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THE ROLE OF CONTROVERSY IN NEPA: RECONCILING PUBLIC VETO WITH PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING

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I. INTRODUCTION

The National Environmental Policy Act ("NEPA") promotes a national policy of encouraging the "productive and enjoyable harmony between man and his environment."¹ The Act seeks, through various "action-forcing" procedures,² to infuse a philosophy of balancing environmental values with other considerations in the decisionmaking process of federal agencies.³ The second purpose of the Act is to engage the public in the agency deliberative process.⁴ Although NEPA calls for a significant role for public participation in the decisionmaking process by federal agencies, the nature and extent of that requirement is not definitive either under the statute itself or under the interpretive Council on Environmental Quality ("CEQ") regulations.⁵ Instead, the degree of the public role generally falls within the ambit of agency discretion.⁶

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¹ 42 U.S.C. § 4321 (1976).

² See *Kleppe v. Sierra Club*, 427 U.S. 390, 409 n.18 (1976) (stating that the term "action-forcing" reflects NEPA's policy, embodied in section 102(2)(C), to infuse consideration of environmental values within the decisionmaking process of all federal agencies); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); 40 C.F.R. § 1500.1(a) (1996). See generally Michael C. Blumm & Stephen R. Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990).

³ See *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981).

⁴ See *Robertson*, 490 U.S. at 349.

⁵ See generally 40 C.F.R. §§ 1500-1517.

⁶ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989).

In some instances, where information is communicated to the public regarding a proposed major federal action, the response may be largely negative. The agency is then placed in the difficult position of having to respond to the controversial issues raised with reasoned support for the government actions. Consequently, although NEPA aims to include the public in various ways both in the disclosure of information and in the solicitation of input, the agencies actually have a marked disincentive to pursue public involvement. This is because the practical effect of controversy, if it rises to a certain level, is that the agency may be required to undertake additional duties of study and analysis. Obviously such obligations impede government actions and may ultimately affect the decisions reached pertaining to the project.

Because the nature of agency decisionmaking typically is informal and the mandate of NEPA is seen principally as procedural rather than substantive,⁷ agencies can avoid controversial issues to some extent by limiting public involvement. Moreover, where courts view opposition to government proposals in narrow terms, the public voice in NEPA is lessened. At some point, the public's ability to influence agency decisionmaking may become so limited that the statutory policy favoring public inclusion is eviscerated. Courts have recognized the reality of "bureaucratic momentum" that may occur whereby one decision by an administrative agency inexorably leads to and justifies the next, ultimately like a "domino effect" unless checked.⁸ The NEPA public participation model partially addresses this concern by interjecting the public role at various pressure points.

A principled approach is needed which reconciles the dual aims of

⁷ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). The Court stated:

NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to ensure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or this Court would have reached had they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.

Id. (citations omitted).

⁸ See *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (finding that bureaucratic rationalization and momentum are "real dangers" to be anticipated and avoided); *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983).

NEPA—ensuring appropriate and timely agency consideration of environmental effects of major projects while also adequately providing information to the public regarding the potential environmental impacts. Part II will briefly explore the decisionmaking process under NEPA, highlighting the opportunities for public involvement. Part III addresses the statutory system of agency decisionmaking based upon the significance of major federal projects. Part IV examines one critical aspect of the determination of significance involving controversial issues within the meaning of the interpretive CEQ regulations.⁹ A multi-factored test will be proposed in Part IV to guide federal agencies and reviewing courts when evaluating whether opposition to a major federal project is “highly controversial” for purposes of affecting agency duties under NEPA.

II. THE PUBLIC PARTICIPATION MODEL AND THE EIS PROCESS

NEPA requires that federal agencies proposing “major federal actions significantly affecting the quality of the human environment” include in their proposals or recommendations a “detailed statement” which provides an assessment of the beneficial and adverse environmental effects of the proposed action.¹⁰ Where an agency concludes that a project is

⁹ See 40 C.F.R. § 1508.27(b)(4) (1996).

¹⁰ 42 U.S.C. § 4332(2)(C), which states in relevant part:

All agencies of the Federal Government shall —

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

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

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the

“insignificant,” its duties of investigation and analysis are more limited under the applicable statutory and regulatory requirements. Groups with concerns that such government conclusions may effectively cut out meaningful public participation and the opportunity to challenge agency assumptions face various barriers to halt the bureaucratic steamroller.

First, the nature and extent of public participation under NEPA is generally committed to agency discretion. Second, the issue of whether a particular project will have a significant effect on the environment is a substantive issue which has been traditionally left to the informed discretion of the agency proposing the action.¹¹ NEPA does, however, provide a procedural framework within which substantive judgments must be made.¹² The role of the courts overseeing agency compliance with NEPA is limited to ensuring that the agency has complied with the procedural duties mandated by the Act within the framework of meeting the substantive purposes or goals of the statute.¹³ Finally, the agency's determination of “no significant impact” is neither a rulemaking nor an adjudicatory function, but rather a factual finding subject to the arbitrary and capricious standard of judicial review.¹⁴ NEPA provides four major opportunities for comment and participation by other agencies and, to a lesser extent, by the public, on agency proposals.¹⁵ Unless a document has been publicly circulated and available for public comment, it does not satisfy NEPA's EIS requirements.¹⁶

comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review process.

¹¹ See *Sierra Club v. Corps of Eng'rs of United States Army*, 701 F.2d 1011, 1029 (2d Cir. 1983); see also *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 453 F.2d 463, 480 (2d Cir. 1971).

¹² See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976).

¹³ See *Kleppe*, 427 U.S. at 406 n.15.

¹⁴ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). The court must ensure that the agency took a “hard look” at the environmental consequences of its actions by carefully reviewing the record to determine whether the agency decision is “founded on a reasoned evaluation of the ‘relevant factors.’” *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

¹⁵ See 40 C.F.R. § 1503.1 (1996).

¹⁶ See *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983); see also 40 C.F.R. §§ 1502.1, 1503.1, 1506.6.

Agencies are further directed by the applicable CEQ regulations to make “diligent efforts” to engage the public in compliance with the NEPA process, although the exact steps are left to the agency’s discretion.¹⁷

¹⁷ See 40 C.F.R. § 1506.6. “Public involvement” is described as:

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the Federal Register and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and area wide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State’s public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

NEPA also requires the circulation of draft impact assessments for comment by appropriate federal agencies with expertise in aspects of the subject matter of the proposal.¹⁸ Where a project implicates several agencies, CEQ regulations provide for the designation of a “lead agency” which assumes primary responsibility for preparing an impact statement and for supervising the process.¹⁹ The regulations also provide for the participation throughout the process by other agencies with special expertise with respect to an environmental issue implicated in the proposal.²⁰

The process leading to the finalization of an environmental impact statement (“EIS”) involves a number of steps and permits a wide range of parties the opportunity to comment. The CEQ regulations outline specific procedural steps that are binding on all federal agencies guiding them through the environmental impact statement process.²¹ The CEQ regulations direct federal agencies to develop procedures to classify proposals in order to streamline the process.²² Agencies are instructed to establish criteria for identifying actions that typically fall into one of the following categories: (1)

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

¹⁸ See *id.* § 1501.4(b).

¹⁹ See *id.* § 1501.5.

²⁰ See *id.* § 1501.6.

²¹ See *id.* § 1500.3.

²² See *id.* § 1507.3(a).

those which normally require an environmental impact statement; (2) those which ordinarily will not necessitate either an EIS or an environmental assessment ("EA"); and (3) those which normally require an EA but do not necessarily lead to preparation of an EIS.²³ Since many routine agency actions normally do not individually or cumulatively cause significant environmental impacts, these may be excepted from the NEPA process as "categorical exclusions."²⁴

The environmental impact statement process serves as evidence that a federal agency has appropriately considered and weighed the reasonably foreseeable environmental impacts of a proposed major action in a timely fashion before making a decision to undertake that action.²⁵ The publication of drafts of the EIS also serves a "larger informational role" by giving assurance to the public that the federal agency has appropriately considered environmental concerns in its decisionmaking process.²⁶

The NEPA process begins at the "threshold" stage, where the CEQ regulations provide that the lead agency consult with other agencies in deciding whether to prepare an EIS.²⁷ The agency is directed to involve other agencies and the general public in preparation of an environmental assessment "to the extent practicable."²⁸ The agency evaluation process begins with the preparation of an environmental assessment, which is a

²³ See *id.* § 1507.3(b)(2).

²⁴ See *id.* §§ 1508.4, 1507.3; see also *Landmark West! v. United States Postal Serv.*, 840 F. Supp. 994, 1003 (S.D.N.Y. 1993).

²⁵ See *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972).

²⁶ In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the Court stated:

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purposes in two important respects. It ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Id. (citing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted); see also *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981)).

²⁷ See 40 C.F.R. § 1508.9(b).

²⁸ See *id.* § 1501.4(b). Comments are solicited from federal agencies with jurisdiction by law (approve, veto, or finance), and from state and local agencies and Indian tribes. See *id.* § 1503.1(a)(2).

“concise public document” used to determine whether a sufficient likelihood of significant environmental consequences exists to necessitate completion of a more in-depth study of the project in an EIS.²⁹ The EA contains evidence and analysis pertaining to the proposal and considers, in abbreviated fashion, alternatives to the proposed action which are required pursuant to section 102(2)(E).³⁰ An agency then will either proceed with preparation of a draft EIS or make a finding of no significant impact (“FONSI”) available to the public.³¹ A practical effect of a determination of “no significant impact” is that it limits agency responsibility to investigate, study, consider alternatives to, and disclose to the public, the potential adverse effects of a project.

The second stage in the EIS process, called “scoping,”³² involves identification of the significant issues raised by the proposed project and engaging participation by other agencies and interested persons in planning the EIS at an early stage. The range of topics for consideration are narrowed in order to focus discussion, timetables are established, and responsibilities are allocated among various agencies. The scope of the impact statement must include connected, cumulative, and similar actions.³³ Various

²⁹ See *id.* § 1508.9(a). In *Cronin v. United States Dep’t of Agric.*, 919 F.2d 439 (7th Cir. 1990), an environmental assessment was described as a “rough cut, low budget environmental impact statement designed to show whether a full-fledged environmental impact statement—which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project—is necessary.” *Id.* at 443; see also *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (describing the different roles of the EA and the EIS).

An EA aims simply to identify (and assess the “significance” of) potential impacts on the environment; it does not balance the different kinds of positive and negative environmental effects, one against the other; nor does it weigh negative environmental impacts against a project’s other objectives, such as, for example, economic development. This latter balancing job belongs to the officials who decide whether to approve the project; and (where there are “significant effects”) those officials should make the decision in light of an EIS. An EIS helps them make their decision by describing and evaluating the project’s likely effects on the environment. The purpose of an EA is simply to help the agencies decide if an EIS is needed.

Id. at 875.

³⁰ See 40 C.F.R. §§ 1501.3, 1508.9(b).

³¹ See *id.* § 1501.4(e)(1).

³² See *id.* § 1501.7.

³³ See *id.* § 1508.25(a).

alternatives are also discussed, including taking no action, other reasonable courses of action, and mitigation measures that are not already included in the proposal.³⁴ The agency must examine direct, indirect, and cumulative environmental impacts potentially resulting from the project.³⁵

The next stage involves the actual preparation of the draft impact statement, which is then circulated to appropriate agencies with jurisdiction or special expertise and other parties for comment.³⁶ Following the comment period, the lead agency prepares a final environmental impact statement.³⁷ The final EIS addresses the criteria enumerated in section 102(2)(C) and responds to comments received regarding alternatives to the proposed action which had not already been given serious consideration by the agency.³⁸ The agency, after reaching a final decision on the proposed project, must prepare a record of decision summarizing and justifying the actions to be undertaken, and explaining why alternatives and mitigation measures were rejected.³⁹

The distinctions between an environmental assessment and an environmental impact statement are substantial. An agency uses the shorter EA format to study and analyze impacts and alternatives to a proposed project to determine whether a more "detailed" comprehensive analysis in an EIS is warranted.⁴⁰ The detailed statement required by section 102(2)(C)

³⁴ See *id.* § 1508.25(b).

³⁵ See *id.* § 1508.25(c).

³⁶ The draft is subject to public and interagency comments for at least 45 days. See *id.* §§ 1503.1, 1503.4, 1506.10(d).

³⁷ The agency must wait 30 days after filing notice in Federal Register. See *id.* § 1506.10. The CEQ serves as a clearinghouse to handle and resolve major interagency disagreements. See *id.* §§ 1504.1-1504.3.

³⁸ See *id.* § 1503.4(a).

³⁹ See *id.* § 1505.1.

