deferential standard, only examining whether any genuine issue of material fact existed which would have precluded the granting of summary judgment. \textit{Id} at 1310. The court agreed that the statute did not require any specific findings by the statute, and that it lacked the authority to impose any such requirement. \textit{Id} at 1311. The court also reviewed affidavits and documents in the record, allegedly confirming that the Secretary had determined that no feasible route existed. \textit{Id}. at 1312. This review led the court to conclude that the Secretary acted in good faith in making his determinations and, as such, it would be futile to hold a trial to decide whether those determinations were arbitrary. \textit{Id}. at 1314. Dissenting, Judge Celebrezze
With NEPA in the background, the case presented the Court with its first significant opportunity to address the judicial role in reviewing governmental actions affecting the environment. Justice Marshall's unanimous opinion in Overton Park reversing the lower court noted: "The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation designed to curb the accelerating destruction of our country's natural beauty." Another issue demanding the Court's attention was the administrative record, and on what basis a court could assess whether an agency head acted arbitrarily or capriciously, if no requirement exists for a written record of decision articulating a basis for decision. The Court articulated the proper role of the reviewing court: agency decisions should be subject to a presumption of regularity, yet a court should conduct a substantial inquiry, ensuring that the agency has acted within the scope of its authority, has considered all the relevant factors and not exhibited a clear error of judgment. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." This searching inquiry, the Court added, had to be based on the whole administrative record, not on the post-hoc rationalizations contained in litigation affidavits. In the final analysis, the petitioners won a significant victory, even though not achieving a full evidentiary hearing or the need for formal findings by the Secretary.

In the context of NEPA, and the requirement for an EIS or some other environmental document, the lack of "findings" would not likely occur too often in environmental cases. The question, instead, would be twofold: first, would Overton's approach to judicial review set both the
minimum and, under NEPA, the maximum authority for the scope of judicial review; and second, how would Overton's emphasis on ensuring that an agency adequately considered all the relevant factors and did not act arbitrarily affect Calvert Cliffs' interpretation of NEPA?

B. The Court Meets NEPA: SCRAP I

Roughly three years after Congress passed NEPA, the Court decided its first NEPA case. Yet, as in Overton Park, the case did not directly involve the underlying environmental issues, but instead, focused on emerging principles of administrative law. While the law of standing advanced favorably toward allowing citizen suits, NEPA suffered its first significant defeat at the mantle of judicial review and standing. In United States v. Students Challenging Regulatory Agency Procedures (SCRAP) the Court held that law students and other environmental groups challenging a rate increase by the Interstate Commerce Commission ("ICC") had standing to pursue their claim. The students alleged that the proposed rate increase would promote the use of new raw materials that compete with recycled materials or scrap. The increased need for raw materials would lead to increased mining, timber harvesting, and other resource extracting activities. As a result, SCRAP claimed, the ICC was required to comply with NEPA before it could allow the increase to take effect.

Writing for a three-judge panel convened for such ICC proceedings, Judge Skelly Wright began by observing that the case presents important issues concerning the applicability of [NEPA] . . . to agency rate making procedures. More

176 See SCRAP I, 412 U.S. at 669.
177 Id.
178 Id.
179 Id. at 676.
180 Id.
181 Id. at 677.
broadly, it tests once again our commitment to use all practicable means and measures . . . in a manner calculated to . . . create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.\textsuperscript{182}

Judge Wright granted the plaintiffs an injunction, limited to enjoining any surcharge that would be imposed on recyclable materials pending the completion of "an adequate environmental impact statement."\textsuperscript{183} Later in his opinion he referred to the agency's approach to NEPA as a "ruse" or "glorified boilerplate," observing that the agency routinely avoided NEPA by simply concluding that all of its actions did not significantly affect the quality of the human environment and, as such, no environmental document was necessary.\textsuperscript{184}

In responding to the suggestion that courts lacked the authority to engage in judicial review of certain ICC decisions, Judge Wright echoed the understanding of NEPA in \textit{Calvert Cliffs} and Judge Friendly's decision in \textit{City of New York v. United States}.\textsuperscript{185} Whether a court might otherwise lack jurisdiction, NEPA nonetheless "implicitly confers authority on the federal courts to enjoin any federal action taken in violation of NEPA's procedural requirements."\textsuperscript{186} He described NEPA as imposing "substantive duties," suggesting that he might not be able to reverse a decision on the merits, under section 101 of the Act,

unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave


\textsuperscript{183} \textit{Id.} at 192. The ICC had subsequently issued a six page "draft environmental impact statement," however as Judge Wright noted, it was not clear what action of the ICC the draft intended to reference. \textit{Id.} at 193-94. The document discussed the 2.5 percent surcharge at issue, though it had already gone into effect. \textit{Id.} at 194. The railroads ultimately sought a long-term selective rate increase of 4.1 percent that was not discussed in the document. \textit{Id.} That draft document—"roundly condemned" by even the CEQ and EPA—noted that there would be some impact on the environment, but added that more information was needed. \textit{Id.}

\textsuperscript{184} \textit{SCRAP}, 346 F. Supp. at 200-201 and n.17.

\textsuperscript{185} \textit{Id.} at 197 ("NEPA is a new and unusual statute imposing substantive duties which overlie those imposed on an agency by the statute or statutes for which it has jurisdictional responsibility.")(quoting \textit{City of New York v. United States}, 337 F. Supp. 150, 164 (E.D.N.Y. 1972))).

\textsuperscript{186} \textit{Id.}
insufficient weight to environmental values. But if the
decision was reached procedurally without individualized
consideration and balancing of environmental
factors—conducted fully and in good faith—it is the re-
ponsibility of the courts to reverse.\textsuperscript{187}

Although events marched forward while the case proceeded to the
high court, the two fundamental principles below became the focus of the
Court's attention: did the plaintiffs have standing and did the court have
jurisdiction over the ICC's order declining to suspend the proposed interim
rate increase.\textsuperscript{188} The Court's recognition that the ICC's order likely had
environmental impacts is evident from Justice Stewart's opinion:

\begin{quote}
[T]he challenged agency action in this case is applicable to
substantially all of the Nation's railroads, and thus alleg-
edly has an adverse environmental impact on all the natu-
ral resources of the country.... [A]ll persons who utilize
the scenic resources of the country, and indeed all who
breathe its air, could claim harm similar to that alleged by
the environmental groups here.\textsuperscript{189}
\end{quote}

Equally evident is that the United States evinced little concern for
those impacts, when in light of Judge Wright's opinion it nevertheless
argued that the Commission's decision under review did not necessarily
warrant the preparation of any NEPA document.\textsuperscript{190} But the government's
principal argument on NEPA focused on arguing that § 15(7) of the
Interstate Commerce Act ("ICA") precluded judicial review of the ICC's
orders declining to suspend rate increases, and further that the lower
court's conclusion that it could exercise jurisdiction over the agency's
decision to ensure NEPA compliance effected an implicit and impermis-
sible amendment of the statutory preclusion of judicial review.\textsuperscript{191}

\begin{footnotesize}
\textsuperscript{187} \textit{Id.} at 197-98 (internal citations omitted).
\textsuperscript{188} \textit{See} SCRAP I, 412 U.S. at 669.
\textsuperscript{189} \textit{Id.} at 687.
\textsuperscript{190} Reply Brief for the United States and the Interstate Commerce Commission at 4 n.1,
United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S.
\textsuperscript{191} \textit{See id.} at 20. In the final section of its brief, the United States also argued that NEPA
did not apply to suspension decisions. \textit{Id.} at 36. Trying to fit the enormous amount of
work required for an EIS as sweeping as a rate increase into the thirty days of
suspension decision would render any NEPA document a "meaningless formality,"
because
\end{footnotesize}
After affirming that the petitioners had standing to pursue their claims, the Court then turned its attention to the question of whether NEPA could be enforced in this circumstance. Here, writing for a plurality of the Court on this issue, Justice Stewart accepted the Solicitor General's argument that NEPA could not be read to repeal implicitly the limitation on judicial review contained in § 15(7) of the ICA. Although noting NEPA's "lofty" purposes, Justice Stewart concluded that the Court could not "agree with the District Court that NEPA has amended § 15(7) sub silentio and created an implicit exception . . . so that judicial power to grant injunctive relief in this case has been revived." To support his conclusion, Justice Stewart purportedly examined the legislative history of NEPA and found nothing to suggest any intention to repeal § 15(7) of the ICA, further observing that "[t]he statutory language, in fact, indicates that NEPA was not intended to repeal by implication any other statute." This conclusion parallels the argument raised by the Solicitor General, who in the United States' brief made the unsubstantiated and passing statement that "[t]here is nothing in NEPA or its legislative history which even suggests that Congress contemplated that the very general language of NEPA would confer a suspension power on the courts which had previously been explicitly withdrawn by Congress." According to Justice Stewart, nothing in the D.C. Circuit's opinion in Calvert Cliffs suggested otherwise, as the court similarly observed that repeals by implication are disfavored. In addition, the case did not involve an explicit congressional decision to preclude the type of relief

