

COMPARING FEDERAL AND STATE ENVIRONMENTAL PLANNING LAWS:
WHAT NEPA LACKS IN SUBSTANTIVE LAW
EXISTS IN ITS PROGENY

by

PHILIP MICHAEL FERESTER

A THESIS

Presented to the Interdisciplinary Studies Program:
Individualized Program
and the Graduate School of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Master of Science

August 1991

APPROVED:


Professor Michael D. Axline, J.D., Co-Chair


Dr. Carl Hosticka, Co-Chair

© 1991 Philip Michael Ferester

An Abstract of the Thesis of
Philip Michael Ferester for the degree Master of Science
in the Interdisciplinary Studies Program: Individualized
Program

to be taken

August 1991

Title: COMPARING FEDERAL AND STATE ENVIRONMENTAL PLANNING
LAWS: WHAT NEPA LACKS IN SUBSTANTIVE LAW EXISTS IN
ITS PROGENY

Approved:

 
Professor Michael D. Axline, J.D., Co-Chair


Dr. Carl Hosticka, Co-Chair

The National Environmental Policy Act's (NEPA's) impact statement procedure was originally developed to implement certain aspirational policy commands. However, the Supreme Court has interpreted NEPA only as an "essentially procedural" statute, leaving administrative discretion to approve environmentally degrading actions essentially unrestrained. This unchecked discretion has led NEPA down a path towards ever-increasing inefficiency.

Several states have enacted "little NEPAs" -- statutes patterned after the federal law. California, Washington, and New York have modified NEPA's framework by adding substantive

elements which force or allow the applicable agencies to act in an environmentally responsible manner. Some states also benefit from a better judicial approach to appealed decisions under their little NEPAs.

This paper proposes amendments to NEPA based on several unique features of California, Washington, and New York's laws. The proposed amendments should rejuvenate NEPA and enhance its effectiveness in reducing or preventing the environmental damage which results from federal actions.

VITA

NAME OF AUTHOR: Philip Michael Ferester

PLACE OF BIRTH: Chicago, Illinois

DATE OF BIRTH: January 11, 1965

GRADUATE AND UNDERGRADUATE SCHOOLS ATTENDED:

University of Oregon

University of Wisconsin - Madison

DEGREES AWARDED:

Master of Science, 1991, University of Oregon

Juris Doctorate, 1991, University of Oregon

Bachelor of Science, 1987, University of Wisconsin -
Madison

AREAS OF SPECIAL INTEREST:

Environmental Law

Natural Resource Policy

PROFESSIONAL EXPERIENCE:

Law Clerk/Internship, Natural Resources Division,
Office of the Attorney General of Washington,
Olympia, WA, Summer 1989

Law Clerk, Legal Services Office, Rhode Island
Department of Environmental Management, Providence,
RI, Summer 1988

AWARDS AND HONORS:

Editor-in-Chief, Journal of Environmental Law and
Litigation, University of Oregon School of Law,
1990-91

ACKNOWLEDGMENTS

The author thanks Mike Axline for his advice, time, and patience in reviewing this work.

The author also extends his heartfelt thanks to his parents, Jan and Stu, for their continued support and encouragement throughout his academic career. Further thanks are in order to Jan and Stu for no longer asking, "When will that thesis ever get finished?"

TABLE OF CONTENTS

Chapter	Page
I. INTRODUCTION	1
II. THE IMPORTANCE OF SUBSTANTIVE NEPA's RISE AND FALL	7
The Rise of Substantive NEPA	9
NEPA at the Supreme Court: Extinguishing Substantive Review	20
The Perils of NEPA Procedures Sans NEPA Substance	32
III. THE SUBSTANCE OF THREE LITTLE NEPAs	44
The California Environmental Quality Act	45
Washington's State Environmental Policy Act .	64
New York's State Environmental Quality Review Act	75
Chapter Summary	87
IV. PREPARING FOR NEPA's RENAISSANCE	90
Recreating substantive NEPA	92
Judicial Review of NEPA Decisions	95
V. CONCLUSION	103
BIBLIOGRAPHY	105

LIST OF FIGURES

Figure	Page
1. Number of EISS Prepared Per Year	35
2. NEPA Cases Filed Per Year	38
3. S.Ct. Petitions for Certiorari in NEPA Cases Per Year	41

CHAPTER I

INTRODUCTION

The National Environmental Policy Act of 1969 (NEPA)¹ has been described as "the environmental Ten Commandments,"² "the environmental bill of rights,"³ and "the environmental Magna Carta."⁴ Others have called it nothing but a "full disclosure bill."⁵ This represents quite a divergence of opinion concerning the superficially simple law that states its two principle purposes are declaring a national policy which encourages harmony between humans and the environment, and promoting efforts to prevent or eliminate damage to the environment and the biosphere.⁶ Certainly, those purposes

¹ 42 U.S.C. §§ 4321-4370a (1988).

² Borrelli, *Environmental Ethics -- The Oxymoron of Our Time*, *The Amicus Journal* 39, 41 (Summer, 1989).

³ Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTG. L. REV. 230 (1970).

⁴ D. MANDELKER, *NEPA LAW & LIT.* § 1:01 (1984).

⁵ *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 728, 749, (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

⁶ 42 U.S.C. § 4321.

seem laudable; in fact, some might consider them grandiose. How, then, could somebody call NEPA a mere full-disclosure bill?