⁴⁰ One court explained the breadth of an EIS as follows:

An EIS must include a discussion of not only the expected environmental impact of the proposed action, any adverse environmental effects, and any alternatives to the proposed action, but also more "cosmic" considerations. These considerations include the relationship between short-term and long-term uses of the environment; any irreversible and irretrievable commitments of resources that would follow upon implementation of the proposal; the effects on surrounding cultural, historical, and ecological resources; the degree to which the project might be "controversial"; the extent to which the project might impose "uncertain or unknown risks" upon the environment; whether the action might establish a precedent for future actions; and the degree to which the

serves several functions.⁴¹ It provides “full disclosure”⁴² of all information pertaining to significant environmental impacts of major federal projects for the benefit of the wider audience of the public and other governmental units.⁴³ A reviewing court then may ascertain whether the federal agency has made a good faith effort to discharge its obligations under NEPA of investigation, analysis, and reasoning to support its decisionmaking.⁴⁴

project, while insignificant in itself, might be significant when considered in connection with other similar actions.

Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732, 741 (3d Cir. 1982) (summarizing 42 U.S.C. §102(2)(C) and 40 C.F.R. § 1508.27 (1981)).

⁴¹ See 40 C.F.R. § 1502.1.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

Id.

⁴² The CEQ regulations provide that the EIS must be “concise, clear and to the point,” *id.* § 1500.2(b), “analytic rather than encyclopedic,” *id.* § 1502.2(a), and “written in plain language.” *Id.* § 1502.8; see also *Oregon Envtl. Council v. Kunzma*, 817 F.2d 484, 493-94 (9th Cir. 1987) (finding that the agency must present the information in an EIS in such a manner that government decisionmakers and interested non-professionals can readily understand the scientific data and analysis).

⁴³ See *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973).

⁴⁴ See *id.* at 1284-85, where the court stated:

Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement “unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind” not only fails to crystallize issues, but “affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives.” Moreover, where comments from responsible experts or sister agencies disclose new or conflicting

Section 102(2)(C) of NEPA also directs federal agencies that are preparing an environmental impact statement to obtain comments from other federal agencies with "jurisdiction by law or special expertise" regarding the subject matter under consideration.⁴⁵ The participation contemplated by section 102(2)(C) is augmented by section 309 of the Clean Air Act⁴⁶ which authorizes the Environmental Protection Agency ("EPA") to review and comment on the environmental impact of federal actions affecting environmental quality. The intent of section 309 is to make environmental agencies "effective participants" in the government's decisionmaking process and to assure consideration of their views by "mission-oriented" federal agencies.⁴⁷ The EPA must refer proposals to the CEQ where it considers the merits unsatisfactory from the perspective of public health or welfare or environmental quality. The CEQ regulations specify procedures for review of an EPA determination that a proposed action is unsatisfactory.⁴⁸ The CEQ also allows such referral by other federal agencies.⁴⁹ The EPA's comments are made publicly available upon conclusion of review.

III. SIGNIFICANCE AND CONTROVERSY IN THE NEPA PROCESS

The determination that a project is "significant" under section 102(2)(C) of NEPA is a threshold issue which directs the future course of both substantive and procedural agency duties and the correlative degree of public involvement. The statutory balance of making the agency

data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response.

Id. (citations omitted).

⁴⁵ See 40 C.F.R. § 1501.6.

⁴⁶ 42 U.S.C. § 7609 (1994).

⁴⁷ See *Alaska v. Andrus*, 580 F.2d 465, 475-76 n.4 (D.C. Cir. 1978) (holding that the determination by EPA that EIS was unsatisfactory did not preclude the agency from proceeding with plans for oil and gas sale but did give rise to heightened obligation to explain justification for proceeding with the action); see also William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205 (1988); Martin Healy, *The Environmental Protection Agency's Duty to Oversee NEPA's Implementation: Section 309 of the Clean Air Act*, 3 ENVTL. L. REP. (ENVTL. L. INST.) 50,071 (1973).

⁴⁸ See 40 C.F.R. § 1504.

⁴⁹ See *id.* § 1504.1(c).

decisionmaking process hinge on the threshold determination of "significance" effectively reflects a compromise by ensuring that only those projects which pose the most potentially serious impacts are evaluated comprehensively, thus using limited agency resources the most efficiently. The statutory notion of significance thus permits the agency to proceed with decisions expeditiously and avoid excessive costs and delays in project implementation.

The evaluation of which aspects of a proposed major federal project are considered significant for NEPA decisionmaking purposes has been described as "chameleon-like," turning on the context of the action relative to the setting.⁵⁰ NEPA requires federal agencies to make numerous judgment calls regarding whether a project presents sufficient environmental impacts to justify preparation of an EIS.⁵¹ The difficulty of such line-drawing determinations is compounded in that the variety of projects within the scope of NEPA has been described as "as broad as the mind can conceive."⁵²

The CEQ regulations which interpret the meaning of "significantly"⁵³

⁵⁰ See *Hanly v. Kleindienst* (Hanly II), 471 F.2d 823, 837 (2d Cir. 1973) (Friendly, J., dissenting); see also *Louisiana Wildlife Fed'n v. York*, 761 F.2d 1044, 1052-53 (5th Cir. 1985).

⁵¹ In *Coalition on Sensible Transp. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987), the court described the agency task as follows:

The NEPA process involves an almost endless series of judgment calls. Here we consider ones relating to the detail in which specific items should be discussed and the agencies' treatment of the project's relation to other government activities. It is of course always possible to explore a subject more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.

Id. at 66.

⁵² *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 229 (7th Cir. 1975).

⁵³ See 40 C.F.R. § 1508.27, which provides:

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible

provide that one factor in that evaluation process involves the extent to which the effects on the quality of the human environment are likely to be "highly controversial."⁵⁴ Courts have struggled, however, in determining the character and degree of controversies that suffice to affect the assessment of significance for purposes of determining the type of agency duties under

officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulative significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

⁵⁴ See *id.* § 1508.27(b)(4).

NEPA. In deference to agency decisionmaking, courts generally have adhered to the notion that the presence of some opposition does not transform the proposed project into being controversial.⁵⁵ On the other hand, if the goal of NEPA of incorporating public opinion into the decisionmaking process is to have meaning and not simply an exercise in bureaucratic box-checking, then the relevance of substantial opposition or criticism of a project should play an important role in defining the significance of that project.

The difficulty lies in finding appropriate, neutral principles to determine whether opposition amounts to a "controversy" for NEPA purposes. Federal agencies and courts need a set of guidelines to lend amplification to the general reference to controversy in the CEQ regulations. Courts recently have tended to read the concept of controversy out of the NEPA equation, thus depriving, in some measure, the public of a meaningful voice in carrying out the statutory policy of open disclosure and input from varied sources.⁵⁶ Although NEPA is principally a procedural statute, the underlying theory is that full compliance with those procedures will hopefully result in decisions which fully and fairly assess potential adverse environmental impacts and consequently direct the decisionmaking agency to find alternatives that lessen environmental degradation.⁵⁷

One of the problems left unresolved by the courts, however, in evaluating controversy as it influences agency duties under the statute, is the lack of clarity in delineating the nature, character, and extent of factors that should be relevant to guide federal agencies and courts. Reliance upon agency deference in matters of scientific debate is only partially helpful in answering the question.

Courts have had numerous opportunities to consider whether a particular dispute was sufficiently "controversial" to influence agency decisionmaking under the act. The results are not uniform, but suggest that a principled set of factors is needed to provide more consistent analysis. Illustrative of cases where courts found the controversy insufficient to affect agency duties include: opposition to construction grants for the

⁵⁵ See *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983).

⁵⁶ See *Friends of the Ompompanoosuc v. Federal Energy Regulatory Comm'n*, 968 F.2d 1549, 1556-57 (2d Cir. 1992) (opposition from governors, senators, and local citizens not considered "substantial"); *West Houston Air Comm'n v. Federal Aviation Admin.*, 784 F.2d 702 (5th Cir. 1986) (over 500 persons opposing airport expansion project deemed minimal).

⁵⁷ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

modernization and expansion of a county sewage treatment system,⁵⁸ construction of a skyscraper in Manhattan,⁵⁹ establishing restricted air space over parts of a state to allow the Navy to conduct practice bombing exercises,⁶⁰ opposition based upon aesthetic impairment of a scenic portion of a river from construction of a barge fleeting facility,⁶¹ location of HUD low-income housing in middle-class neighborhood in Chicago,⁶² a permit to build a marina and commercial fishing piers on outer banks of North Carolina,⁶³ a decision of United States Fish and Wildlife Service to issue a permit that authorized the taking of the Mission Blue butterfly from areas of the San Bruno Mountain,⁶⁴ a permit for construction of a water intake structure and pipeline presenting potential negative effect on striped bass population of Roanoke River,⁶⁵ construction of a hydroelectric power station in Vermont,⁶⁶ a Forest Service salvage project to harvest timber damaged by tornadoes,⁶⁷ a permit for the construction of a municipal landfill on wetlands site that was allegedly the indispensable habitat of the highly endangered Florida Panther and the threatened Eastern Indigo Snake,⁶⁸ governmental restrictions on the total allowable catch of pollock in the Gulf of Alaska,⁶⁹ and an Air Force plan to install radio towers to transmit war messages in the event of a nuclear war.⁷⁰

Illustrative of cases finding a controversy included: a permit authorizing road construction affecting the critical habitat of the Desert

⁵⁸ See *Town of Orangetown*, 718 F.2d at 29.

⁵⁹ See *Landmark West! v. United States Postal Serv.*, 840 F. Supp. 994 (S.D.N.Y. 1993).

⁶⁰ See *North Carolina v. Federal Aviation Admin.*, 957 F.2d 1125 (4th Cir. 1992).

⁶¹ See *River Road Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445 (7th Cir. 1985).

⁶² See *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225 (7th Cir. 1975).

⁶³ See *Rucker v. Willis*, 484 F.2d 158 (4th Cir. 1973).

⁶⁴ See *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985).

⁶⁵ See *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991).

⁶⁶ See *Friends of the Ompompanoosuc v. Federal Energy Regulatory Comm'n*, 968 F.2d 1549 (2d Cir. 1992).

⁶⁷ See *Foundation for Global Sustainability v. McConnell*, 829 F. Supp. 147 (W.D.N.C. 1993).

⁶⁸ See *Fund for Animals, Inc. v. Rice*, 85 F.3d 535 (11th Cir. 1996).

⁶⁹ See *Greenpeace Action v. Franklin*, 14 F.2d 1324 (9th Cir. 1993).

⁷⁰ See *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988).

Bighorn Sheep,⁷¹ a permit allowing Sea World to capture whales for purposes of scientific research and public display,⁷² a Navy proposal to take Atlantic bottle nose dolphins from the Gulf of Mexico and transport them for military use to the Bangor submarine base in Puget Sound,⁷³ issuance of a permit to conduct scientific research on killer whales,⁷⁴ a license issued by the Federal Energy Regulatory Commission ("FERC") permitting construction and operation of a hydroelectric power project,⁷⁵ a Department of Energy proposed plan to ship spent nuclear fuel rods from Taiwan through a port in Virginia,⁷⁶ a permit issued for fill material to construct a bridge and jogging path in connection with a road extension,⁷⁷ Forest Service decision not to prepare an EIS for nine timber sales of giant redwoods in the Sequoia National Forest,⁷⁸ and plans to develop an industrial park with railroad line and marine terminal.⁷⁹

Despite the considerable deference shown to agencies, though, courts have become increasingly focused on whether the agency has met the letter of its procedural requirements under NEPA, and have devalued the role of countervailing public opinion as it could impact on the decisionmaking process. Has NEPA become a "paper tiger" after all? The following section will attempt to articulate a comprehensive framework for determining what criteria should guide agencies and courts in meeting the twin aims of NEPA—animating agency decisionmaking with environmental values while engaging the public in a meaningful dialogue about the potential effects of that project on the human environment.

This article proposes a multi-factored test that federal agencies and reviewing courts should consider when evaluating whether opposition to a major federal project is "highly controversial" for purposes of affecting agency duties under NEPA: (1) the degree of opposition, both in quantitative

⁷¹ See *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172 (9th Cir. 1982).

⁷² See *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986).

⁷³ See *Progressive Animal Welfare Soc'y v. Department of the Navy*, 725 F. Supp. 475 (W.D. Wash. 1989).

⁷⁴ See *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579 (W.D. Wash. 1987).

⁷⁵ See *LaFlamme v. Federal Energy Regulatory Comm'n*, 852 F.2d 389 (9th Cir. 1988).

⁷⁶ See *Sierra Club v. Watkins*, 808 F. Supp. 852 (D.C. Cir. 1991).

⁷⁷ See *Audubon Soc'y v. Dailey*, 977 F.2d 428 (8th Cir. 1992).

⁷⁸ See *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988).

⁷⁹ See *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985).

and qualitative terms; (2) whether the disputed information is a matter of legitimate scientific debate regarding the potential environmental impacts of the project; (3) the stage or timing in which the disputed information is raised and whether it would serve a useful purpose in light of decisions remaining; (4) whether the agency has a reasoned plan of mitigation to speak to the issues raised in opposition to the action; and (5) whether the dispute involves a matter of objective environmental effects or an issue of a subjective nature, such as aesthetics.