[192] SCRAP I, 412 U.S. at 690.
[193] Id. at 690-91.
[194] Id. at 692-93. Justice Stewart's record of deciding environmental cases is not easily categorized; his votes appear more aligned on the basis of federalism principles than on any pro or anti-environmental bias. See WENNER, supra note 98, at 159.
[195] SCRAP I, 412 U.S. at 694. Justice Stewart invoked the language in NEPA, which requires that federal agencies review their statutory authorities and policies for determining whether to recommend to Congress any needed changes to comply with NEPA, to support his conclusion that NEPA did not implicitly repeal or amend existing statutes. Id. at 694-95. (citing to 42 U.S.C. § 4333) (2000 & Supp. V 2005)).
being sought in \textit{SCRAP I}.\textsuperscript{198} He further reasoned that, if NEPA were to apply in this case, its application "would disturb [the] careful balance of interests" established under § 15(7) of the ICA.\textsuperscript{199}

Dissenting to that part of Justice Stewart's opinion addressing NEPA, Justice Douglas highlighted the serious environmental concerns raised by the petitioners. He quoted a telling comment by Chairman Train of CEQ about the importance of having the ICC assess environmental impacts:

[The Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical, and timely fashion in compliance with the requirements of the National Environmental Policy Act. The Commission's actions to date appear to be inconsistent with the objectives of NEPA, and the analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and environmental quality.]\textsuperscript{200}

In further arguing that NEPA should apply to the ICC's action, Justice Douglas warned that the Court "greatly weakens NEPA in a crucially important segment of the federal environmental field," and that the preclusion of judicial review only applied to instances where the ICC had yet to act on a rate suspension.\textsuperscript{201} Apparently concerned with a trend that he undoubtedly foresaw and lamented, Justice Douglas quoted recent articles by a former CEQ member, Robert Cahn, relating how Congressman Dingell had witnessed federal agencies' reluctance to apply

\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 697. Justice Stewart ended his analysis by quoting from the Second Circuit's decision in \textit{Port of New York Authority v. United States}. \textit{Id.} at 697-98.

In \textit{Port of New York Authority}, the court determined that Congress intended to "vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief." 451 F.2d 783, 788 (2d Cir. 1971) (internal citations omitted). And so, in response to the argument that an EIS had to be prepared before any interim rate increase could be allowed, the court held that it would defeat the purpose of NEPA, which requires a case-by-case, careful, and detailed balancing, to apply the statute when such a detailed analysis could not be performed within the requisite time period. \textit{Id.} at 789-790. But, the court also added that it agreed with the D.C. Circuit's decision in \textit{Calvert Cliffs}, on the breadth and application of NEPA in those instances where it applies. \textit{Id.}

\textsuperscript{200} \textit{SCRAP I}, 412 U.S. at 707 (Douglas, J., dissenting in part).
\textsuperscript{201} \textit{Id.} at 712 (Douglas, J., dissenting in part).
NEPA adequately. Justice Douglas observed that "these cases are, indeed, Exhibit A of the current practice of federal agencies to undermine the policy announced by Congress in NEPA." Justice Marshall, similarly objecting to the Court's treatment of NEPA, attempted to assuage Douglas's concern. Although arguing that the plurality wrongly held that the lower court lacked the power to issue an injunction, Justice Marshall suggested the holding was narrow: "the decision clearly concerns only the scope of remedies available to the District Court in the context of a case of this particular character." Justice Marshall further noted that Justice Stewart neither addressed the adequacy of NEPA compliance nor the proper scope of review.

The Court's first foray into the significance of NEPA, therefore, arguably signaled a degree of uncertainty of how to marry new stand-alone environmental programs, such as NEPA, with the host of existing federal statutes and programs.

C. So We Meet Again: SCRAP II

The Court's next confrontation with NEPA occurred again in the context of the SCRAP litigation before the ICC, in Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)—SCRAP II. A year after the Commission approved a temporary emergency surcharge of 2.5 cent, the railroads, filed for an average four cent long-term rate increase on most of its commodities. The Commission responded by suspending for seven months—the maximum statutory period—what otherwise would have been an automatic increase,

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202 Id. at 714 (Douglas, J., dissenting in part).
203 Id.
204 Id. at 724 (Marshall, J., concurring in part and dissenting in part). One NEPA scholar subsequently described the case as Justice Marshall had. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 5:09 (Clark Boardman Collaghan 1985 & Cumulative Supp. 1991) ("SCRAP I is best read as a case holding that a specific limitation in a federal statute withdrawing the right to injunctive relief otherwise available in NEPA litigation is an implied repeal of the power of the federal courts to grant that remedy.").
207 SCRAP II, 422 U.S. at 297.
pending an investigation into the reasonableness of the rates.\textsuperscript{208} \textit{SCRAP} \textit{I} involved the temporary emergency surcharge, but \textit{SCRAP} \textit{II} focused on the long-term rate increase.\textsuperscript{209} The plaintiffs sought to enjoin this long-term rate increase, prompting the Commission to suspend its approval of such increases until it had completed its review of the environmental effects.\textsuperscript{210} It was that decision that led the district court in \textit{SCRAP} \textit{I} to conclude that any challenge to the long-term rate increase was not ripe.\textsuperscript{211} On March 5, 1973, the Commission issued its draft EIS, with the final draft issued two months later.\textsuperscript{212} That document concluded that the increase would not have any significant adverse effects on the environment, and even if they did those effects would be justified to ensure a healthy railroad system.\textsuperscript{213}

The Commission did not use this staff prepared statement and the critical comments on the draft statement to develop a new opinion to supplant or even supplement its October opinion. Instead the Commission merely appended a one-sentence order to the statement's back page which adopted the entire statement as part of its prior opinion on the rate increases. . . .\textsuperscript{214}

The plaintiffs challenged this aspect of the Commission's decision on the approval of the long-term rate increases.\textsuperscript{215} Once again, a three-judge district court panel gathered, and Skelly Wright penned yet another harsh criticism of the Commission's attitude toward NEPA.\textsuperscript{216} At the outset, Judge Wright rejected the railroad's claim, over Judge Flannery's dissent,\textsuperscript{217} that the court could not even review the Commission's decisions under the ICA—and more particularly compliance with

\textsuperscript{208} Id.
\textsuperscript{209} Compare supra note 183 with supra note 207.
\textsuperscript{210} \textit{SCRAP} \textit{II}, 422 U.S. at 297.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 1295.
\textsuperscript{215} Id. at 1298.
\textsuperscript{216} Id. at 1291, 1294.
\textsuperscript{217} Id. at 1311 (Flannery, J., dissenting).
NEPA. Judge Wright reasoned that "[o]ur reliance on NEPA in finding jurisdiction is not inconsistent with the Supreme Court's admonition in its SCRAP opinion that 'NEPA was not intended to repeal by implication any other statute.' "

The court then observed that the agency failed to fulfill the procedural aspect of NEPA. According to the court, the agency prepared the environmental document post-hoc, with little effort to meaningfully address any of environmental issues. "We perused the statement carefully and cannot find that it presents such a full and good faith consideration and balancing. This conclusion is not surprising given the above-recounted history of the statement's post-decision preparation." The court, therefore, vacated the Commission's order and directed that the agency reopen its proceedings for a "full consideration of the proposed rate increases on recyclable commodities." The court also gave the agency some explicit instructions on how to engage in its environmental analysis, stating that "[a]ll the environmental effects must be balanced against the costs, if any, to the national transportation policy of attempting to alleviate the effects by not increasing the rates." But this time around, faced with the nuances of its authority regarding the propriety of injunctive relief and what would be the need to inquire into the environmental harm, the court refused to enjoin the railroads from collecting the rate increments on recyclable materials.

Justice White began the Supreme Court's opinion by dismissing the notion that the Court lacked jurisdiction to review the lower court's decisions. The Court dismissed this argument, reasoning that the case

\[218\] SCRAP II D.D.C., 371 F. Supp. at 1296.
\[219\] Id. at 1298 (citing SCRAP I, 412 U.S. at 694).
\[220\] Id. at 1299.
\[221\] Id. at 1302 ("We find the Commission's failure to alter its draft impact statement in response to three of the critical comments of other federal agencies particularly troublesome.").
\[222\] Id. at 1301-02. Judge Flannery reached the opposite conclusion, believing that the Commission complied with NEPA. Id. at 1311. His reasons appear somewhat result-driven. Id. at 1311-12.
\[223\] SCRAP II D.D.C., 371 F. Supp. at 1306.
\[224\] Id. During the course of instructing the agency, the court rejected plaintiffs' suggestion that they be afforded the opportunity to engage in cross-examination. Id. Here, although the court indicated that an oral public hearing might be required, ratemaking constitutes a form of rulemaking governed by § 553 of the APA and, as such, does not require an opportunity for cross-examination. Id. at 1306-07.
\[225\] Id. at 1308-10.
no longer involved enjoining any rate increase, nor had the lower court delved into the substantive issues of whether the Commission adequately balanced environmental and non-environmental issues. As such, the Court concluded that jurisdiction existed to review whether the Commission complied with the procedural obligations of NEPA.