IV. A PROPOSED MODEL FOR DETERMINATION OF SIGNIFICANCE IN AGENCY DECISIONMAKING UNDER NEPA

A. *Consideration of Degree of Opposition*

The CEQ regulations state that one factor in assessing the significance of a proposed project is the “degree to which the effects on the quality of the human environment are likely to be highly controversial.”⁸⁰ The regulatory limitation, couched in terms of the “degree” of opposition, is consistent with NEPA’s general framework of focusing administrative attention on the potentially most significant environmental effects of their actions.⁸¹

The characterization of what degree of controversy satisfies the CEQ requirement has been variously stated as being a “substantial dispute,”⁸² “robust dissent,”⁸³ or of an “extraordinary nature.”⁸⁴ What types of actions amount to a substantial dispute, though, is unclear. Courts have consistently held that mere opposition to a project does not amount to being “highly

⁸⁰ 40 C.F.R. § 1508.27(b)(4) (1996).

⁸¹ See *Preserve Endangered Areas of Cobb’s History, Inc. v. Corps of Eng’rs of United States Army*, 916 F. Supp. 1557, 1564 (N.D. Ga. 1995) (holding that NEPA instructs federal agencies to perform a balancing of interests by weighing competing concerns to see whether going forward with a project outweighs its potential adverse environmental consequences; the most important word in the itemization of considerations regarding what is significant is “degree”); *Landmark West! v. United States Postal Serv.*, 840 F. Supp. 994, 1003 (S.D.N.Y. 1993) (controversy is matter of degree).

⁸² *Hanly II*, 471 F.2d 823, 830 (2d Cir. 1972).

⁸³ *Foundation for Global Sustainability v. McConnell*, 829 F. Supp. 147, 153 (W.D.N.C. 1993).

⁸⁴ *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983).

controversial.”⁸⁵ Rather, the focus ordinarily is whether a substantial dispute exists regarding the “size, nature, or effect” of the agency action.⁸⁶ Uncertainty remains, however, in determining the quality or quantity of opposition to a major federal action that would be sufficiently substantial to affect agency duties under NEPA.

An early leading case interpreting the term “significantly” in the context of section 102(2)(C) and which raised the idea that opposition or controversy pertaining to a project could affect the nature and extent of NEPA duties was *Hanly v. Kleindienst* (“Hanly II”).⁸⁷ The case involved a challenge to the General Service Administration’s (“GSA”) determination that the proposed construction of a nine-story federal detention center and office building located in Manhattan did not significantly affect the quality of the human environment and thus did not require preparation of an environmental impact statement.⁸⁸

In *Hanly I*,⁸⁹ the court found that the GSA had relied upon an inadequate record because it considered the effects of the building on water, heat, sewage and garbage, yet failed to take a hard look at the environmental impact of the jail with respect to the surrounding social fabric of the neighborhood as well as traffic and parking problems.⁹⁰ The court rendered an expansive view of what constitutes “environmental considerations” for NEPA purposes, stating that the scope of the Act extends beyond sewage and garbage and includes “protection of the quality of life for city residents.”⁹¹ The court enjoined construction of the jail pending compliance by the GSA with its procedural duties under NEPA. Following remand, the GSA submitted an environmental assessment which considered numerous

⁸⁵ *Friends of the Ompompanoosuc v. Federal Energy Regulatory Comm’n*, 968 F.2d 1549, 1557 (2d Cir. 1992) (distinguishing between “controversy” and “opposition” to the project—the former potentially affecting agency duties under NEPA and the latter simply reflecting the reality that virtually all projects have critics).

⁸⁶ 471 F.2d at 830. The court observed that virtually all projects will engender some degree of criticism; therefore the term “controversial” instead should properly refer to those situations “where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed.” *Id.*; see also *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

⁸⁷ 471 F.2d 823 (2d Cir. 1972).

⁸⁸ See *id.* at 826.

⁸⁹ See *Hanly v. Mitchell* (*Hanly I*), 460 F.2d 640 (2d Cir. 1972).

⁹⁰ See *id.* at 646.

⁹¹ See *id.* at 647.

environmental factors, determined that the construction of the complex was not “significant” to justify preparation of an EIS, and concluded that the jail should still be built.

In *Hanly II*, the Second Circuit squarely addressed the issue left open in *Hanly I* regarding the proper scope and application of the “amorphous term ‘significantly’” within the meaning of section 102(2)(C). The court recognized that virtually every major federal action has some adverse impact on the human environment.⁹² The court articulated a two-fold inquiry into both the “context” and “intensity” in assessing the significance of a major federal project for defining agency duties under the statute.⁹³

The case is also notable for the court’s observations regarding the relevance and character of public opposition in making the significance determination. The court observed that it was understandable that some would oppose the project because of a “psychological distaste” for having a jail located in close proximity to residential apartments.⁹⁴ Nevertheless, such psychological and sociological effects “do not lend themselves to measurement”⁹⁵ and thus probably fall short of affecting the significance determination by the agency. The court observed that virtually all projects will engender some degree of criticism; therefore the term “controversial”

⁹² See *Hanly II*, 471 F.2d at 830. The court of appeals observed that “an action which is environmentally important to one neighbor may be of no consequence to another.” *Id.*

⁹³ See *id.* at 830-31. The court stated:

(1) [T]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the areas affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Where conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change. Absent some showing that an entire neighborhood is in the process of redevelopment, its existing environment, though frequently below an ideal standard, represents a norm that cannot be ignored. For instance, one more highway in an area already honeycombed with roads usually has less of an adverse impact than if it were constructed through a roadless public park One more factory polluting air and water in an area zoned for industrial use may represent the straw that breaks the back of the environmental camel.

Id.

⁹⁴ See *id.* at 833.

⁹⁵ See *id.*

instead should properly refer to those situations “where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed.”⁹⁶

This distinction between the nature of the controversy being directed at “subjective” factors, such as a personal dislike of or disagreement with the project’s objectives, and “objective” emphasis on the environmental aspects of the agency’s decisionmaking process, is more fully discussed in Part IV of this article. In the former instance, considerable deference is given to agency decisionmaking, principally on the basis that unanimity of opinion is impossible and subjective tastes differ. In the latter, especially where the character of the dissent has an objective scientific basis, reviewing courts have been more inclined to evaluate whether the agency has a reasoned explanation for its decision to dismiss the controversy. The *Hanly II* court’s emphasis on the degree of opposition corresponds to and reflects NEPA’s structure and priority for agency duties increasing as the project is deemed to present a significant impact to the quality of the human environment.

Opposition, in order to be cognizable under NEPA, must focus on the anticipated *environmental effects*, not merely the government’s decision to go forward with the project.⁹⁷ For instance, in *Town of Orangetown v. Gorsuch*,⁹⁸ the Town challenged the approval by the EPA of construction grants for the modernization and expansion of a county sewage treatment system. The town claimed that the EPA erred in its determination that the system would not significantly affect the quality of the human environment, pointing to strong local opposition to the project.⁹⁹

The court acknowledged that the expansion of an unpopular sewage treatment plant would be expected to generate considerable opposition. However, in order to affect an agency’s duties under NEPA, the nature of the opposition must be of an “extraordinary” character, not merely speculation that the plant expansion will increase odor problems.¹⁰⁰ The court stated that

⁹⁶ *Id.* at 830. The court observed: “Experience in local zoning disputes demonstrates that it is the rare case where some neighbors do not oppose a project, no matter how beneficial, and that their opposition is usually accompanied by threats of litigation.” *Id.* at 830 n.9A.

⁹⁷ See *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

⁹⁸ 718 F.2d 29 (2d Cir. 1983).

⁹⁹ See *id.* at 31.

¹⁰⁰ See *id.* at 39.

“opposition and a high degree of controversy . . . are not synonymous.”¹⁰¹ Further, the prospect of litigation did not transform a project into being significant for NEPA purposes; otherwise someone could always affect the government process merely by threatening litigation.¹⁰²

At what point does the sheer quantity of opposition constitute a sufficient *degree* of controversy to affect agency decisionmaking duties under NEPA? This was explored in *West Houston Air Commission v. Federal Aviation Administration*,¹⁰³ where the FAA issued a certificate which authorized an airport to serve larger passenger flights. The FAA’s own regulations interpreting NEPA provide that an EA should not be prepared before a Part 139 certificate is issued unless the proposed action is “highly controversial on environmental grounds.”¹⁰⁴

The court dismissed the opposition as insubstantial, although the FAA had received 558 signatures on petitions, representing some 396 households, and about 120 letters opposing the airport expansion.¹⁰⁵ The court reasoned that the actual number of people who objected was not large in relation to the population who would be affected by the certification.¹⁰⁶ Thus, the public opposition was seen as “minimal” in relation to the relevant project service area, and not of such an “extraordinary nature” to warrant a modification of the agency’s responsibilities under NEPA.¹⁰⁷

NEPA contemplates that the nature and extent of the impact statement process turns in part on the “significance” of the proposed project. Should

¹⁰¹ *Id.* See also *Foundation for Global Sustainability v. McConnell*, 829 F. Supp. 147, 153 (W.D.N.C. 1993) (holding that objections by several groups to Forest Service decision for salvage project to harvest timber damaged by tornadoes are not robust enough dissent to affect agency decisionmaking responsibilities).

¹⁰² See *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983).

¹⁰³ 784 F.2d 702 (5th Cir. 1986).

¹⁰⁴ *Id.* at 704. The applicable regulation provided that a project was considered highly controversial when “opposed by a Federal, state or local government agency or by a substantial number of the persons affected by such action on environmental grounds.” *Id.*

¹⁰⁵ See *id.* at 705. Compare *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), where approximately 1,000 comments were received both voicing support and opposition to an application for a permit authorizing Sea World to capture killer whales for scientific research and display. The court held that the agency failed to provide a reasoned explanation of its decisions rather than a conclusory statement that the impacts were “not significant.” *Id.* at 828.

¹⁰⁶ *West Houston Air Comm’n*, 784 F.2d at 705.

¹⁰⁷ See *id.*

a negative inference be drawn, for example of “insignificance,” where public opposition may be limited? In an early case under NEPA, *Mahelona v. Hawaiian Electric Co.*,¹⁰⁸ that question was addressed by the court in a suit brought by surfing groups seeking to enjoin an electric utility and governmental plan to construct a discharge facility at a site affecting surfers. Although opposition to the agency action was limited, the court observed that the *lack* of adverse public response regarding the permit application for the discharge facility did not necessarily render the project “insignificant” for NEPA purposes.¹⁰⁹

Implicit in the court’s analysis is recognition that expression of public concern or lack thereof is just one of many factors regarding whether or not an EIS is justified. The court indicated that it is preferable to place a burden upon the agency rather than “risk the substantial and often irreversible environmental and financial consequences which may result from a short-sighted and narrow approach” by the agency with respect to NEPA responsibilities.¹¹⁰

B. *Debate Within the Scientific Community*

Controversy within the scientific community has played an influential role in the assessment of whether a proposed project is considered “significant” for NEPA purposes. Scientific debates have taken various forms, including disputes over proper scientific methodologies to obtain data pertaining to a proposed project, the reliability of data generated, the interpretation of data, the relationship of environmental impacts within and beyond an affected ecosystem, and the advisability of pursuing a particular course of action in light of other available alternatives. Because the scientific community seldom speaks with unanimity, “controversy” is the norm, not the

¹⁰⁸ 418 F. Supp. 1328 (D. Haw. 1976).

¹⁰⁹ See *id.* at 1333-34. The court observed: “[W]here the Corps knows that a project will seriously interfere with an important existing activity in an area, it may not place reliance on the silence of relatively unorganized and ill-informed citizens in determining the environmental impact of a proposed project.” *Id.* at 1333.

¹¹⁰ *Id.*

exception.¹¹¹

Some projects that implicate NEPA may raise a host of environmental impact issues which are not readily calculable because of the uncertainties of science. In matters on the “frontiers of science,” courts have been the “most deferential” to agency decisions.¹¹² In evaluating factual disputes over highly technical matters, courts routinely defer to the informed decision of the responsible federal agency, provided that it has a reasoned basis of support.¹¹³ The Supreme Court has supported the discretion of federal agencies to rely upon the reasoned opinions of its own qualified experts for purposes of NEPA compliance where specialists have expressed differing views on a particular matter, even if a reviewing court might consider other opinions more persuasive.¹¹⁴

¹¹¹ See *Foundation for Global Sustainability v. McConnell*, 829 F. Supp. 147, 153 (W.D.N.C. 1993); see also *Sierra Club v. Watkins*, 808 F. Supp. 852, 860 n.9 (D.C. Cir. 1991) (stating that no case has answered the “difficult question of how many experts must dispute an agency’s findings before it becomes ‘controversial’”).

¹¹² When an agency is “making predictions, within its area of special expertise, at the frontiers of science,” and the court is examining its scientific determinations, rather than otherwise simple factual findings, “a reviewing court must generally be at its most deferential.” *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983).

¹¹³ See *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543 (10th Cir. 1993). “[D]isagreement among experts or in the methodologies employed is generally not sufficient to invalidate an environmental assessment. Courts are not in a position to decide the propriety of competing methodologies” in matters of special environmental expertise charged to the agency; rather the nature of inquiry is whether the agency had a rational basis and took into consideration the relevant factors. *Id.* at 1553 (citations omitted); see also *Sierra Club v. Watkins*, 808 F. Supp. 852, 868 (D.D.C. 1991) (issuing an injunction where the DOE failed to comply consistently with its own scientific methodology by not assessing certain low probability risks associated with shipping spent nuclear fuel rods from Taiwan through a port in Virginia, until the agency appropriately discussed the full range of risk factors involved in the transportation of the spent nuclear fuel). *Id.* at 877.

¹¹⁴ In *Marsh v. Oregon Natural Resources Council*, the Court observed:

When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack

The framework of NEPA itself compounds the difficulty of evaluating diverse scientific judgments regarding an agency proposal. Because the principal focus of the statute is mandating procedural compliance, substantive adverse environmental effects associated with a project are subordinated to the procedural mission. Nevertheless, in complying procedurally, the agency will hopefully obtain feedback from other agencies, the scientific community, and interested members of the general public. An agency may gain useful insights from such information, and thus may decide to modify the project or select a particular alternative course of action. However, an agency is not required to discuss every scientific viewpoint or to give weight to any particular theory. Courts should not dismiss every scientific debate surrounding a project and automatically defer to the federal agency's own scientific methods. Rather, what is needed is an approach that reconciles the competing policies of deference to agency expertise while also fairly considering relevant scientific information as it may influence the decisionmaking process.

The leading case for determination by a federal court that an agency insufficiently considered the relevance of scientific "controversy" in the NEPA decisionmaking process is *Foundation for North American Wild Sheep v. United States Department of Agriculture*,¹¹⁵ (hereinafter "Wild Sheep"). In that case, several environmental interest organizations challenged the United States Forest Service's decision not to prepare an environmental impact statement prior to granting a special use permit allowing a mining company to reconstruct and use a road across federally controlled forest lands.¹¹⁶ The company owned and operated a tungsten mine in the San Gabriel Mountains in the Angeles National Forest and wanted to increase its access to its mining operations by reopening the road.¹¹⁷ The only other available road access frequently flooded, thus causing substantial "down time" and precluding economical operation of the mine. The proposal involved clearing the road of vegetation, widening the road and repairing

of significance—of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

490 U.S. 360, 378 (1989).

¹¹⁵ 681 F.2d 1172 (9th Cir. 1982).

¹¹⁶ *See id.* at 1174.

¹¹⁷ *See id.*

certain portions that had been washed out.¹¹⁸

The road construction proposal was opposed by various environmentalist organizations (collectively the "Foundation"), biologists, the California State Department of Natural Resources, and the California State Department of Fish and Game, principally on the basis that the road construction would negatively impact the habitat and ecosystem of one of the remaining herds of Desert Bighorn Sheep.¹¹⁹ California law considered the Bighorn Sheep a "protected" species of wildlife and prohibited sport hunting; federal law classified the Bighorn as a "sensitive" species which received certain special management protections.¹²⁰ The Foundation relied upon scientific evidence which indicated that the Bighorn was particularly sensitive to environmental changes and susceptible to "stress-related" diseases resulting from interaction with other species.¹²¹

The Forest Service responded to the various concerns in an environmental assessment, and considered a range of alternative courses of action with differing types of projected effects on the Bighorn herd. The agency determined that the alternative which provided for limited usage and closure during the several months of lambing season should be adopted.¹²² The agency further determined that no environmental impact statement was necessary because the alternative would adequately mitigate the potential harm to the Bighorn herd and thus would not have a significant effect on the quality of the human environment.¹²³

The Foundation sought injunctive relief to halt the reopening of the road until the agency prepared an EIS.¹²⁴ The Ninth Circuit Court of Appeals held that the Forest Service failed to take a "hard look" at the environmental consequences of its decision, and the agency's determination that reopening the road would not pose significant environmental consequences was unreasonable.¹²⁵ The court found the EA inadequate because it failed to include an estimate of projected truck traffic on the road and the potential

¹¹⁸ *See id.* at 1175.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.* at 1175-76.

¹²² *See id.* at 1176.

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.* at 1182.

effect on the Bighorn herd.¹²⁶ The court observed that “controversial” for purposes of assessing significance of proposed agency action had reference to those situations ““where a substantial dispute exists as to the size, nature, or *effect* of the major federal action rather than to the existence of opposition to a use.””¹²⁷

The court focused on the widespread criticism of the Forest Service’s proposed action by numerous conservationist environmental organizations, state agencies, and biologists with specialized knowledge of the Bighorn sheep in challenging the agency’s scientific assumptions and conclusions that the project would not have a significant detrimental impact on the herd.¹²⁸ The court reasoned that such scientific debate going to an important matter constituted the sort of “controversy” that would justify preparation of an EIS for more in-depth study and evaluation of alternative courses of action.¹²⁹ The court accordingly reversed and remanded, finding that the agency action was unreasonable.¹³⁰

Several years after the *Wild Sheep* decision, the Ninth Circuit again addressed the issue of public controversy in the NEPA decisionmaking process in *Jones v. Gordon*.¹³¹ The National Marine Fisheries Service issued a permit under the Marine Mammal Protection Act authorizing Sea World to capture killer whales for purposes of scientific research and public display. The permit contemplated that up to 100 whales could be collected over a five year period from California and Alaska coastal waters, ten of which could be maintained permanently in captivity for research and display and the remainder temporarily studied and released.¹³²

The permit sparked a tremendous outpouring of public opinion as over 1,200 comments supported the application and 1,000 comments voiced

¹²⁶ See *id.* at 1178.

¹²⁷ *Id.* at 1182 (quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973)).

¹²⁸ See *id.* at 1181-82.

¹²⁹ See *id.* at 1182; see also *Progressive Animal Welfare Soc’y v. Department of the Navy*, 725 F. Supp. 475 (W.D. Wash. 1989) (holding that Navy plans to take Atlantic bottle nose dolphins from the Gulf of Mexico and transport them to the Bangor submarine base in Puget Sound, Maine, for military use, pursuant to Marine Mammal Protection Act violated NEPA where the navy failed to prepare EA or EIS, and finding that the “reverse impact” on the dolphins was subject to scrutiny under NEPA as “highly controversial”).

¹³⁰ See *Foundation for North American Wild Sheep*, 681 F.2d at 1181-82.

¹³¹ 792 F.2d 821 (9th Cir. 1986).

¹³² See *id.* at 823.

opposition in whole or in part.¹³³ The public comments criticized the agency's scientific conclusions on various grounds, including arguments that killer whales in captivity cannot perform their ecological role, that whales do not survive long once in captivity, and that exploitation would present a long-term harm to both population size and social structure of the species.¹³⁴ Further, they argued that the permit would undercut the United States' position against whaling.¹³⁵ The Service's own final report on the application by Sea World for the permit to capture the whales acknowledged the existence of "public controversy based on environmental consequences."¹³⁶

The Service disputed some of the scientific evidence offered by opponents of the permit, but did not explain why they were insufficient to create a public controversy based on environmental consequences.¹³⁷ The Court of Appeals for the Ninth Circuit upheld the district court's judgment that the decision by the agency not to prepare an environmental impact statement was deficient and unreasonable because it failed to explain why the permit did not fall within an exception to its own categorical exclusions pertaining to public controversy.¹³⁸ The court held that the agency must provide reasoned explanations of its decisions rather than conclusory statements of "no significance."¹³⁹

¹³³ *See id.*

¹³⁴ *See id.* at 828.

¹³⁵ *See id.* at 829.

¹³⁶ *See id.* at 828.

¹³⁷ *See id.* at 828-29.

¹³⁸ *See id.* at 829.

¹³⁹ *See id.* at 828; *see also* *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 741 (3d Cir. 1982) (finding that an agency cannot avoid responsibilities under NEPA merely by asserting that an activity won't have a significant effect; the responsible federal agency must supply convincing statement of reasons why potential effects are insignificant); *Public Serv. Co. of Colorado v. Andrus*, 825 F. Supp. 1483, 1496 (D. Idaho 1993) (not accepting the conclusory statements of no significant effects in an environmental assessment where those statements form the basis for the EA and are either clearly inadequate or a bad faith analysis of expected environmental consequences).

In a similar vein, in *Greenpeace U.S.A. v. Evans*, 688 F. Supp. 579 (W.D. Wash. 1987), an environmental organization challenged issuance of a permit to conduct scientific research on killer whales in Puget Sound. *See id.* at 580. The permit authorized the harassment of the killer whales and the collection, by dart biopsy, of skin and tissue samples to study contamination and diet and pod integrity. *See id.* The government claimed that the activity fell within a categorical exclusion under NEPA and thus did not necessitate

Interestingly, although the number of public comments criticizing the agency action exceeded 1,000, the court did not specifically rely on that to conclude that the project was "highly controversial." Rather, the court focused on the fact that the agency had not articulated a reasoned explanation of its decision to issue the permit in light of the scientific uncertainty surrounding the impact of the proposal on the whales. Presumably, the sheer quantity of the criticism lent credence to the scientific debate, but was not articulated as an independent factor to constitute a controversy.

Another influential decision regarding the issue of scientific controversy was *Sierra Club v. United States Forest Service*,¹⁴⁰ which involved a challenge to the Forest Service's decision not to prepare an EIS for nine timber sales of giant redwoods in the Sequoia National Forest. The agency concluded that the logging would not significantly affect the quality of the human environment, although five of the affected tracts contained groves of giant sequoia redwoods that are known for their size and longevity.¹⁴¹

The Sierra Club produced affidavits and testimony of conservationists, biologists, and other scientific experts who criticized the

preparation of an EIS. *See id.* at 581.

The National Marine Fisheries Service ("NMFS") published a summary of the project and requested public comments. *See id.* at 580. In response, two comments supported the project and ten strongly voiced opposition. Also, another federal agency and the Regional Director of the NMFS itself expressed serious environmental concerns about the project. *See id.* The concerns included questions regarding the validity of the scientific techniques relied upon by the agency, possible long term alteration of the killer whale's social behavior as a result of the harassment, and the potential that it would negatively impact the ability of other researchers to collect data by causing whales to avoid the area. *See id.* at 581.

The court agreed that the NMFS study was "controversial," pointing to those factors as well as the number of organizations and individuals opposing issuance of the permit. *See id.* at 583. Additionally, the court considered the government's failure to explain why the effects of the study would not be controversial, and the government effectively or implicitly agreed that the project was scientifically controversial by attaching various limitations and restrictions to the permit (e.g., observers, limit number, suspend research if indication that harm to previously healthy whale). *See id.* at 581. In sum, the court found that once legitimate scientific controversy raises credible points of disagreement over method or analysis, the agency cannot merely dismiss such opposing views without providing adequate support in the administrative record. *See id.* at 585-86.

¹⁴⁰ 843 F.2d 1190 (9th Cir. 1988).

¹⁴¹ *See id.* at 1192.

EA's and disagreed with the Forest Service's conclusions that the logging operations would not pose a serious threat to the sequoias.¹⁴² They contended that the agency should have erred on the side of conservation and careful evaluation of the ecological balance because of "uncertainties" regarding the groves of giant sequoias, and because sequoias are viewed as "priceless" natural resources that can be devastated by a disruption of the existing ecological balance.¹⁴³

Two factors joined to influence the court's decision that the agency had failed to properly assess the significance of the public controversy regarding the logging proposal. First, the nature of the resource potentially affected are characterized as "priceless." Second, scientific uncertainties existed as to the effects of a disruption of the ecosystem on the giant sequoias. The Sierra Club contended that the agency should have erred on the side of conservation based upon these two factors.¹⁴⁴ The court agreed with the Sierra Club and concluded that to ignore such public input would render section 1508.27(b)(4) of NEPA a "nullity."¹⁴⁵ Consequently, the court enjoined the timber sales, finding that the agency decision was not fully informed and well considered.¹⁴⁶

A recent illustration of the role of controversy as affecting the determination of "significance" in agency decisionmaking under NEPA is *Greenpeace Action v. Franklin*.¹⁴⁷ In *Greenpeace Action*, an environmental activist organization alleged violations of NEPA and the Endangered Species Act,¹⁴⁸ by the Secretary of Commerce and the National Marine Fisheries Service in establishing a total allowable catch of pollock in the Gulf of Alaska without preparation of an EIS. The plaintiffs contended that the agency policy regarding the pollock would prove excessively harmful to the Steller sea lion population, classified as a "threatened" species under the ESA.¹⁴⁹ The plaintiffs claimed that the pollock was a staple in the diet of the Steller sea lion and that excessive harvesting of pollock would cause a

¹⁴² See *id.* at 1193-94.

¹⁴³ See *id.* at 1194.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 1195; see also *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982).

¹⁴⁶ See *Sierra Club*, 843 F.2d at 1195.

¹⁴⁷ 14 F.3d 1324 (9th Cir. 1993).

¹⁴⁸ 16 U.S.C. § 1536(a)(2).