Nevertheless, Justice White found few faults with how the Commission complied with NEPA. To begin with, he rejected the lower court’s concern with the timing of the Commission’s EIS. A draft EIS only had to be prepared once the Commission itself issued a proposal, recommendation or report. According to Justice White, the agency took its earliest relevant action when the Commission issued its report on, October 4, 1972, in response to the new rate increase being proposed by the railroads. Although no EIS had been prepared by then, the Court noted that environmental issues had been discussed during the hearing and in written submissions, and the ICC had even ordered the railroads to prepare and circulate their own impact statement. This led Justice White to conclude that the Commission had “thoroughly complied” with NEPA.

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226 SCRAP II, 422 U.S. at 307-08.

227 Id. at 319. The Court reconciled its holding with SCRAP I and argued that the holding was not inconsistent with its earlier decision, but only asserted that NEPA creates a “procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions.” Id. The Court continued by arguing that judicial review allows the Court to review these considerations for adequacy, even if the other aspects of the rate increase are not ripe. Id.

228 Id. at 319-20.

229 Id. at 320.

230 SCRAP II, 422 U.S. at 320-21.

231 Id. at 321.

232 Id. He added that the ICC cured any lingering concerns regarding the timing of NEPA compliance by the subsequently prepared March 1973 draft EIS, which Justice White concluded adequately addressed the environmental effects of the particular rate increase, reasoning that “no purpose could have been served by ordering it to thoroughly explore the question in the confined and inappropriate context of a railroad proposal for a general rate increase when it was already doing so in a more appropriate proceeding.” Id. at 325. This approach arguably conflicted with some lower court opinions requiring strict procedural compliance. Compare id. with Daly v. Volpe, 350 F. Supp. 252, 257-58 (W.D. Wash. 1972); Morningside-Lenox Park Ass’n v. Volpe, 334 F. Supp. 132, 139-43 (N.D. Ga. 1971); and Env’tl. Def. Fund v. U.S. Army Corps of Eng’rs, 325 F. Supp. 728, 740 (E.D. Ark. 1971).

The railroads advanced the argument that NEPA requires an agency to engage in a “hard look”, but after doing so the statute they argued does not command any particular outcome or require anything more of the agency. Brief for the Aberdeen and Rockfish R.R. Co. passim, SCRAP II, 422 U.S. 289 (No. 73-1966), 1974 WL 187591. They
Once again, though under the mantle of judicial review instead of standing, the Court arguably diminished NEPA while simultaneously allowing a case to proceed in the courts. Indeed, it is hard to imagine a more callous treatment of NEPA. The agency had made up its mind before the draft EIS was circulated, a chorus of federal agencies disagreed with the agency’s analysis, the agency never corrected the draft EIS, and then the agency simply “ appended a one-sentence order to the statement’s back page which adopted the entire statement as part of its prior opinion on the rate increases.”

Dissenting from the Court’s treatment of NEPA, Justice Douglas emphasized that the EPA, CEQ, the Department of Commerce and the General Services Administration all expressed concerns with the agency’s draft EIS, concerns which the agency never addressed. Douglas also observed that “[t]he Court implicitly concedes the shortcomings of the Commission’s analysis, relying, as the Commission did, on the prospect that the environmental issues would receive further study . . .” in the ongoing inquiry into the underlying rate structure.

Such a deferral to a later date, Justice Douglas concluded, contradicts the statute’s requirement that environmental issues be considered before the agency acts. Justice Douglas found particularly troubling the fact that the agency had delayed its consideration for quite some time, and even by the time of the Court’s consideration of the matter some two years later, nothing indicated that the agency had developed its report or an indication of when it would develop its report. Ending on a policy note, Justice Douglas admonished that “NEPA is more than a technical statute of administrative procedure. It is a commitment to the preservation of our natural environment. The statute’s language conveys the urgency of the task.”

further argued that, had Congress intended a more substantive role, then the legislative history would reflect that fact, which they said it does not—albeit only citing to ten pages of the history in a footnote. Id. at 35 n.40. The Court avoided offering any standard for the scope of review, but twice referred to whether the agency had engaged in a “hard look,” and observed that under any standard the agency adequately addressed environmental matters. SCRAP II, 422 U.S. 322-28.


234 SCRAP II, 422 U.S. at 328 (Douglas, J., dissenting in part).

235 Id. at 330.

236 Id.

237 Id. at 330-31.

238 Id. at 331.
D. Narrowing Further: Kleppe v. Sierra Club

A year later, the Supreme Court issued yet another NEPA decision, this time in the context of the debate over national energy policy and the development of federal coal reserves. The Kleppe v. Sierra Club decision is now remembered for the unexceptional proposition that NEPA applies when an agency actually proposes an action. The case perhaps more importantly continued the Court's march toward narrowing the scope of the statute—with once again perfunctory analysis.

By the early 1970s, the Department of the Interior's federal coal leasing program was shrouded in controversy. Leasing of public coal resources had been on an ad hoc basis, with little scrutiny. In 1971, the Interior Department issued an informal moratorium on any new coal leases or permits for prospecting for coal on the public lands until the Department could develop a coherent approach to the leasing and development of the nation's coal resources. The Department formalized this moratorium in 1973, indicating that it would prepare a new federal coal program and accompanying EIS. The Department released its final EIS on the new national program in 1975, and in January of 1976 Secretary Kleppe proposed the Energy Minerals Activity Recommendation System ("EMARS"). At the same time, Secretary Kleppe also announced that the Department would develop a programmatic EIS and, among other things, create a Northern Great Plains Resource Program. The Natural Resources Defense Council successfully challenged the EIS on EMARS, claiming that the Department failed to address the need for any additional federal coal leasing.


Id. at 401-02.

See DANIEL MANDELKER, NEPA LAND AND LITIGATION § 1:06 (Callaghan & Co. 1984) (noting that Kleppe was the “first influential Supreme Court case” interpreting NEPA and that the Court took a “restrictive view of the time at which an impact statement must be prepared . . . .”). But see Caldwell, supra note 8 (failing to mention Kleppe).


Watson, supra note 242, at 78.


Kleppe, 427 U.S. at 397-98.

Id. at 397-98.

These events surrounding the federal coal leasing program all moved forward while a lawsuit proceeded apace. Filed in June of 1973, a lawsuit challenged the Interior Department's failure to prepare a regional environmental impact statement covering northeastern Wyoming, eastern Montana, and the western parts of North and South Dakota—the Northern Great Plains.\footnote{Sierra Club v. Morton, 421 F. Supp. 638, 640 (D.D.C. 1974) (mem.).} Although the Interior Department had agreed to prepare a national programmatic EIS, and it had indicated that it would likely prepare site-specific EIS's for particular leases, it rejected the notion that an EIS was required for a particular region because it had not undertaken or proposed to undertake any particular "plan" or "program" covering only that region.\footnote{Id. at 646.} The district court agreed, and declined to require the preparation of a separate EIS for the Northern Great Plains region.\footnote{Id. at 646-47.} A divided panel of the Court of Appeals thought otherwise, and believed that the Interior Department would violate NEPA if it failed to prepare an EIS and continued to "contemplate" federal action in the Northern Great Plains Region.\footnote{Id. at 646-47.} The government conceded that its EIS for the national coal program did not address the cumulative impact of development in the region.\footnote{Id. at 646-47.} Judge Bazelon explained how only through an EIS focused on the region could the government adequately assess the cumulative impact of the multitude of activities occurring in the region.\footnote{Id. at 877-78.}

Yet, the court issued an arguably narrow decision, noting the importance of addressing cumulative impacts but without requiring an EIS unless the government actually engages in some "regional" program.\footnote{Id. at 872 n.23.} The record, according to Judge Wright, amply demonstrated that the government had treated the Northern Great Plains as a distinct region warranting a regional program, and that the federal agencies had even developed interagency group to formulate a regional program.\footnote{Id. at 877-78.} But while that program raised questions about the cumulative impact of development in the region, it did not "purport to provide answers to these problems."\footnote{Id. at 877-78.} Accordingly, NEPA did not necessarily dictate the development of a

comprehensive regional EIS.\textsuperscript{257} Instead, a court must assess whether the government's contemplation of a regional program had ripened sufficiently to progress beyond a "dream" stage, an assessment that first should be addressed by the agency.\textsuperscript{258} The Department of the Interior, he observed, could make that judgment when it issued its final interim report on the Northern Great Plains region.\textsuperscript{259} The court ultimately remanded the case, allowing the government to decide how to proceed, but cautioning that whatever action the government took it would have to ensure that it examined development activities comprehensively.\textsuperscript{260}

In lieu of agreeing to make this judgement, the United States sought to persuade the Supreme Court that the lower court had gone too far. In its Petition for Writ of Certiorari, the government presented the following question:

> whether, under [NEPA], a court may intervene in [the government's] decision-making process to require federal agencies to engage, in addition, in "regional" planning and to issue an additional impact statement for a four-state area so long as they continue "contemplating" private applications, even though there neither is nor will be a recommendation or report on a proposal for a major federal action with respect to that four-state area.\textsuperscript{261}

\textsuperscript{257} Morton, 514 F.2d at 879.

\textsuperscript{258} Id. Here Judge Wright noted that the record supported answering part of the inquiry affirmatively. Judge Wright outlined the inquiry:

> How likely is the program to come to fruition, and how soon will that occur? To what extent is meaningful information presently available on the effects of implementation of the program, and of alternatives and their effects? To what extent are irretrievable commitments being made and options precluded as refinement of the proposal progresses? How severe will be the environmental effects if the program is implemented?

\textit{Id.} at 880 (adopting, with slight modifications, the factors identified in Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973)).

\textsuperscript{259} Id. at 881-82.

\textsuperscript{260} Id.

The government explained that it had rewritten its final EIS covering the national coal program and that its Northern Great Plains Resources Program concluded in 1975 (and terminated in January 1976), and it did not provide any actual plan of development—instead, it was simply a planning tool.\textsuperscript{262} Interior's principal concern was that if such a regional EIS was required, then all individual leases and mining plans in the region would be enjoined until the completion of that regional EIS.\textsuperscript{263} The agency emphasized to the Court that requiring what it described as an unnecessary EIS would further delay the program—possibly by at least another three years.\textsuperscript{264}

The parties ultimately pressed the Court to resolve a legal issue divorced from events.\textsuperscript{265} Respondents suggested that the only real issue was whether the Northern Great Plains is a valid region for purposes of preparing an EIS.\textsuperscript{266} In short, respondents argued that the only issue left was the scope of the region for purposes of preparing an EIS.\textsuperscript{267} The legal principle, then, had two parts: first, whether a comprehensive environmental impact statement would be required "when a number of federal actions are closely related," such that "the environmental impact and effects of one of them cannot be analyzed without considering the impact

\textsuperscript{262} Petition for Writ of Certiorari, \textit{supra} note 261, at 6.
\textsuperscript{263} \textit{Id.} at 12-13. Interior added that it would, if appropriate, prepare EIS's for particular leases and mining plans in the region, and any EIS's for "successive leases or mining plans will assess the cumulative effects of all coal mining within the area affected." \textit{Id.} at 23.
\textsuperscript{264} \textit{Id.} 12-13.
\textsuperscript{265} Leo M. Krulitz, \textit{Management of Federal Coal Resources}, 24 ROCKY MTN. MIN. L. INST. 139, 177 (1979). As a former Solicitor of the Department, Krulitz explained that Interior already had been engaged in various pieces of litigation and had decided to propose the type of regional activity being argued about in \textit{Kleppe}. \textit{Id.}
\textsuperscript{266} Brief for Respondents on Writ of Certiorari at 42, Sierra Club v. Morton 514 F.2d 856 (D.C. Cir. 1975), \textit{appealed sub nom.}, Kleppe v. Sierra Club, 427 U.S. 390 (1976) (No. 75-552).
and effects of other related actions." If so, the second question was whether the circumstances surrounding activities in the Northern Great Plains region presented such a situation.

Justice Powell, writing for the majority, parsed the language of the Act and concluded that an EIS was required only when there has been "a report or recommendation on a proposal for a major federal action . . . ," and no such report or recommendation existed here. The Court noted Brief for Respondents on Writ of Certiorari, supra note 266, at 49. The brief expressed concern that, absent a regional EIS, Interior would avoid addressing the cumulative effect of coal development in the same geographic area, even though those activities were related actions. Id. at 42.

See id. A host of parties, including Congressman Dingell and national environmental organizations ("NEOs") filed amicus briefs. Congressman Dingell focused on applying NEPA earlier in an agency's decision-making process. Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curia of John D. Dingell at 9-14, Kleppe, 427 U.S. 390 (No. 75-552), 1976 WL 181499. The NEOs' brief emphasized that NEPA should apply when the agency has committed itself to study a region separately, and their focus was on the failure of individual environmental reviews of projects to address cumulative effects adequately. Brief for Environmental Defense Fund, Inc., et al as Amici Curiae in Support of Affirmance at 13-25, Kleppe, 427 U.S. 390 (No. 75-552), 1976 WL 181498. Twenty-two states also filed an amicus brief noting the importance of programmatic impact statements addressing the cumulative effect of actions in a region. Brief of 22 Named States as Amici Curiae in Support of Respondents passim, Kleppe, 427 U.S. 390 (No. 75-552), 1976 WL 194215.

Kleppe, 427 U.S. at 399. The Kleppe oral argument occurred the day after the Court heard argument in Flint Ridge Dev. Co. v. Hills, 426 U.S. 776 (1976)—another NEPA case. The case involved the application of NEPA to the Department of Housing and Urban Development's ("HUD's") receipt of a disclosure statement filed by private real estate developers pursuant to the Interstate Land Sales Full Disclosure Act. Id. at 780-81. Congress designed the Act to protect against false and deceptive practices in the sale of unimproved land. Id. at 778. HUD's review of these disclosure statements is minimal, only reviewing for completeness. Id. at 781. Respondents alleged that HUD was required to prepare an EIS before allowing the disclosure statement to become effective (unless HUD concludes that the statements are incomplete, it becomes effective 30 days after submission). Id. at 782. Flint Ridge and the United States argued that an EIS was not required, because (1) allowing the disclosure statement to become effective was not a major federal action, and (2) HUD is exempt from NEPA compliance because it would conflict with the agency's mandatory statutory obligation under the Interstate Sales Act. Id. at 786-87. The Court deftly avoided NEPA by holding that NEPA and the Interstate Sales Act are in conflict, and that § 102 of NEPA could not be held to trump the agency's underlying statute. Id. at 788-89. Today, such a circumstance would likely involve an inquiry into the first question, whether HUD's receipt of a disclosure report constitutes a discretionary federal action triggering NEPA. And it is because of this fact, when coupled with the Court's apparent effort to avoid discussing NEPA too much while Kleppe was pending, that warrants relegating Flint Ridge to this footnote.
that the undisturbed finding of the district court was that the record contained no evidence of any "proposal for an action of regional scope." Absent such a proposal, an EIS would be transformed into a generalized study document, like the Northern Great Plains Resources Program, rather than serve as a detailed statement outlining the alternatives and effects of any proposed plan. Justice Powell rejected the D.C. Circuit’s factual assumption that the government had proposed some regional action as a consequence of its “contemplation” of a regional development plan or effort to control development in the region. In fact, he observed that the oral argument confirmed that no such proposal for regional development existed. The Court noted that respondents “have not attempted to support” the D.C. Circuit’s opinion. Justice Powell further rejected the suggestion that NEPA could force planning in advance of any proposal, noting that the statute clearly requires that an EIS need only be ready at the time the agency makes its recommendation or report on a proposed federal action. The respondents’ approach would insert courts into the “day-to-day decisionmaking process of the agencies, and would invite litigation.”

The Court then addressed respondents’ claim that an EIS would be warranted on a regional basis when a number of site-specific activities are “intimately related.” While Justice Powell agreed that a comprehensive EIS would be appropriate when several activities with “cumulative or synergistic” impacts are being proposed in a region, he concluded that the failure to prepare such an EIS would be determined by asking whether the agency’s failure to do so was arbitrary—a standard Justice Powell indicated respondents had accepted at oral argument. Because the record contained no evidence of arbitrary behavior by the Interior Department, he rejected respondents’ claim.