¹⁴⁹ See 14 F.3d at 1327.

decline in the sea lion population.¹⁵⁰ The group claimed that various scientific studies, including the Service's own data, linked the harvesting of pollock as the "leading factor" in the decline of the sea lion population.¹⁵¹ The Service disagreed, relying on two environmental assessments which analyzed the projected effect of the harvesting policy, but which concluded that it did not correspond to a reduction in the sea lion population.¹⁵²

The court upheld the Service's decision not to prepare an EIS, finding that its conclusions were based on substantial scientific data, not speculation.¹⁵³ Thus, even though the Service's scientific data was not dispositive and a dispute existed pertaining to its management measures, that did not equate to a "controversy" for NEPA purposes.¹⁵⁴ The court flatly rejected the notion that a controversy exists for NEPA purposes whenever qualified experts disagree; otherwise the EA process would be rendered meaningless.¹⁵⁵ The court reasoned that, if a scientific dispute alone led to a determination that an agency had acted arbitrarily or capriciously, they "could only act upon achieving a degree of certainty that is ultimately illusory."¹⁵⁶

The court accorded a greater degree of deference to the agency because it was a fact-based challenge to the agency determination not to prepare an initial EIS.¹⁵⁷ The court also found that an environmental controversy cannot be established "post hoc" by critics of a proposal simply presenting the differing views of their own experts when at the time of the

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *See id.* at 1327-1328.

¹⁵³ *See id.* at 1332-36.

¹⁵⁴ *See id.* at 1333.

¹⁵⁵ *See id.* at 1335.

¹⁵⁶ *Id.* at 1336. The court observed:

If this type of disagreement were all that was necessary to mandate an EIS, the environmental assessment process would be meaningless. An agency's careful evaluation of the impact of its proposed action, its collection and review of evidence, and its reasoned conclusions as to what the data reveals would be for not if by simply filing suit and supplying an affidavit by a hired expert, predicated upon the same facts relied upon the same facts relied upon by the agency but reaching a different conclusion, a litigant could create a controversy necessitating an EIS.

Id. at 1335.

¹⁵⁷ *See id.* at 1331.

agency action there was no dispute.¹⁵⁸

The court distinguished the situation in *Greenpeace Action* from that in *Wild Sheep* in that the Service had considered crucial factors and had established a virtual consensus, even among objecting parties, that its management measures, as revised, were adequate to preserve the Sea Lion food supply.¹⁵⁹

A recent illustration of the role of controversy as affecting the determination of "significance" in agency decisionmaking under NEPA is *Fund for Animals, Inc. v. Rice*.¹⁶⁰ In that case, an environmental group sought to prevent construction of a municipal landfill on a wetlands site that was allegedly an indispensable habitat of the highly endangered Florida Panther and the threatened Eastern Indigo Snake.¹⁶¹ The Corps of Engineers had issued a Clean Water Act permit for construction of the landfill under section 404 and Nationwide Permit No. 26.¹⁶² The Corps had determined that a public hearing would not benefit the decisionmaking process.¹⁶³

The court found that the agency had satisfied its obligations of taking a "hard look" at the permitting decision under NEPA in that it had considered two separate "no jeopardy" Fish and Wildlife Service Biological Opinions regarding the panther and snake, extensive information provided by plaintiff's experts, as well as information gained through two public hearings held by the state.¹⁶⁴ Further, the EPA had also given its approval to the project. Thus, despite the presence of criticism of the permitting decision claiming that the project would potentially impact negatively on the habitat of the species, the nature and extent of the opposition did not constitute the *degree* of "controversy" sufficient to trigger a duty on the part of the agency to prepare an environmental impact statement.¹⁶⁵

This case reaffirms the historic approach taken by many courts: where there is a dispute among credible scientists, the federal agency will have discretion to make a reasoned choice in determining which scientific methodology to follow in compliance with NEPA. Further, the agency

¹⁵⁸ *Id.* at 1334.

¹⁵⁹ *See id.* at 1333-34.

¹⁶⁰ 85 F.3d 535 (11th Cir. 1996).

¹⁶¹ *See id.* at 538.

¹⁶² *See id.* at 539.

¹⁶³ *See id.*

¹⁶⁴ *See id.* at 546.

¹⁶⁵ *See id.*

simply cannot conclude that the proposal poses no significant impact, rather, it must provide sufficient support for that determination. Provided the agency has discharged its procedural duties, however, the agency is not bound by NEPA to select a particular course of action, notwithstanding scientific opposition or whether a reviewing court would have preferred an alternative plan. Interestingly, one of the problems left unresolved by the courts, in evaluating "controversy" as it influences agency duties under the statute, is the lack of clarity in delineating the nature, character, and extent of factors that should be relevant to guide agencies and courts. Reliance upon agency deference in matters of scientific debate is only partially helpful in answering the question.

C. Timing and Usefulness of Purpose

In its policy statements, NEPA establishes a "philosophical" orientation in its wide-sweeping consideration of the environmental values and the relationship of people with the environment.¹⁶⁶ Yet the mechanism by which its philosophy is implemented is exceedingly pragmatic. The EIS process reflects a prioritization of agency resources to focus on those environmental effects deemed "significant."¹⁶⁷ One key aspect of significance turns on the degree to which the project is considered "highly controversial."¹⁶⁸ That inquiry itself may be interpreted according to whether opposition to a major federal project generates information which, if more fully taken into account by the lead agency, would serve a useful purpose in light of the decisionmaking process.¹⁶⁹

NEPA's policy of active public involvement and participation must be balanced against the policy of allowing an agency to make reasoned decisions in an expeditious manner. This balance is necessary to avoid excessive costs and delays in the administrative process. The nature of governmental decisionmaking contemplates the progressive development of

¹⁶⁶ See 42 U.S.C. § 4321 (1994). The purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment." *Id.*; see also 40 C.F.R. § 1508.14 (1996). "Human environment" is interpreted "comprehensively to include the natural and physical environment and the relationship of people with that environment." *Id.*

¹⁶⁷ 40 C.F.R. § 1500.

¹⁶⁸ *Id.* § 1508.27(b)(4).

¹⁶⁹ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

facts and consequent analysis in different stages, each with functional differences. Thus, controversy cannot be established *post hoc*; rather, the disputed material must be raised in a timely fashion to facilitate incorporation into the federal agency's study and analysis.¹⁷⁰ In determining whether a particular dispute is considered "highly controversial" for purposes of affecting agency decisionmaking duties, a court should evaluate the stage of the process in which the information is raised and the value to the ongoing duties remaining by the agency. There are several dimensions to this inquiry: (1) will the information serve a useful purpose in light of the remaining decisions; (2) are the goals of NEPA advanced regarding meaningful public involvement and fully developed information available to the governmental agency; (3) what is the nature of the controversy in light of purpose and goals of the proposed project; and (4) at what stage of administrative proceedings was the disputed information raised, and have other groups had an opportunity to raise the same issue at an earlier time?

Evaluating agency compliance under NEPA must be done by reference to the statutory policy of considering environmental values "to the fullest extent possible."¹⁷¹ As recognized by Judge Skelly Wright in *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,¹⁷² Congress did not intend for NEPA to become a "paper tiger."¹⁷³ Instead, its procedural requirements set a high standard for federal agencies which would be "rigorously enforced by the reviewing courts."¹⁷⁴ Other courts have recognized that NEPA's action-forcing mandate reflects more than an "environmental full-disclosure."¹⁷⁵ Instead, the Act was

¹⁷⁰ See *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1334-35 (9th Cir. 1993). The purpose of NEPA is further explained in 40 C.F.R. § 1500.1(b): "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." *Id.*

¹⁷¹ 42 U.S.C. § 4332.

¹⁷² 449 F.2d 1109 (D.C. Cir. 1971).

¹⁷³ See *id.* at 1114

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *Environmental Defense Fund, Inc. v. Corps of Eng'rs of United States Army*, 470 F.2d 289, 297 (8th Cir. 1972). The court observed: "The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill government archives." *Id.* at 298.

“intended to effect substantive changes in decisionmaking,”¹⁷⁶ recognizing that a certain degree of institutional bias exists within a governmental agency.¹⁷⁷

The pragmatic dimension of the respective roles of the agency and the public as role-players in the NEPA process was highlighted in *River Road Alliance, Inc. v. Corps of Engineers of United States Army*.¹⁷⁸ The case involved opposition to a permit issued by the Army Corps of Engineers for a temporary barge fleeting facility on the Mississippi River. The principal objection was that the Corps failed to adequately consider the detriment to the aesthetics of the area if the barge facility were constructed.¹⁷⁹

Judge Posner noted the practical concern of cost in preparation of a full-scale EIS, observing that government activity would “pretty much grind to a halt” if every federal action necessitated preparation of a full scale environmental impact statement.¹⁸⁰ A critical question in the analysis of the significance of information pertaining to the project, then, was whether the consequences were potentially serious enough to justify the attendant time delays and expense. The court observed:

The statutory concept of “significant” impact has no determinate meaning, and to interpret it sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides.¹⁸¹

Judge Posner also recognized a historical shift in emphasis from the *Hanly II* era of the early 1970s where preparation of an environmental impact statement was less burdensome, to the increasing complexity and associated

¹⁷⁶ *Id.* at 297.

¹⁷⁷ *See id.* at 295; *see also* *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (holding that each government decision “represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues”).

¹⁷⁸ 764 F.2d 445 (7th Cir. 1985).

¹⁷⁹ *See id.*

¹⁸⁰ *See id.* at 449.

¹⁸¹ *Id.*

costs in preparing environmental assessments.¹⁸² As a consequence of that change, Judge Posner observed that there had been a corresponding “loosening of the judicial reins on agency decisions not to require environmental impact statements.”¹⁸³ Posner suggests that “today, for good or ill, environmental assessments are thorough enough to permit a higher threshold for requiring environmental impact statements.”¹⁸⁴ With respect to evaluating the nature and extent of public opposition in light of its significance for NEPA purposes, Judge Posner stated that to allow the presence of criticism to “tip the balance” toward requiring preparation of an EIS would be tantamount to allowing a “heckler’s veto” in First Amendment law.¹⁸⁵

The utility of the information generated in a public controversy also played a key role in *No GWEN Alliance of Lane County, Inc. v. Aldridge*,¹⁸⁶ involving a plan by the Air Force to install numerous 300 foot radio towers that would be components in the Ground Wave Emergency Network (“GWEN”). The purpose of the GWEN system is to send war messages to United States strategic forces during and after a nuclear war by the utilization of low frequency radio waves between sensor installations, command posts, and land based nuclear forces.¹⁸⁷ The network is designed to withstand the electromagnetic pulse generated by atmospheric nuclear detonations.¹⁸⁸ The Air Force issued a generic EA for the entire project and site specific EA’s for each proposed tower location.¹⁸⁹

The group challenging the action claimed that the documents should also consider the environmental impacts of nuclear war.¹⁹⁰ Essentially, they argued that the GWEN system is destabilizing, makes nuclear war more probable and potentially more severe, and increases the likelihood that an area with a GWEN tower would be a priority target.¹⁹¹ The court rejected the plaintiff’s contentions, reasoning that it would not serve a useful purpose for

¹⁸² *Id.* at 450-51.

¹⁸³ *Id.* at 450.

¹⁸⁴ *Id.* at 451.

¹⁸⁵ *See id.*

¹⁸⁶ 855 F.2d 1380 (9th Cir. 1988).

¹⁸⁷ *See id.* at 1381.

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

the Air Force to speculate on the potential devastation associated with a nuclear war.¹⁹²

The NEPA process also contemplates circulation of federal proposals among other agencies with jurisdictional responsibilities and expertise in the relevant field. The comments received by such agencies may influence the decisionmaking by the lead agency but are not entitled to deference nor dictate a particular result.¹⁹³ The nature and extent of the disagreement, though, may affect whether the proposal is considered "highly controversial,"¹⁹⁴ and thus whether an EIS must be prepared.

For example, in *Foundation for Global Sustainability v. McConnell*,¹⁹⁵ there was disagreement within the Forest Service regarding the propriety of a decision to conduct a salvage operation to harvest timber damaged by tornadoes. The court noted that disagreement within an agency may evidence controversy but that NEPA does not require unanimity of

¹⁹² See *id.* at 1387. The court observed:

While the precise effects of a nuclear exchange may be "controversial," "uncertain," "unique," and "unknown," everyone recognizes that these effects would be catastrophic [D]etailing these results would serve no useful purpose. The NEPA requirement that the agency activity be causally related to an environmental impact is not overcome simply because the exact effect of the project is, for example, controversial or unique.

Id.

¹⁹³ See *Committee to Preserve Boomer Lake Park v. Department of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993) (holding that disagreement among experts or in methodologies employed is generally not sufficient to invalidate an EA); *Virgin Islands Tree Boa v. Witt*, 918 F. Supp. 879, 899 (D.V.I. 1996) (finding that disagreement over the potential effect on the Virgin Islands Tree Boa, an endangered species, of proposed project to construct temporary emergency housing for residents displaced by the devastation caused to St. Thomas by Hurricane Marilyn, viewed insufficient to require EIS).