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271 Kleppe, 427 U.S. at 400.
272 Id. at 402 (“There would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA.”).
273 Id. at 403-04.
274 Id. at 404.
275 Id. at 408.
276 Kleppe, 427 U.S. at 405-06.
277 Id. at 406.
278 Id. at 408.
279 Id. at 410. Later, the Court emphasized this point by observing “cumulative environmental impacts are, indeed, what require a comprehensive impact statement.” Id. at 413.
280 Id. at 412.
281 Id.
which contributes little to the reasoning of the case, Justice Powell opined that the role of a court in assessing NEPA compliance is to ensure that the agency has taken the requisite "hard look" at environmental consequences, and not substitute its judgment for that of the agency.\footnote{Kleppe, 427 U.S. at 410 n.21 (citing Scenic Hudson Preservation Conf. v. Fed. Power Comm'n, 453 F.2d 463, 481 (2d Cir. 1971) and Natural Res. Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972)). The oral argument in Kleppe is quite instructive. The parties and the Court had a difficult time defining the "proposal" at issue, and the question at one point became whether the government was controlling a number of regional site-specific activities that had to be analyzed for their cumulative effect on the region. And after questioning by the Court, respondent's counsel indicated that the principal concern was that no cumulative effects analysis was being conducted on each of these individual projects and a challenge to each of these projects individually for their NEPA compliance was not as efficient as the present approach. Transcript of Oral Argument at 14-25, 41-51, Kleppe, 427 U.S. 390 (No. 75-552).}

In hindsight, it is far from surprising that the Court held in favor of the government and demanded that there be some actual "proposal" for administrative action before NEPA would be triggered. The case presented the Court with a choice: would NEPA be interpreted to require that the government engage in early planning before even proposals are sufficiently articulated or would it be cabinied to require only the development of an EIS once an agency has preliminarily made up its mind and decided to recommend proceeding along a particular course of conduct? The former approach would have required the Court to separate NEPA from the APA—something it had shown it was unwilling to do. To force planning, such as regional coal planning, would require answering what "final agency action" under the APA, the court was reviewing, and the notion that "inaction" could constitute "action" was not discussed.\footnote{Arguably, this problem is implicit when the Court, expressing concern about the stage at which a court appropriately enters the picture, argued that judicial intervention is only warranted "when the report . . . is made, and someone protests the absence or the inadequacy of the [EIS]." Kleppe, 427 U.S. at 406 n.15. The Court characterized the "decision" under review as "the decision of the petitioners not to prepare" a programmatic regional EIS. Id. at 409. Interestingly, the issue that generated a dissent by Justice Marshall, joined in by Justice Brennan, had little to do with any interpretation of NEPA, but rather with the appropriateness of affording a remedy for a violation of the Act. Id. at 415-23. Focusing on the remedy for a violation of an Act had been one of the driving issues behind the Court's earlier interpretation of the Endangered Species Act ("ESA") in Tennessee Valley Authority v. Hill. 437 U.S. 153 (1978). There, environmental plaintiffs sought to persuade the Court that, once a violation of the ESA is identified, a court could not determine whether to allow a clear violation of the ESA to occur. See Id. at 166. The appropriate remedy for violations of environmental statutes had yet to solidify. See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (addressing the court's equitable discretion to decide whether to enjoin violations of the Federal Water Pollution Control Act).}
effectively meant that NEPA was about process married to the APA—a result achieved without any meaningful review of NEPA's legislative history, sparse on analysis, and devoid of any explanation of the effect and role of Congress's declaration of national policy and directive to federal agencies in § 101 of the Act.

E. Closing the Door on NEPA: Vermont Yankee

In Vermont Yankee, more than any other case, the Supreme Court began to solidify the current view that NEPA is nothing more than a procedural statute.284 The case involved two decisions of the D.C. Circuit, collectively reviewing fifteen decisions, orders and promulgations of the Nuclear Regulatory Commission.285 Several of the counsel who had appeared before Judge Wright in Calvert Cliffs were once again in court.286 But this time the intersection of the APA and NEPA presented an insurmountable barrier. Both cases involved, in the words of D.C. Circuit Chief Judge Bazelon, "the manner and extent to which information concerning the environmental effects of radioactive wastes must be considered on the public record in decisions to license nuclear reactors."287 A growing chorus of commentators had been urging that NEPA demanded something different than a conventional proceeding under the APA.288 This approach dovetailed with Judge Bazelon's belief that courts, under the APA, could provide greater scrutiny of agency decisions and demand heightened procedures if necessary to ensure a reasoned decision making process.289

285 See Vermont Yankee, 435 U.S. at 527.
287 NRDC, 547 F.2d at 637.
289 Gillian E. Metzger, The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste, in ADMINISTRATIVE LAW STORIES 124, 126 (Peter L. Strauss ed., 2006). Ronald Krotoszynski observed that "[b]eginning in the 1970s, Judges David Bazelon and Harold Leventhal engaged each other, and their colleagues on the D.C. Circuit, in an extended debate about the proper scope and limits of judicial review of agency action." Ronald J. Krotoszynski, Jr., "History Belongs to the Winners": The
In the context of a nuclear licensing proceeding, this meant, at the very least, a process designed to ensure a full consideration of nuclear fuel processing and waste disposal. The environmental petitioners’ claims in Vermont Yankee were anything but extraordinary by today’s standards, and indeed the agency’s approach toward NEPA in Vermont Yankee would not likely survive judicial scrutiny today, yet when transformed into a “procedural” issue under the APA, these claims became shrouded by the Court’s effort to limit what it perceived to be judicial activism.

In response to Calvert Cliffs, the AEC, whose functions were subsequently transferred to the Nuclear Regulatory Commission (“NRC”), published a notice that it was considering changes to its Appendix D regulations addressing environmental effects associated with the uranium fuel cycle. The agency noted that the issue of costs and benefits associated with the uranium fuel cycle had been raised in a number of individual licensing proceedings, but that it was not “clear” how it could develop such an analysis in any individual case. Accordingly, the AEC concluded that, “if [such issues] are to be considered at all, [they would need to] be considered in a generic fashion through the rulemaking process.” This led to the development of the “Environmental Survey of the Nuclear Fuel Cycle” document—a report that the agency indicated was available for review and comment. The AEC afforded an opportunity to participate in an informal hearing held six weeks later, and told parties that the hearing would be a “legislative-type hearing” and part of a rulemaking, “rather than an adjudicatory proceeding.” Two years later, the AEC finalized its rulemaking, noting that it considered only


See generally David L. Bazelon, Coping with Technology through the Legal Process, 62 CORNELL L. REV. 817, 822 n.19 (1977) (discussing the need for an administrative decision making process “that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public.” (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring), cert. denied, 426 U.S. 941 (1976))).

See Calvert Cliffs, 449 U.S. 1109; supra Part III.


Id. at 24,192.

Id.

Id. at 24,193.

Id.
two options for addressing the uranium fuel cycle: (1) either not including any consideration of costs and benefits during an individual licensing decision or, (2) in a licensing proceeding, factoring into the individual cost-benefit analysis "the environmental effect associated with the uranium fuel cycle, albeit small... in the form of numerical values." Although it adopted the latter approach, the AEC nonetheless cautioned that the Environmental Survey report was not an alternatives analysis but only a primary database for the proposed amendment to its regulations, and that further environmental impact statements were being prepared.

In adopting its rule, the AEC dismissed several arguments about the adequacy of its new procedures. To begin with, it rejected the complaint that the hearing on the rule did not include a right to engage in discovery and cross-examination. Next, the AEC dismissed the suggestion that it had not adequately explored the risks of terrorism or accidents by noting that the Environmental Survey report was limited to light-water-power reactors and not high-level waste disposal, such as those utilizing recycled plutonium fuel, and observing that the report had examined a few "postulated" accidents. The AEC similarly rejected other claims on the basis of its belief that the environmental effects of the uranium fuel cycle are insignificant—albeit based upon a document, the report, that the agency itself admitted was not a NEPA document. This belief led the AEC to conclude that issues associated with the long-term environmental effects of waste storage and disposal could be addressed later, perhaps in connection with an environmental impact statement on high-level waste storage. Additionally, AEC's assumption led it to conclude that any pending licensing proceedings need not incorporate these changes into either an applicant's environmental report or any already circulated draft environmental impact statement.

299 Id. The AEC emphasized that it did not need to develop an EIS at this time, because the purpose of the proceeding was to determine what factors of an EIS are required by NEPA and not to perform an in-depth review of the uranium fuel cycle. Id.; see also id. at 14,191 (stating that the Environmental Survey is not an EIS and does not require further discussion that would only be appropriate in individual licensing actions).
300 Id. at 14,189.
301 Id.
302 Environmental Effects of the Uranium Fuel Cycle, 39 Fed. Reg. at 14,189; see supra note 299 and accompanying text.
304 Id. at 14,190-91.
The agency's unique response to the concern over nuclear waste storage and disposal made the environmental groups' NEPA challenge unnecessarily appear as an APA issue. In an individual, adjudicatory licensing proceeding, where the agency otherwise allowed discovery and cross-examination, the agency removed from those proceedings the issue of nuclear waste disposal and storage, indicating instead that it would address those issues in generic rulemaking. And yet, while such a bifurcation of environmental issues under NEPA would be highly suspect today, it, more importantly at the time, meant that no NEPA document would address the matter or include an alternatives analysis, and those parties interested in exploring in depth nuclear waste storage and processing in an individual licensing case might never get the chance. This catch-22 occurred because no EIS had been prepared in the generic rulemaking proceeding and the parties were not afforded an opportunity to engage in any meaningful examination of the Environmental Survey report that would be incorporated into the cost-benefit analysis in any future licensing proceeding. Moreover, the Union of Concerned Scientists and various environmental organizations found the report problematic. One might say that this was a well constructed Escher diagram, from which those concerned with nuclear waste storage and disposal would be forever trapped from questioning the agency's analysis.

Indeed, Judge Bazelon understood that the argument was not an abstract right to conduct discovery or cross-examination during a rulemaking when he penned the D.C. Circuit's NRDC opinion. Rather, he framed the court's analysis around whether the agency had sufficiently ventilated the high-level nuclear waste storage problem. He


306 See O'Reilly v. United States Army Corps of Eng'rs, 477 F.3d 225, 235-38 (5th Cir. 2007) (discussing impermissible segmentation of agency decisions); Stewart Park & Reserve Coal., Inc. v. Slater, 352 F.3d 545 (2d Cir. 2003) (discussing avoiding NEPA compliance through impermissible segmentation of actions); Scope, 40 C.F.R. § 1508.25 (2008).

307 See supra notes 294-97 and accompanying text.

308 NRDC, 547 F.2d at 637 n.2.

309 Others at the time suggested that such generic rulemakings might be necessary to avoid the cumbersome and inefficient process that had emerged for the licensing of nuclear facilities. See, e.g., Cramton, supra note 305, at 597-99.

310 NRDC, 547 F.2d at 643 n.25.

311 Id. at 643-44.
noted that the public interest intervenors, for instance, specifically disclaimed any general right to discovery or cross-examination, arguing instead the rulemaking relied solely on a perfunctory assurance by one expert and did not address the waste problem in any meaningful manner. As such, the procedures employed by the agency did not sufficiently ventilate an important environmental concern. This expert's analysis was incorporated into the agency's "Environmental Survey" report toward the end of the process. It also appeared contrary to the growing scientific commentary cautioning the country about the nuclear waste disposal problem. Also, while the rulemaking process included a public hearing and an opportunity for the hearing board to question people, the board only questioned intervenor's expert witnesses and not this expert. Intervenors were not permitted to delve into this expert's conclusions when he finished testifying. When the Commission issued its rulemaking, it "summarily" disposed of any concerns about waste disposal without responding to any of the other specific concerns.

Based on this, Judge Bazelon explored the role of the court when reviewing an agency's decision to curtail any meaningful consideration of, in hindsight, an unquestioningly important environmental issue. The court emphasized that the procedures an agency employs are less important than simply ensuring that all appropriate issues are sufficiently explored. Here, the court found such exploration by the agency utterly lacking. The AEC had not engaged in reasoned decisionmaking because it made no probing inquiry into the waste disposal problem, even when confronted with a bevy of criticisms. Having reached that conclusion, Judge Bazelon declined to direct what process the agency should use to ensure a genuine consideration of the issues, only suggesting that

312 Id. at 643 n.25.
313 Id. at 651. The court would describe this person's "boilerplate" analysis, with no citations to studies, which recommended federal interim and then long-term "repositories" as opposed to the agency's prior approach of burying wastes inside abandoned salt mines, as "vague," containing "conclusory reassurances" or "unadorned conclusions." Id. at 645, 647-50.
314 Id. at 647.
315 NRDC, 547 F.2d at 650-52 nn. 51-52.
316 Id. at 643, 651.
317 Id. at 651.
318 Id. at 652.
319 Id. at 644.
320 Id.
321 NRDC, 547 F.2d at 653.
322 Id.
various "devices . . . [might] flesh out the record." The ultimate goal was to ensure a fully developed factual record.

In Aeschliman, the court examined the Consumer Power's Midland, Michigan nuclear facility licensing proceeding and held that the agency had neither adequately considered the alternative of energy conservation in its EIS, nor fully addressed concerns with an independent safety report. First, the court held that energy conservation was a "colorable" alternative that warranted some preliminary investigation by the agency, regardless of any comments by the intervenors. The agency needed, at the very least, to provide some explanation for why further consideration of any such alternative might not be reasonable if absent from the EIS. Next, the court responded to the claim that the agency should have allowed greater inquiry into a five page report on the safety of the facility prepared by the Advisory Committee on Reactor Safeguards. Opponents of the facility presented 337 interrogatories, document production requests, subpoenas, as well as requests for depositions of the members of this independent board. Judge Bazelon concluded that the agency legitimately denied some discovery requests. The categorical denials, though, amounted to a failure to clarify the Advisory Committee on Reactor Safeguards' report.

That the APA, rather than NEPA, would occupy center stage as the cases progressed to the Supreme Court and appeared virtually preordained in light of Judge Bazelon's separate opinion responding to Judge Tamm's concurrence in NRDC. Judge Tamm agreed with court's conclusion reaffirming the purposes and goals of NEPA and the court's

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323 Id. at 653.
324 Id. at 654.
326 Id. at 628-29.
327 Id. at 628-30.
328 Id. at 630. The Advisory Committee on Reactor Safety is an independent group charged by Congress with reviewing each application for a construction permit or an operating license. Id.
329 Id.
330 Aeschliman, 547 F.2d at 630-31.
331 Id. at 631 ("the [report] should have provided a short explanation, understandable to a laymen, of the additional matters of concern to the committee, and a cross-reference to the previous reports in which those problems, and the measures proposed to solve them, were developed in more detail.").
earlier decision in *Calvert Cliffs*. He disagreed, however, with the court’s suggestion that, under the APA, some hybrid rulemaking process could be required. Judge Bazelon responded with a separate opinion, advocating the utility of allowing a court, under the APA, to require enhanced—or hybrid—procedural requirements. He only mentioned NEPA once in this separate opinion, and even then only in a footnote without discussion.

Judge Bazelon’s choice to use *Vermont Yankee* as a forum for advocating his approach to judicial review under the APA ultimately proved troublesome for strong advocates of NEPA. In writing for a 7-0 majority, then Justice Rehnquist curtailed Judge Bazelon’s paradigm for APA judicial review. The Court signaled early that this would be an APA rather than a NEPA case when it questioned why the rule had been struck down, and then opined that it was likely “because of the perceived inadequacies of the procedures.” Also, when rejecting NRDC’s effort to have the case dismissed as moot, the Court specifically addressed the need for the Court to expound upon the role of the judiciary in reviewing agency actions. Not surprisingly, therefore, Justice Rehnquist began his analysis with the “absolutely clear” prescription that agencies are “free to fashion their own rules of procedure” unless otherwise constitutionally constrained. The Court briefly added that nothing in NEPA permits a court to alter the “carefully constructed procedural specifications of the APA.”

The Court’s principal discussion of NEPA focused on Consumers Power licensing of its Midland facility, and the lower court’s decision that the agency had failed to address adequately the alternative of energy conservation. The Court dispatched this issue by holding that “the concept of alternatives must be bounded by some notion of feasibility,”

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332 NRDC, 547 F.2d at 658.
333 Id. at 658-59.
334 Id. at 655-57.
335 Id. at 657 n.9.
336 *Vermont Yankee*, 435 U.S. at 523; see Metzger, supra note 289, at 158-61 (noting that Justices Blackmun and Powell did not participate, that Justice Brennan apparently was troubled by the decision and would not have granted certiorari, and that Justice Marshall had some reservations).
337 *Vermont Yankee*, 535 U.S. at 541-42.
338 Id. at 535 n.14.
339 Id. at 543-44 (internal citation omitted).
340 Id. at 548 (“the only procedural requirements imposed by NEPA are those stated in the plain language of the Act.”) (citing Kleppe, 427 U.S. at 405-06)).
and here the agency had not acted arbitrarily or capriciously in requiring that the project's opponents provide more than "cryptic and obscure reference to matters that 'ought to be' considered." With Kleppe as the only source, the Court added the broad statement—not necessarily even relevant to the discussion—that "the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review." The agency contemporaneously decided in another proceeding to include energy conservation as an alternative, thereby making the Court's consideration of this issue largely academic.

Yet, the Court illustrated its apparent lack of appreciation for NEPA with unnecessary comments at the end of its opinion. In the last paragraph of the opinion, the Court provides one "further observation." Here, in *dicta*, the Court addressed the role of nuclear power and political policy choices, and concluded that, while NEPA may set forth substantive goals for this Nation, "its mandate to the agencies is essentially procedural[:] it is to insure a fully informed and well-considered decision . . . ."