¹⁹⁴ See *Roanoke River Basin Assoc. v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991). See also *Public Serv. Co. of Colo. v. Andrus*, 825 F. Supp. 1483, 1497 (D. Idaho 1993) (holding that one of the key factors in evaluating significance of DOE's proposal involving shipment, receipt processing, and storage of nuclear spent fuel at national engineering laboratory in Idaho, was that agency's own independent contractor expressed "grave reservations" about the scope and the adequacy of EA and finding of no significant impact); *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (asserting that an influential factor in finding significance of project to build industrial park and marine terminal was disagreement among several federal environmental agencies).

¹⁹⁵ 829 F. Supp. 147 (W.D.N.C. 1993).

opinion.¹⁹⁶ Further, the court reasoned that debate and dissension could serve a useful purpose by fleshing out the issues regarding government proposals.¹⁹⁷ To require a full-blown EIS simply because of a disagreement among governmental units would be counterproductive to NEPA's policy of generating healthy discussion.¹⁹⁸

Similarly, in *Roanoke River Basin Association v. Hudson*,¹⁹⁹ the State of North Carolina and the Roanoke River Basin Authority appealed a decision by Army Corps of Engineers to issue a permit to the City of Virginia Beach to construct a water intake structure and pipeline. Several state and federal agencies contended that the effect on the striped bass population in the Roanoke River was sufficiently uncertain that an EIS should be conducted.²⁰⁰ The Corps itself had recognized that the pipeline was controversial because of the substantial volume of water removed from the river basin, but concluded that the controversy had been eliminated by its mitigation plan.²⁰¹ The court upheld the agency decision, finding that the disagreement among government agencies did not constitute a sufficient controversy to necessitate the preparation of an EIS.²⁰² Rather, the Corps properly should consider the comments of other agencies, but was not bound to defer to them, only to address the comments and provide a reasoned explanation why it found them unpersuasive.²⁰³

The administrative process under NEPA blends mandated procedural steps to ensure full consideration of environmental values by all federal agencies undertaking major projects with significant environmental effects. Such requirements, although not directed to achieve a particular outcome, are intended to ensure the integrity of the process and hopefully achieve better decisionmaking. Timing issues play an important role in the procedural mechanism, as the value of information declines to the extent that it is presented later in the process. The utility of controversial ideas is a relevant

¹⁹⁶ See *id.* at 153.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* The court stated, "Such a result would be directly opposed to the Congressional desire to have these issues debated, which is the precise reason for requiring agencies to solicit public comment on a proposed action." *Id.* at 154.

¹⁹⁹ 940 F.2d 58 (4th Cir. 1991).

²⁰⁰ See *id.* at 62.

²⁰¹ See *id.* at 62-63.

²⁰² See *id.* at 64.

²⁰³ See *id.*

consideration in assessing whether an agency should undertake further or different steps under the statute. Utility, though, is not an end in itself but rather a component in the overall assessment of whether a proposal is significant and thus merits a closer look by the lead agency.

D. Mitigation Measures as Affecting Determination of Significance

NEPA contemplates that federal agencies incorporate consideration of potential mitigation measures in various stages as part of their decisionmaking process.²⁰⁴ The CEQ regulations provide for various instances in which an agency should consider mitigation measures in the process of its decisionmaking. Mitigation plays a role in the scope of the EIS,²⁰⁵ in the alternatives to the proposed action,²⁰⁶ the consequences to that action,²⁰⁷ and finally in the explanation of the decision rendered.²⁰⁸

In keeping with the philosophy that NEPA duties are essentially procedural, courts have not mandated that an agency actually adopt a particular mitigation plan as a substantive requirement.²⁰⁹ In evaluating the significance of a proposal for purposes of assessing whether an EIS must be prepared, however, one relevant factor is whether the agency contemplates undertaking mitigation steps to ameliorate the adverse environmental impacts

²⁰⁴ 40 C.F.R. § 1508.20 (1996). "Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

²⁰⁵ See *id.* § 1508.25(b).

²⁰⁶ See *id.* § 1502.14(f).

²⁰⁷ See *id.* § 1502.16(h).

²⁰⁸ See *id.* § 1505.2(c).

²⁰⁹ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

of the project, including those aspects deemed “controversial.”²¹⁰ Thus, although a major federal action may be projected to present “significant” environmental effects, an agency may also contemplate adoption of various mitigation measures that would collectively lessen such impacts to the degree that the project would no longer be considered significant. If so, an agency may not be required to prepare an EIS because the mitigation measures would sufficiently reduce or eliminate the adverse impacts. Mitigation issues also can arise in the context of reviewing the sufficiency of agency evaluation in a full-blown environmental impact statement as well.²¹¹

Consideration of projected mitigation measures as part of the “significance” calculus may present problems, however, where the definiteness or certainty of the future commitment to undertake such steps is unclear. The concerns by a reviewing court pertaining to whether mitigation measures in fact will be implemented by the agency are alleviated where a statute or regulation mandates such actions, or where a formal undertaking or contractual commitment is made by the agency or by a third party. Otherwise, generalized references to mitigation measures without some commitment or obligation by the agency have drawn criticism as eviscerating the agency’s duties under NEPA.²¹² The balance between formalized undertakings to implement mitigation measures as compared to generalized non-binding plans for mitigation²¹³ has presented a fertile ground for challenge to agency action.

In *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*,²¹⁴ the Forest Service approved plans for exploratory mineral drilling in a wilderness area in Montana despite the potential for impacting

²¹⁰ See *Maryland-National Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029, 1039 (D.C. Cir. 1973) (holding that a modification of the project design to ameliorate various adverse environmental effects, such as potential damage to river ecology, could obviate duty to prepare EIS).

²¹¹ See *Robertson*, 490 U.S. at 332.

²¹² See WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* (2d ed. 1994).

[T]here always has been something suspiciously circular about the practice of mitigated FONSI: the agencies contend with conviction that they don’t have to write EISs to consider all the bad things that might happen because they already have given careful thought to, and taken precautions against, all the bad things that might happen.

Id. at 893-94.

²¹³ See *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982).

²¹⁴ 685 F.2d 678 (D.C. Cir. 1982).

the habitat of grizzly bears, a threatened species under the Endangered Species Act. The Service incorporated a variety of mitigation conditions in its environmental assessment, including restrictions on overnight camping, limiting helicopter flights, reclamation of drilling sites, seasonal restrictions on drilling activity, and monitoring of the drilling by agency personnel.²¹⁵

Appellants, in reliance upon CEQ guidance,²¹⁶ contended that the mitigation measures could not be used to justify the Forest Service's failure to prepare an EIS because they were not included in the original agency proposal nor mandated by statute or regulation. The court acknowledged that ordinarily CEQ interpretations were entitled to substantial deference; however, the particular guidance at issue was merely an informal statement not of a regulatory character.²¹⁷ The court upheld the Service's reliance on the mitigation measures as justifying its decision not to prepare an environmental impact statement even though the plans were developed subsequent to the original proposal and were not imposed by statute or regulation.²¹⁸ The court observed that NEPA's threshold of what constitutes a "significant effect" is not reached when the agency includes mitigation measures that "compensate completely" for adverse effects of the proposal.²¹⁹

²¹⁵ See *id.* at 680.

²¹⁶ See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,038 (1981). The CEQ had taken a position that mitigation measures should influence agency decisionmaking only in narrow circumstances:

Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.

Id.

²¹⁷ See *Cabinet Mountains Wilderness*, 685 F.2d at 682.

²¹⁸ See *id.* at 682-83.

²¹⁹ *Id.* The court stated:

Logic also supports this result. NEPA's EIS requirement is governed by the rule of reason, and an EIS must be prepared only when significant environmental impacts will occur as a result of the proposed action. If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. To require an EIS in such

The court concluded that the agency action properly considered the mitigation measures and that its determination that an EIS was not required was not "arbitrary or capricious."²²⁰

However, mitigation measures contemplated by an agency at an early stage in the administrative process, such as in the context of an environmental assessment, do not necessarily have to "completely eliminate" the controversy in order to render a project "insignificant" for EIS purposes. For example, in *Friends of Endangered Species, Inc. v. Jantzen*,²²¹ the United States Fish and Wildlife Service decided to issue a permit that authorized the taking of an endangered species, the Mission Blue butterfly, in connection with plans for an extensive commercial and residential development. The Service issued a FONSI based upon a Biological Opinion which concluded that the planned development under the permit would not jeopardize the continued existence of the butterfly under the Endangered Species Act.

The court recognized that mitigation measures may be considered in determining whether a federal proposal is considered significant, and thus required preparation of an EIS.²²² The mitigation plan promulgated by the agency included various habitat conservation and protection measures, restrictions on development, and plans to ensure the cooperation of government agencies with jurisdiction over the affected area.²²³ The Service had concluded that the measures would actually enhance the ability of the butterfly to survive. The court noted that even if the mitigation measures would not completely compensate for all of the projected adverse environmental impacts, that would not necessarily require preparation of an EIS.²²⁴ The agency's mitigation plans served to reduce the potential adverse effects of the project, thereby obviating its "controversial" character.

circumstances would trivialize NEPA and would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.

Id. at 682 (citations omitted).

²²⁰ *See id.* at 683.

²²¹ 760 F.2d 976 (9th Cir. 1985).

²²² *See id.* at 987. The court also found that where federal project conforms to existing land use patterns, zoning or local plans, such conformity is evidence supporting a finding of no significant impact. *See id.*

²²³ *See id.*

²²⁴ *See id.*; *see also* discussion *supra* notes 165-67 and accompanying text (analyzing the discussion in *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991)).

Similarly, in *North Carolina v. Federal Aviation Administration*,²²⁵ groups challenged a final rule issued by the Federal Aviation Administration revoking, realigning, and establishing restricted air space over parts of the state of North Carolina to allow the Navy to conduct practice bombing exercises.²²⁶ Various groups voiced opposition to the rule, including the General Accounting Office, state agencies, local governments, and individuals, based on aeronautical, social, economic, environmental, and procedural grounds.²²⁷ The principal environmental concerns raised by the FAA's own analysis included noise from aircraft, danger to wildlife, and the potential harm associated with the use of laser weapons.²²⁸ Interestingly, an internal memorandum prepared by the FAA manager of operations had cautioned that the Navy's proposal was "highly controversial" and also referred to the opposition to the special use airspace.²²⁹ The Navy responded to the concerns by twice modifying its proposal. The court, in reviewing the government's actions, found that the "controversy" had been resolved satisfactorily when the FAA adopted the Navy's supplemental environmental assessment, including certain mitigation measures.²³⁰

The sufficiency and definiteness of mitigation measures are relevant considerations in assessing whether the measures should affect the determination of significance of the project under NEPA. In *LaFlamme v. Federal Energy Regulatory Commission*,²³¹ for example, a group challenged issuance of a license by the FERC permitting construction and operation of a hydroelectric power project. The FERC had circulated the license application to various state and federal agencies for comment, but none raised objections or suggested modifications.²³²

Subsequently, there was a large outpouring of negative public opinion, including complaints about water purification problems, harm to vegetation and wildlife due to inadequate minimum streamflows, diminished recreational opportunities, and harm to aesthetic interests.²³³ The FERC

²²⁵ 957 F.2d 1125 (4th Cir. 1992).

²²⁶ See *id.* at 1127-28.

²²⁷ See *id.* at 1129.

²²⁸ See *id.* at 1130.

²²⁹ *Id.*

²³⁰ See *id.* at 1133.

²³¹ 852 F.2d 389 (9th Cir. 1988).

²³² See *id.* at 394.

²³³ See *id.*

addressed most of the concerns raised in varying degrees but concluded that no EIS was necessary because issuance of the license did not constitute a major federal action significantly affecting the quality of the human environment.²³⁴

In a challenge to the licensing decision, the court found both procedural and substantive violations of NEPA by the agency.²³⁵ The court characterized as a “procedural” flaw the agency’s failure to prepare either an EA or a FONSI with respect to the licensing decision, having instead merely relied upon several staff reports; this invited speculation about the project.²³⁶ Further, the agency had planned to base its mitigation plan on a post-licensing study; this effectively eliminated true consideration of possible alternatives as the agency eliminated independent analysis of consequences prior to issuance of the license.²³⁷

With respect to the issue of timing, the court observed that one of NEPA’s primary goals is “to facilitate ‘widespread discussion and consideration of environmental risks and remedies associated with the pending project’” in order to carry out an informed decisionmaking process.²³⁸ Necessarily, that requires that the collection and evaluation of various ideas occur prior to approval of a course of action.²³⁹

The court viewed as a “substantive” error the agency’s failure to provide adequate support in the administrative record for its conclusions that the project’s impact on the area’s recreational use and visual quality were insignificant and that its mitigation measures were adequate.²⁴⁰ In that vein, the court found that the public controversy pertaining to recreational use and visual quality in the proposed affected area and the proposed mitigation measures on preventing significant environmental degradation *supported* the court’s conclusion that substantial questions were raised regarding the significance of the environmental impact.²⁴¹ Also, the FERC failed to

²³⁴ See *id.* at 394-95.