The Court, in short, accepted the petitioners' argument that the principal issue was whether NEPA amended the APA by requiring that agencies provide more than notice and comment proceedings under APA § 553. The Court simply never understood the other side's argument about NEPA, perhaps in part because the NRDC had attempted to argue that the rulemaking was not even an issue before the Court. When
counsel for NRDC attempted to respond to questioning about whether NEPA effectively required an adjudicatory hearing, he was never able to finish his answer, although he clearly was beginning to explain that the bifurcation of the issue between the licensing and rulemaking proceedings effectively avoided the preparation of a NEPA document containing a full analysis of the waste issue. Further, respondents never affirmatively argued, and readily conceded, that they were not suggesting that the APA or NEPA required a hybrid-type rulemaking. In their brief, they asserted that the agency simply failed to take the requisite "hard look" at the environmental issues, and further suggested that the other parties had raised a "straw-man" argument by seeking to convince the Court that the issue involved whether additional procedures for rulemaking beyond the APA were required. Only at the end of their brief did NRDC suggest, generically, that the concept of hybrid rulemaking under the APA, divorced from any NEPA discussion, might have some merit.

In a decision that contained little analysis of what Congress intended to achieve when it passed NEPA, and no assessment of the role the Act would play in an agency's decision-making process, the Court continued its trend of transforming the statute into a strictly procedural mandate. It did this, unfortunately, with strikingly little fanfare or analysis, as Thomas Schoenbaum notes, because of the bifurcation of the issue between the adjudicatory and rulemaking processes. He correctly observes that the agency had the flexibility to choose to proceed either by adjudication or rulemaking, and in the adjudication, the nuclear fuel cycle undoubtedly would have been fully ventilated as part of the EIS for the facility. Yet, once the agency removed that issue from the individual licensing proceeding and shifted it over into its generic rulemaking process,

348 Id. at 47-49.
349 Brief for Respondents at 40-44, Vermont Yankee, 435 U.S. 519 (Nos. 76-419, 76-528), 1977 WL 205092. Elsewhere, NRDC distinguished NEPA from the APA and addressed why NEPA might require some additional rulemaking procedures as a result of the hard look doctrine, but, never elaborated on what it meant. Id. at 45-49. It would appear that NRDC suggested that a typical APA review case affords considerable latitude and discretion to an agency, while NEPA requires that the agency engage in a more-searching inquiry into environmental matters before proceeding.
350 Id. at 49-56.
352 Schoenbaum, supra note 351, at 430-31.
that opportunity became curtailed, unless the agency prepared an EIS for the rulemaking. The agency specifically stated that it had not performed any EIS or similar environmental document in the rulemaking process—an obvious deficiency by today's standards. Unless one myopically focuses on the APA and ignores NEPA, it seems hard to disagree with Schoenbaum's conclusion that the Court erred by conflating the APA and NEPA and overlooking the mandates of NEPA, all in an effort to ostensibly rebuff the efforts of Chief Judge Bazelon.

V. STRYCKER'S BAY & THE END OF A DECADE

If any doubt about substantive judicial review of agency decisions under NEPA still existed after Vermont Yankee, such doubts were, in the words of William Andreen, "laid . . . to rest" by the 1980 decision in Strycker's Bay Neighborhood Council, Inc. v. Karlen—or in an opinion that merits little adherence to stare decisis. Or, to put the matter more bluntly, the Court in Strycker's Bay "effectively squashed any possibility of judicial enforcement of NEPA's substantial goals." The case involved the Secretary of the Department of Housing and Urban Development's ("HUD")

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353 Id.
354 Id. at 430. To the extent applicable, agencies must comply with NEPA when rulemakings may constitute a major federal action significantly affecting the quality of the human environment. E.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1212-14 (9th Cir. 2008).
357 Andreen, supra note 8, at 243-45.
358 Lindstrom, supra note 16, at 260; see also JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 277 (2003) ("In decisions that followed [Calvert Cliffs, 427 U.S. 1109 and Strycker's Bay, 444 U.S. 223], courts have gone to great lengths to make clear that NEPA is a procedural rather than a substantive statute.").
decision to proceed with the “selection of a housing site which could produce adverse social environmental effects, including racial and economic concentration,” because of an asserted concern with the delay “in the construction process” that would occur if a more appropriate site for affordable housing were selected. In a short per curiam opinion, the Court, with Justice Marshall dissenting, capped the coda of the first decade of NEPA by emphasizing that the statute was nothing more than a procedural statute.

The case involved a classic zoning fight, with existing landowners in a neighborhood attempting to stave off urban renewal and development of affordable housing in the community. The urban renewal project involved approximately twenty square blocks on the west side of Manhattan, and included a considerable amount of low income housing for those former area residents who had been displaced because of what we today would call gentrification. A private school in the area and some middle income residents raised a number of challenges to the City’s plan, expressing concern that, the proposed changes to the community would deteriorate the neighborhood and make it a ghetto. When marshaling an array of claims against the City’s effort, the plaintiffs argued, in part, that HUD had failed to comply with NEPA before agreeing to fund public housing because HUD had prepared an environmental clearance document concluding that the project did not significantly affect the quality of the human environment. Plaintiffs asserted that HUD needed to prepare an EIS focusing on the significant psychological and social consequences of allowing low income housing. The district court rejected this argument, concluding that such issues were not the

359 *Strycker's Bay*, 444 U.S. at 228 (Marshall, J., dissenting).
360 *Trinity Episcopal Sch. Corp. v. Romney*, 387 F. Supp. 1044, 1047 (S.D.N.Y. 1974). New York City had announced its intention of providing affordable housing, at a time when New York and other states were developing the concept of communities providing a percentage of low-to-moderate income housing for the region. *Id.* at 1057; see also Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 716 (N.J. 1975), cert. denied, 423 U.S. 808 (1975) (proposing the idea that a development “plan take into account... a fair share of the regional housing needs of low and moderate income families . . . .”).
363 The plaintiffs argued that low income housing could cause the neighborhood to tip into a ghetto, with increased occurrences of anti-social acts, and that regardless of the reality, plaintiffs possessed a justifiable fear in the change of the community's character that warranted examination under NEPA. *Id.* at 1077-78.
The court also held that HUD legitimately relied upon other agencies for information about the effects of the project, exercised its own independent judgment, and that its environmental clearance document "satisfactorily" covered the environmental and social factors. The court rejected plaintiffs' suggestion that HUD should have prepared an alternatives analysis in its environmental document. With little discussion, the court reasoned that NEPA did not require an examination of alternatives outside an EIS.

The district court's conclusion that an alternatives analysis is only required in an EIS prompted the Second Circuit to reverse in part and remand the case back to the lower court. The court held that NEPA requires an examination of alternatives, even when the agency does not prepare an EIS, and that HUD had acted inappropriately in simply accepting the City's judgment that no alternatives existed. In remanding the case, the court directed the lower court to fashion an appropriate order requiring the consideration of reasonable alternatives.

The lower court responded by enjoining construction on the site. HUD prepared a new environmental compliance document, submitted it to the court during the fall of 1977, and moved to dissolve the injunction and dismiss the case. The district court described this document as substantial, held that the government had complied with NEPA and the mandate of the Second Circuit, and dismissed the complaint.

But when the Second Circuit reviewed the case again, its decision sounded a decidedly different tone. The Second Circuit noted that the City had apparently altered its proposed objectives and, in lieu of just providing affordable housing and possibly dispersing low-income housing, the City had decided to concentrate all such housing in one low income high rise apartment building on the site. While the City had

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364 Id. at 1078-79 (stating that "community attitudes and fears" and "antisocial propensities of low income persons" do not trigger a NEPA study).
365 Id. at 1081-83.
366 Id.
367 Id. at 1083.
368 Trinity Episcopal Sch. Corp. v. Romney, 523 F.2d 88, 95 (2d Cir. 1975).
369 Id.
370 Id. at 92-95.
371 See Harris, 445 F. Supp. at 206, 208.
372 Id. at 208.
373 Id. at 209.
374 Id. at 223.
375 Karlen, 590 F.2d at 42.
identified alternative sites, perhaps even superior from a social environmental impact, those sites were deemed unacceptable by the City because transfer to any of those sites would further delay construction of such housing. In fact, HUD even criticized the City's conclusions about the use of the site, but nevertheless proceeded with the project solely because of the delay that would be occasioned by transferring the project to another site. This led the court to note that the "HUD report reveals many warning signals which must be considered in relation to the local environment... [The addition of the high-rise low income housing] in an area already containing a high percentage of low-income housing... constitutes concentration[,] [contrary to] the integration contemplated by NEPA." Further, HUD could not simply accept the City's choice for solving its affordable housing problems, but instead had to exercise its own independent judgment. The court cited the Federal Fair Housing Act and its own precedent to support HUD's exercise of its own judgment. Additionally, the court called on the language of NEPA § 102(1) as a basis for HUD to exercise its own independent judgment. Specifically, the court instructed that HUD "use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans... and resources to the end that the Nation may... (1) fulfill the responsibilities for each generation as trustee for the environment for succeeding generations." This arguably unnecessary reference to § 102 of NEPA in the court's discussion of why HUD's decision to reject other alternatives was contrary to congressional housing policy would later trigger Supreme Court review.