²³⁵ See *id.* at 399.

²³⁶ See *id.*

²³⁷ See *id.* at 400.

²³⁸ *Id.* at 398 (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980)).

²³⁹ See *id.* 400; see also *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979).

²⁴⁰ See *Laflamme*, 852 F.2d. at 399.

²⁴¹ See *id.* at 400-01.

provide a reasoned explanation to counter the public concerns.²⁴² Accordingly, the license was suspended and the agency was directed to consider the requirements of the statutes involved.²⁴³ This result is consistent with the policy of NEPA that an agency should be afforded discretion to make reasoned judgments, particularly regarding complex scientific matters, yet cannot be permitted to “put on blinders” and effectively ignore public controversy materially related to the subject of the decision.²⁴⁴

In a similar vein, *Preservation Coalition, Inc. v. Pierce*²⁴⁵ involved a challenge to a downtown center redevelopment project funded by HUD. With respect to the relevance of mitigation measures contemplated by the agency, the court held that such measures must be “project-related” in order to be considered toward the determination of environmental significance.²⁴⁶ For instance, the court reasoned that the potential impairment of air quality from increased traffic would not be considered “mitigated” for NEPA purposes simply by the agency pointing to a requirement that automobiles also must satisfy emission reduction standards under other laws.²⁴⁷

Further, proposed mitigation measures must have a sufficient level of definiteness in order to permit incorporation by the agency in its project assessment. Although commitments to undertake mitigation steps could be made by third parties and do not necessarily require formal contractual commitments, the court stated that they “must be more than mere vague

²⁴² See *id.* at 401.

²⁴³ See *id.* at 403.

²⁴⁴ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

²⁴⁵ 667 F.2d 851 (9th Cir. 1982).

²⁴⁶ See *id.* at 860; see also *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986). In *Friends of the Earth*, the court upheld an agency decision to issue a permit to a logging company for discharging fill material into a wetlands area without preparing an EIS. The adverse effects of the loss of wetlands were appropriately mitigated by a plan involving the transfer of an “off-site” parcel of land for purposes of its conversion into a substitute wetlands area. See *id.* But see *Morgan v. Walter*, 728 F. Supp. 1483, 1491 (D. Idaho 1989) (finding that agency decision basing mitigation plan involving establishment of a preservation zone to offset a proposed water diversion project was inadequately supported to justify decision not to prepare an EIS).

²⁴⁷ *Preservation Coalition*, 667 F.2d at 851 (stating that “[t]he significance of the adverse environmental impact of a particular agency action cannot be obviated by pointing to the beneficial environmental impact of a different and unrelated action”).

statements of good intentions.”²⁴⁸ Consequently, although some of the mitigating factors fell short of the standard, other project-related changes were closely planned with the city and involved firm commitments by the developer, thus justifying the agency’s reliance on such conditions as appropriate mitigating factors.²⁴⁹

Promises to mitigate adverse environmental consequences in the future do not necessarily obviate the need for preparation of EIS.²⁵⁰ For example, in *Sierra Club v. Marsh*,²⁵¹ a group challenged plans for an industrial development in Maine which included construction of a dry-cargo marine terminal, adjacent commercial park, and a causeway that would connect an island to the mainland with a road and railroad line.²⁵² The Corps of Engineers and the Federal Highway Administration prepared an EA, issued a FONSI, and granted the necessary permits and funding.²⁵³ The Maine voters and government agencies supported the project, approving bond referenda to finance the state’s share of costs.²⁵⁴

In reversing the district court, the Court of Appeals for the First Circuit relied on several factors to determine that the project was significant and required preparation of an EIS, including that the Corps had merely promised to mitigate the potential adverse effects of the project in the future.²⁵⁵ The court reasoned that possible mitigation, as it impacts on agency decisionmaking, is not merely a technical requirement that, if addressed, automatically obviates the need for EIS.²⁵⁶ Rather, mitigation measures must

²⁴⁸ *Id.* at 860; *see also* *Audubon Soc’y v. Dailey*, 977 F.2d 428, 436 (8th Cir. 1992) (holding a city’s offer to be bound by certain mitigating conditions inadequate to cure defect in the permit issued for fill material to construct bridge and jogging path in connection with a road extension); *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 353 (S.D.N.Y. 1991) (finding that a proposal to construct new postal facility impermissibly relied upon traffic mitigation measures which lacked state approval).

²⁴⁹ *See Preservation Coalition*, 667 F.2d at 860-61.

²⁵⁰ *See The Steamboaters v. Federal Energy Regulatory Comm’n*, 759 F.2d 1382, 1393-94 (9th Cir. 1985) (stating that the agency must give specific convincing explanation of how proposed mitigation conditions will render the environmental effects of a project insignificant).

²⁵¹ 769 F.2d 868 (1st Cir. 1985).

²⁵² *See id.* at 872.

²⁵³ *See id.* at 873.

²⁵⁴ *See id.*

²⁵⁵ *See id.* at 877.

²⁵⁶ *See id.*

be examined in light of "NEPA's underlying purpose of requiring agencies to determine and assess environmental effects in a systematic way" to force decisionmakers to focus on effects when making major decisions.²⁵⁷

Finally, in *Robertson v. Methow Valley Citizens Council*,²⁵⁸ the Court considered whether NEPA imposes a substantive duty upon agencies to adopt a mitigation plan to address adverse environmental effects associated with a major federal action. The case involved a challenge to the issuance of a special use permit for the development and operation of a major downhill ski resort in a national forest.²⁵⁹ The citizens group criticized the adequacy of the EIS prepared by the Forest Service on the basis that it failed to include a plan to mitigate the potential adverse consequences to the environment, including deteriorated air quality and potential losses to area wildlife.²⁶⁰ The Service had considered a variety of on-site and off-site mitigation measures in the EIS, had contemplated adoption of some steps in issuance of the permit, and anticipated further measures could be implemented in future stages of the process.²⁶¹ The citizens group, though, claimed that the Forest Service had an affirmative duty under NEPA to develop a substantive mitigation plan prior to granting of the permit.²⁶²

Justice Stevens, writing the majority opinion, reaffirmed the long-standing view that NEPA's "action-forcing" procedures require agencies to take a hard look at the environmental consequences of their actions, as well as serve to advance the informational role of the statute.²⁶³ The Court concluded, stating that "[a]lthough these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process."²⁶⁴ The statute, however, does not establish priorities for governmental action nor does it elevate environmental concerns over other interests.

²⁵⁷ *Id.* at 882.

²⁵⁸ 490 U.S. 332 (1989).

²⁵⁹ *See id.* at 337.

²⁶⁰ *See id.* at 336.

²⁶¹ *See id.* at 357-58.

²⁶² *See id.* at 347.

²⁶³ *See id.* at 350 (citing *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980)); *see also* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978).

²⁶⁴ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

The Court recognized that both the language of the act and the CEQ's implementing regulations contemplate that the discussion of potential steps to mitigate adverse environmental effects plays an important function under NEPA.²⁶⁵ The agency obligations under the statute pertaining to mitigation, however, were characterized as procedural rather than substantive.²⁶⁶ As a result, the Court recognized a "fundamental distinction" between a requirement that a mitigation plan be discussed and evaluated by the agency at relevant stages in the decisionmaking process contrasted with a requirement that a substantive plan for mitigation actually be formulated and adopted.²⁶⁷ The critical question, then, pertaining to whether the agency had discharged its statutory obligations turns on whether the mitigation measures were "fairly evaluated" according to the procedural strictures of the act.²⁶⁸ The Court observed that NEPA prohibits "uninformed" actions, not "unwise" actions.²⁶⁹ Consequently, the Court reasoned, NEPA would not necessarily be violated if one-hundred percent of the deer herd were adversely affected.²⁷⁰

Robertson is distinguishable, however, from *Cabinet Mountain* in that the context for assessing agency compliance with NEPA regarding mitigation was in the adequacy of the EIS itself, rather than whether the adoption of mitigation measures may obviate the necessity to prepare an EIS at all. The similarity is the emphasis on procedural compliance with the requirements of the statute, viewing NEPA as not mandating particular results nor even preferring "environmentally friendly" actions. Such a view gives life to the concern that NEPA is merely a bureaucratic-oriented statute with little empirical effects; however, the question remains as to whether in the process of evaluation, federal agencies actually will incorporate mitigation measures to ameliorate the adverse environmental impacts of major federal actions.

²⁶⁵ See *id.* at 351.

²⁶⁶ See *id.*

²⁶⁷ See *id.* at 352.

²⁶⁸ See *id.* The Court stated: "There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Id.*

²⁶⁹ See *id.* at 351.

²⁷⁰ See *id.* at 332.

E. *Subjective versus Objective Considerations*

1. *Value Preferences and Psychological Factors*

The question of whether subjective values, such as aesthetics or perceptions about changing demographics associated with a project, should be considered in the NEPA decisionmaking process has presented unique problems for agencies and reviewing courts. In one sense, NEPA's expansive policy can be read to encompass virtually any factor—whether objective or subjective—that touches and impacts upon the “human environment.”²⁷¹ On the other hand, courts have recognized the need to find tools to confine such considerations within manageable limits.

An early interesting case exploring the distinction between subjective personal considerations and objective environmental factors for NEPA purposes was *Nucleus of Chicago Homeowners Ass'n v. Lynn*.²⁷² A neighborhood group claimed that the location of a planned HUD low-income housing project would detrimentally affect the social character of their middle-class neighborhood in Chicago.²⁷³ The group asserted that the public housing development would not only increase the burden on schools, transportation, and fire services, but also would bring more crime and ruin the aesthetic and economic quality of the area.²⁷⁴ The essence of their complaint was that low-income public housing tenants as a group showed a statistically higher incidence of criminal behavior and property destruction than did those in a higher social class and that HUD failed to consider the adverse social

²⁷¹ 40 C.F.R. § 1508.14 (1996). The CEQ regulations define “human environment” as follows:

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of “effects” (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Id.

²⁷² 524 F.2d 225 (7th Cir. 1975).

²⁷³ See *id.* at 228.

²⁷⁴ See *id.*

effects of the tenants on the neighborhood.²⁷⁵

The court questioned whether the fears of neighbors regarding "people pollution" is a cognizable impact factor under NEPA.²⁷⁶ The court recognized that the broad environmental policy expressed in NEPA includes concern for the quality of the urban environment.²⁷⁷ However, some types of urban socio-economic effects were inherently harder to quantify and identify than clean air and water.²⁷⁸ Consequently, in such situations greater deference is given to agency good faith judgments.²⁷⁹ The court rejected the plaintiff's arguments, finding that HUD did adequately consider the impact of the housing on the "social fabric" of the community, and concluded that the compliance with relevant zoning laws, increased burden on schools, transportation, fire, and other services would be incremental.²⁸⁰

In *Metropolitan Edison Co. v. People Against Nuclear Energy*,²⁸¹ the Supreme Court considered the extent to which federal agencies are required to evaluate subjective factors as cognizable "effects" in their duties under NEPA. The case involved a challenge to the resumption of operation of one of the nuclear power plants at Three Mile Island following the malfunction of a different plant.²⁸² The Nuclear Regulatory Commission ("NRC") had considered certain "direct effects" on the environment from reopening the plant, including the release of low-level radiation, increased fog, and the release of warm water into a nearby river.²⁸³ The plaintiffs claimed, though, that the agency had violated NEPA by failing to also consider the severe psychological distress that area residents would experience from restarting the plant.²⁸⁴ The threat to mental health was associated with fears of a nuclear catastrophe and the dangerous effects of a release of radiation.²⁸⁵

²⁷⁵ *See id.*

²⁷⁶ *See id.* at 231. The HUD regulations implementing NEPA provided that the degree of controversy over environmental consequences of proposed project was a consideration factor regarding the appropriate environmental clearance procedures that should be followed. *See id.* at 231-32.

²⁷⁷ *See id.* at 229.

²⁷⁸ *See id.*

²⁷⁹ *See id.*

²⁸⁰ *See id.*

²⁸¹ 460 U.S. 766 (1983).

²⁸² *See id.* at 768.

²⁸³ *See id.* at 774-75.

²⁸⁴ *See id.*

²⁸⁵ *See id.*

The Court observed that effects on human health were cognizable under NEPA and that human health could include psychological health.²⁸⁶ Justice Rehnquist, writing the majority opinion, however, observed that NEPA is principally concerned with potential harms to the “physical” environment.²⁸⁷ Thus, to determine whether a particular effect is relevant under NEPA, requires an assessment of the relationship between the effect and the change in the physical environment caused by the federal action.²⁸⁸ The Court compared its causation analysis to “proximate cause” in tort law, both functioning as a pragmatic tool to limit obligation within manageable bounds.²⁸⁹

Turning to the disputed agency action, the Court found that NEPA did not require the NRC to consider psychological effects of existence of a risk before the risk materialized.²⁹⁰ The pragmatic basis for the Court’s holding was the inherent difficulty of agencies to effectively draw lines between “genuine” claims of psychological health and those “grounded solely in disagreement with a democratically adopted policy.”²⁹¹ The Court recognized an important public policy under NEPA involving an evaluation of whether “the gains from any technological advance are worth its attendant risks”; however, the fear associated with the risk of a nuclear accident was not an “effect” caused by a change in the physical environment as contemplated by the statute.²⁹² The limitations of causal connection to the

²⁸⁶ *See id.* at 772.

²⁸⁷ *See id.* at 774.

²⁸⁸ *See id.* at 772. The Court observed:

The theme of § 102 is sounded by the adjective “environmental”: NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word “environmental” out of its context and give it the broadest possible definition, the words “adverse environmental effects” might embrace virtually any consequence of a governmental action that some [sic] one thought “adverse.” But we think the context of the statute shows that Congress was talking about the physical environment—the world around us, so to speak. NEPA was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment.

Id.

²⁸⁹ *See id.* at 774.

²⁹⁰ *See id.* at 766.

²⁹¹ *See id.* at 778.

²⁹² *See id.* at 776.

“physical environment” by the Court in *Metropolitan Edison* further restricts the applicability of subjective or personal factors in the NEPA analysis.

Several years following *Metropolitan Edison*, in *Olmsted Citizens for a Better Community v. United States*,²⁹³ various local organizations and residents sought to enjoin a proposal for the conversion of a former state mental hospital into a federal prisons hospital under NEPA.²⁹⁴ The proposal drew strong opposition; seventy-eight percent voted against the project in a nonbinding referendum and 2,000 people attended a public meeting to voice their concerns.²⁹⁵ They challenged the adequacy of the government’s consideration of various environmental factors, including allegations that the effects of converting the mental hospital facility into a federal prisons hospital would lead to an increase in crime in the area, negatively affect neighborhood development, and introduce weapons and drugs.²⁹⁶

The court relied upon *Metropolitan Edison Co.* in characterizing the social impacts resulting from a change in the nature of the use and in the type of persons associated with the facility, rather than from “physical changes” connected with the project.²⁹⁷ Such social effects or local concerns would be considered collateral and thus outside the scope of NEPA by virtue of lacking a causal relationship to the environmental effects presented by the project. The court concluded that the disagreement with the project’s aims and effects, being in the nature of a “local political dispute,” should not be resolved in the forum of a federal court.²⁹⁸

Interestingly, the court noted that there were no “special aesthetic concerns” such as if the project affected a pristine wilderness area, unique, rare, or unusual natural features, or a special scenic area.²⁹⁹ This could suggest by implication not only that such aesthetic interests are cognizable under NEPA but that public perceptions regarding the nature of the resource affected could influence agency decisionmaking in some circumstances. The

²⁹³ 793 F.2d 201 (8th Cir. 1986).

²⁹⁴ See *id.* at 204.

²⁹⁵ See *id.* at 209.

²⁹⁶ See *id.* at 205.

²⁹⁷ See *id.*

²⁹⁸ See *id.* at 210; see also *Como-Falcon Community Coalition v. United States Dep’t of Labor*, 609 F.2d 342, 346 (8th Cir. 1979) (finding that the potential for alteration of the character of a neighborhood from proposed job corps center does not necessarily require preparation of an environmental impact statement).

²⁹⁹ See *Olmsted Citizens*, 793 F.2d at 206.

court found, though, that the agency's actions in attempting to minimize aesthetic impacts, such as through establishing a natural landscape buffer zone between the campus and nearby residential areas, supported the agency decision not to prepare an EIS.³⁰⁰

2. *Aesthetic Considerations*

Another factor considered by some courts in evaluating whether a federal action is "highly controversial" is whether the project's aesthetic qualities present significant environmental effects within the meaning of NEPA.³⁰¹ In determining whether a particular dispute may be characterized as "controversial" and therefore potentially "significant" under NEPA, courts and federal agencies have drawn a line between opposition motivated by personal preferences or values versus those disputes based upon an objective relationship to the perceived environmental impacts of the proposed action. The contours of that distinction, however, are often less than clear. Personal distaste for the aesthetic impact of a project, even if widely shared, seldom has influenced the agency decisionmaking process.

The reasons underlying this approach are based both in the language of the statute and in practical recognition of the manner in which the administrative process needs to function in order to be effective. Subjective

³⁰⁰ See *id.* at 206-07.

³⁰¹ The CEQ regulations define "effects" as follows:

"Effects" include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 C.F.R. § 1508.8 (1996).

concerns are inherently imprecise and do not lend themselves to quantification and evaluation.³⁰² To impose a duty upon an agency to fully evaluate each personal preference would be inordinately time consuming and costly and ultimately would probably produce little beneficial information toward the decisionmaking process. Otherwise, the assertion of personal value choices could be used as an effective litigation strategy to hamstring the ability of agencies to accomplish their tasks. Limitation of the relevance of personal value preferences, such as aesthetic concerns, is also consistent with the procedural emphasis of the statute.

The issue was addressed in an early case under NEPA, *Maryland-National Capital Park and Planning Commission v. United States Postal Service*.³⁰³ The Postal Service planned to locate a bulk mail center adjacent to a major highway. Concerns were raised that the facility would impair the visual quality of users of the highway, and that the loading and docking areas should be landscaped.

Judge Leventhal, writing the majority opinion, recognized that aesthetic considerations are cognizable interests within the meaning of the "human environment."³⁰⁴ The judge drew support for that conclusion from section 101(b)(2) which states one policy of the act is to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing

³⁰² See *River Road Alliance, Inc. v. Corps of Eng'rs of United States Army*, 764 F.2d 445 (7th Cir. 1985). In *River Road*, neighborhood group and the State of Illinois mounted opposition to the issuance of a permit, by the Army Corps of Engineers, for a temporary barge fleeting facility on the Mississippi River. The principal objection was that the Corps failed to adequately consider the detriment to the aesthetics of the area if the barge facility were constructed. In upholding the agency action, the court observed:

Aesthetic objections alone will rarely compel the preparation of an environmental impact statement. Aesthetic values do not lend themselves to measurement or elaborate analysis. The necessary judgments are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a much lengthier and costlier environmental impact statement.

Id. at 451.

³⁰³ 487 F.2d 1029 (D.C. Cir. 1973).

³⁰⁴ See *id.* at 1038; see also *Hanly v. Kleindienst*, 471 F.2d 823, 832 (2d Cir. 1972) (holding that a proposed federal jail in Manhattan harmonized architecturally with existing buildings in area and could even enhance the appearance of the neighborhood.); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1500 (D. Ariz. 1990) (finding that agency properly considered cultural, historic, and religious concerns of tribe in EIS).

surroundings.”³⁰⁵ The court carefully explained, however, that recognition of aesthetic interests as relevant to agency evaluation did not necessarily require certain results in the decisionmaking process:

That some, or perhaps all, environmental impacts have an esthetic facet, does not mean that all adverse esthetic impacts affect environment. That is neither good logic nor good law. Some questions of esthetics do not seem to lend themselves to the detailed analysis required under NEPA for a § 102(c) impact statement. Like psychological factors they “are not readily translatable into concrete measuring rods.” The difficulty in precisely defining what is beautiful cannot stand in the way of expressions of community choice through zoning regulation. But the difficulties have a bearing on the intention of Congress, and whether it contemplated, for example, a requirement of a detailed “environmental impact statement,” and concomitant investigation, because of the possibility that each new Federal construction would be ugly to some, or even most, beholders, on such issues as: Is this proposed building beautiful? Or, what is the esthetic effect of placing the “controversial” Picasso statute in front of the Civic Center building in Chicago?³⁰⁶

The court further observed that it was beyond the scope of the

³⁰⁵ *Maryland-National Capital Park and Planning Comm'n v. United States Postal Serv.*, 487 F.2d 1029. The court stated:

This language was taken from the Senate version of the Bill, in Conference, H. Rep. No. 91-765, 91st Cong., 1st Sess. 8 (1969), U.S. Code Cong. & Admin. News 1969, p. 2751. The Senate Report No. 91-296, 91st Cong., 1st Sess. 18 stated: “Each individual should be assured of safe, healthful, and productive surroundings in which to live and work and should be afforded the maximum possible opportunity to derive physical, esthetic, and cultural satisfaction from his environs.” And esthetics have played a part in court protection of environmental values even prior to NEPA, as appears from *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965) and the court’s advertence to the affected Hudson river scenery as “finer than the Rhine.”

Id. at 1038.

³⁰⁶ *Id.* (citations omitted).

agency's duty to take a hard look at problems which essentially pertained to differences in perspective because of individual taste or personal preferences.³⁰⁷ Aesthetic considerations, being inherently subjective, would present intractable problems in application and analysis. The court concluded that the assessment by the agency had appropriately and sufficiently dealt with the potential aesthetic impact of the facility in its landscaping plans.³⁰⁸

A recent illustration of the evaluation of the role of public controversy in the NEPA decisionmaking process is *Friends of the Ompompanoosuc v. Federal Energy Regulatory Commission*.³⁰⁹ The case involved a challenge to the grant of a license by the FERC for the construction and operation of a hydroelectric power station. Opponents of the licensing decision included local residents, two governors of Vermont, and both United States Senators from Vermont.³¹⁰ They claimed that the project was inconsistent with the historic and aesthetic character of the area and would have unacceptably adverse impacts on recreation.³¹¹

The court acknowledged that the controversial character of the license was a relevant factor in assessing the significance of the project under NEPA but also noted that the CEQ regulations did not prescribe the weight to be given to each factor.³¹² The court focused on the mandate of procedural compliance under the statute, observing that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences."³¹³ Despite the strong opposition to the project, the court found that the agency had discharged its procedural duties under NEPA.³¹⁴

The court distinguished between "controversy" and "opposition" to the project—the former potentially affecting agency duties under NEPA and the latter simply reflecting the reality that virtually all projects have critics.³¹⁵ Because the nature of the criticism was principally on aesthetic grounds, the

³⁰⁷ See *id.*

³⁰⁸ See *id.* at 1039.

³⁰⁹ 968 F.2d 1549 (2d Cir. 1992).

³¹⁰ See *id.* at 1551-52.

³¹¹ See *id.* at 1553.

³¹² See *id.* at 1556.

³¹³ *Id.* (citing *Strycker's Bay Neighborhood Council, Inc. v. Carlen*, 444 U.S. 223, 227 (1980)).

³¹⁴ See *id.*

³¹⁵ See *id.* at 1557.

court concluded that aesthetic objections alone are "seldom enough" to influence agency duties because they are inherently subjective.³¹⁶ Since that criticism was on a subjective level, a more extensive EIS would not serve a useful purpose and facilitate the agency's decisionmaking responsibilities under the Act.

NEPA is a wide-sweeping statute that seeks, in its action-forcing procedural mandate, to force all federal agencies to assess a broad range of factors in the decisionmaking process. The talisman of "human environment" is the *relationship* of people to the environment. The concept of "effects," according to the CEQ, specifically includes a reference to aesthetics.³¹⁷ Thus, where aesthetic interests are related to an environmental impact, NEPA requires federal agencies to take such concerns into account. The difficulty in that assessment, though, is finding an appropriate middle-ground to fairly accommodate the public concerns while not unduly burdening agencies. Courts that simply cast aside aesthetic concerns improperly fail to consider the breadth of NEPA's reach and undercut another aim of the policy of incorporating public involvement in the decisionmaking process. Reliance on the procedural emphasis of the statute should not be used as a lightning rod to eliminate in appropriate circumstances consideration of legitimate environmental effects, even those of a subjective nature.

IV. CONCLUSION

The structure of NEPA contemplates two principal objectives: infusing environmental considerations into the mission of all federal agencies and engaging a wider audience in the decisionmaking process. The mechanism by which these goals are accomplished is principally by certain "action-forcing" procedural requirements of investigation, study, and analysis of significant environmental impacts on the human environment. Although no particular result is dictated nor specific environmental preferences are established, the NEPA process is intended to facilitate better decisions.³¹⁸ In

³¹⁶ See *id.*

³¹⁷ See 40 C.F.R. § 1508.8(b) (1996).

³¹⁸ See *id.* § 1500.1(c) ("Ultimately . . . it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.").

order to achieve the statutory goals, relevant information must be obtained pertaining to proposed major federal actions. In the process of disclosure and pursuit of useful information about environmental consequences, disagreement often surfaces regarding the propriety of certain alternative courses of government action. Where the nature of the disagreement or opposition is of a substantial character, it may ultimately affect the duties of the lead agency.

A comprehensive, multi-factored approach should be adopted to guide federal agencies and reviewing courts to evaluate whether opposition to a major federal project is “highly controversial” and therefore influences the determination of “significance” within the meaning of section 102(2)(C). Thus, with respect to issues of legitimate scientific debate which could serve a useful purpose if integrated into the agency’s analysis, the NEPA goals of better decisionmaking would be furthered. The methodology proposed reconciles the twin aims of the statute and reinforces the role of active and meaningful public participation. Agencies still would retain considerable discretion regarding procedural implementation and substantive decisionmaking; however, that discretion would be tempered by the idea of fully considering relevant disputed information.