The Supreme Court summarily reversed the lower court opinion. In its short per curiam opinion, with only one paragraph of analysis, the Court invoked Vermont Yankee and then quoted a phrase from Kleppe that a court could not second-guess an agency's choice of action. Dissenting, Justice Marshall suggested that the case was far

376 Id. at 42-43.
377 Id. at 44.
378 Id. at 43.
379 Id. at 44.
380 Id. at 44-45 (citing 42 U.S.C. §§ 3601, 3608 (2006) and Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973)).
381 Karlen, 590 F.2d at 44.
382 Id.
384 Id. at 227-28. The opinion contains no other analysis, other than a footnote responding to Justice Marshall's dissent. Id. at 228 n.2.
more complicated than the *per curiam* opinion indicated. Justice Marshall believed that the lower court effectively concluded that HUD had acted arbitrarily and capriciously, and that it had failed to take the requisite hard look at the consequences of its action. He distinguished *Vermont Yankee* as inapposite, and tasked reviewing courts, *per Overton Park*, with conducting a "searching and careful" inquiry to protect against unreasonable agency action. In its footnote responding to Justice Marshall, the *per curiam* opinion merely suggested that perhaps such a careful review would be appropriate if the issue were simply one of arbitrary and capricious behavior, but such did not seem to be the case, because apparently the lower court had not overturned the district court's decision which supposedly concluded that HUD had not acted arbitrarily or capriciously.

The Court's perfunctory treatment of the lower court's opinion, as well as NEPA and the APA, occurred in the context of a summary disposition, further prompting Justice Marshall in dissent to question the Court's decision to avoid plenary review. Summary disposition allowed the Court to decide a case based solely on the petition for writ of certiorari, with no further briefing or oral argument. Later in his career, Justice Marshall would lament the Court's treatment of cases like *Strycker's Bay*, suggesting that the Court should not resolve cases by summary disposition. Summary disposition, based on a "skeletal" presentation of the issues does not afford the Court or the parties with an adequate basis upon which to decide a matter. *Strycker's Bay* evidenced the problems because the Petition for Writ of Certiorari contained three questions and the entire argument section of the petition

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386 Id. at 228 (Marshall, J., dissenting).
387 Id.
388 Id. at 229, 231 (Marshall, J., dissenting).
389 Id. at 228 n.2. The footnote concludes as follows: "Instead, the appellate court required HUD to elevate environmental concerns over other, admittedly legitimate, considerations. Neither NEPA nor the APA provides any support for such a reordering of priorities by a reviewing court." Id. For further discussion of this footnote, see Andreen, *supra* note 8, at 244 n.276.
392 Id.
393 Id. at 192.
only contained nine pages with little more than some block quotes from a few cases. The first question asked whether the lower court violated the APA and NEPA by “preempt[ing]” the agency’s discretion. The Court eventually examined this question, and reversed the lower court’s judgment based on three pages of argument—most of which was a block quote from Overton Park and then a block quote from Kleppe. The point of these two quotes was simply to argue that the APA established the proper scope of review and that the lower court’s opinion conflicted with that standard of review.

And so, once again, a concern about the appropriate scope of review under the APA trumped any meaningful consideration of NEPA and led to a decision that purported to announce an interpretation of a statute that ten years earlier had been hailed as the environmental Magna Carta.

CONCLUSION

With the decision in Strycker’s Bay closing the statute’s first ten years, and the number of petitions filed by environmental groups for writ of certiorari in NEPA cases about to drop off precipitously, and with the government having won all its NEPA cases, it is appealing yet too cursory to suggest, as one commentator observed, that “[t]he Supreme Court’s entire record in the 1970s with regard to the environment was primarily anti-environmental.” It also is too simplistic to assume that the Court ever fully addressed the scope of what Congress intended when it passed the Act. Indeed, the cases, briefs and arguments to the Court never fully addressed Congress’s intent, other than to quote a few excerpts here and there from the legislative record. Nor was the Court...

394 Id. at 3. The other two questions were: (1) whether an alternatives analysis is required when the agency does not prepare an EIS, and (2) “[w]hether social and psychological factors, such as community opposition to public housing, are environmental factors within the scope” of NEPA. Id.
395 Id. at 17-19.
396 Id.
397 See Shilton, supra note 33, at 556 n.27.
398 WENNER, supra note 98, at 151.
399 Cf. Brief for the Federal Respondents, Vermont Yankee, 435 U.S. 535 (Nos. 76-619, 76-528), 77 WL 189463 (discussing NEPA’s legislative history); Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curia of John D. Dingell at 3-14, Kleppe, 427 U.S. 390 (No. 75-552), 1976 WL 181499 (discussing the Congressional intent behind NEPA).
ever presented with any detailed analysis of how NEPA and the APA ought to relate to one another. If we look at this first decade not through hindsight, we can better appreciate that little about what Congress intended in NEPA would be relevant to the Court’s early concerns.

Congress passed NEPA at a time when several forces began converging, and ultimately it would prove to be the APA that dominated. To begin with, NEPA reflected the first wave of major environmental legislation. Congress was defining new policies and goals for the administrative state, in broad and sweeping language. NEPA reflected broad policies and mandates, not altogether different than what Congress did in 1972 when it said that all waters of the United States would be fishable and swimmable roughly within the next decade. Also, Congress began passing these laws before the doctrine of standing had evolved and before principles of administrative law, such as the scope of review, had yet to emerge.

NEPA, therefore, presented a blank canvass upon which the agencies and courts could draw their own picture for how the statute would be interpreted, applied, and enforced. One option would have involved delving into the legislative history to understand Congress’s intent when, over the course of many years, it considered and finally passed the Act. Aside from a few occasional quotes, and assumptions about that history, the Court avoided engaging in any meaningful and detailed analysis of the new statute. Another option would have been to endorse the D.C. Circuit’s analysis in Calvert Cliffs.

Instead, the Court focused on another emerging issue, the proper role of courts when reviewing administrative actions under the APA. In each case decided by the Court during the first decade of NEPA, that APA focus dominated the Court’s attention explicitly or implicitly. The APA

The one brief that examined the legislative history in more depth than others, was the Brief for Federal Respondents in Vermont Yankee, although that brief appears overly dogmatic and extreme and, as the Court would note, misrepresented some facts. Vermont Yankee, 435 U.S. at 540 n.15.


NEPA's DEVOLUTION

discussion effectively overshadowed any meaningful inquiry into whether Congress intended to substantively alter agency decisions. It is not surprising, therefore, with this background, that the Court in the 1980's parroted its earlier holdings that NEPA is a procedural not a substantive statute.402 The emerging principles of the APA that had shaped or, perhaps to put it differently, precipitated the devolution of NEPA into a procedural statute, had already been solidified by the statute's decennial.

NEPA, however, remains relevant today, and it seems only fitting that as the statute turns forty we revisit its vibrance and potential. Its very language supports agency consideration of the environment's future when assessing environmental impacts. The congressional history supports agency decisions deeply informed, if not governed, by the goal of environmental sustainability. In light of NEPA's judicial history from its first decade, citizens cannot force agencies to interpret the Act substantively. Agencies themselves, though, still retain the ability to act, make rules, and adjudicate with the ultimate goal of environmental sustainability.

An ecological crisis of greater urgency and magnitude than that of the late 1960s and early 1970s, threatens our oceans, our freshwater supplies, our dying species, and the sustainability of our ecosystems because of greenhouse gas emissions.407 Faced with all these challenges,


403 The Millennium Ecosystem Assessment Board reports that "[n]early two thirds of the services provided by nature to humankind are found to be in decline worldwide." MILLENNIUM ECOSYSTEM ASSESSMENT BD., LIVING BEYOND OUR MEANS: NATURAL ASSETS AND HUMAN WELL BEING 5 (2005), available at http://www.millenniumassessment.org/documents/document.429.aspx.pdf.


we must ensure that our legal institutions are capable of responding in an adept manner, and this may mean revisiting such weak precedents as *Stryker's Bay*. NEPA has the potential to be used as a powerful tool to help orient our government, and even society, towards the goal of sustainability. The fortieth anniversary of NEPA can rightly inspire reflection on the history surrounding of one the earliest statutes designed to help avert environmental crises.