The answer to this question can be discovered through a study of NEPA's legislative history, as well as the scholarly and judicial interpretations that have added several layers of gloss to the original text. Such a study reveals that this revolutionary planning law sought to implement Congress' purposes through a procedural mechanism which forced all agencies of the federal government to prepare environmental impact statements (EISs) before undertaking certain actions.⁷ This procedural mechanism was so unique that administrators, lawyers and judges focused on its provisions, drawing the EIS procedure into the limelight. At the same time, the substantive policies which form NEPA's foundation were ignored, causing them to drift into the backstage shadows.⁸

⁷ 42 U.S.C. § 4332(2).

⁸ Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, 6 *The Environmental Forum* 18, 20 (November/December 1989); Caldwell, *A Constitutional Law for the Environment: 20 Years With NEPA Indicates the Need*, 31 *Environment* 7 (December 1989). Professor Caldwell played an instrumental role in the creation of the revolutionary EIS procedure, recognizing that aspirational statements of national environmental policy would have little meaning without an action-forcing mechanism. See R. LIROFF, *A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH*, 16 (1976). Others have also noted this phenomenon. See, e.g., Montange, *NEPA in an Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 *VIRG. ENVTL. L.J.* 1 (1989).

This occurred because the federal judiciary had a relatively easy time interpreting and applying NEPA's straight-forward procedural sections and their accompanying administrative regulations.⁹ The substantive policy and purpose statements, on the other hand, are vaguely drafted aspirational commands which are far more difficult to apply.¹⁰ The courts ignored

⁹ See 40 C.F.R. §§ 1500-1508 (1990) (Council on Environmental Quality).

¹⁰ NEPA's substantive policies are set out in its declarations of purpose and of national environmental policies in sections 2 and 101 of the law, and are supposed to be incorporated into the EIS procedure through section 102(1). The relevant language follows:

Section 2: [NEPA's purposes] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere

Section 101(a): The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill . . . other requirements of present and future generations of Americans.

Section 101(b): In order to carry out the policy set forth [above], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to . . .:

these sections, leaving federal agencies to interpret and apply these constitution-like commands as they saw fit. It was thought that the judiciary's role simply did not extend to a consideration of the substance, or the merits, of particular decisions.¹¹

Some people realized early in NEPA's history that the innovative EIS procedure would become an ineffectual waste of paper without judicial recognition of the need to use NEPA's substantive policies to help guide the decisionmaking process.¹² Without these substantive foundations,

-
- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; . . .
 - (3) attain the widest range of beneficial uses of the environment without degradation . . . or other undesirable and unintended consequences . . .

Section 102: The Congress authorizes and directs that, to the fullest extent possible:

- (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . .

The procedural requirement for producing impact statements can be found in section 102(2)(C).

¹¹ This will be discussed in Chapter II of the paper.

¹² Some of the more visionary scholars include Cohen and Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COMM. L. REV. 685, 702 (1972) ("[T]he failure to require compliance with [NEPA's substantive policies] will lead ultimately to frustration of the legislative purpose of NEPA. . . ."), and Muskie and Cutler, *A National Environmental Policy, Now You See It, Now You Don't*, 25 MAINE L. REV. 163, 173 (1973) ("[A]ll that an agency must do to

environmental impact statements would indeed become nothing more than full-disclosures of future environmental degradation.

The federal government's enactment of NEPA was closely paralleled in twenty-eight states that enacted "little NEPAs."¹³ These laws usually have similar policy rationales and procedural mechanisms to NEPA. In a significant way however, some states sought to improve upon NEPA by holding state agencies and municipalities to higher standards than their federal counterparts are held to. These states expanded the substantive foundation of their environmental planning laws, sometimes allowing the judiciary, even superficially, to review the merits of administrative decisions made pursuant to EISs. Some states also strengthened their little NEPAs by extending the reach and detail required in the impact statement process.

The purpose of this paper is to explore the differences in the implementation and enforcement of the substantive

comply fully with NEPA's [procedural] requirements is to conduct a good faith but relatively undefined balancing analysis, consider the alternatives, and file a [section] 102(2)(c) environmental statement concerning its proposed action. Once the agencies wake up . . . and do their homework on proposed projects, NEPA is less and less likely to stand in the way of their missions.") Accord Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

¹³ See Robinson, *SEQRA's Siblings: Precedents From Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155, 1157 (1982).

provisions of three different state environmental planning laws with their parent law, NEPA. Chapter II analyzes the history of NEPA's substantive provisions. Particular emphasis is placed on demonstrating that the judiciary's failure to recognize and enforce NEPA's substantive provisions has eroded its procedural effectiveness. This discussion leads to the conclusion that NEPA jurisprudence and administration face significant problems which requires revitalizing parts of the law. Chapter III studies the environmental planning laws of California, Washington, and New York. While they are all siblings of NEPA, each jurisdiction demonstrates a different level of substantive strength. Chapter IV draws on the laws of California, Washington and New York in a search for the strongest and most "workable" combination of effective amendments. Amendments to NEPA will fall into two categories; the creation of stronger substantive mandates which will lead to environmental impacts of smaller magnitudes, and the creation of a principled method for judicial review that will enable courts to better enforce the letter and spirit of NEPA.

CHAPTER II

THE IMPORTANCE OF SUBSTANTIVE NEPA'S RISE AND FALL

Since NEPA contains no provisions concerning judicial review, it is not intuitively obvious that any decision made pursuant to NEPA's directives is judicially reviewable. This fault did not render the statute meaningless: early appellate court decisions held that federal compliance with NEPA's procedural provisions was judicially enforceable.¹⁴ This means that courts at least ensure that EISs are prepared when circumstances so require,¹⁵ and that EISs adequately consider the environmental effects of the proposed action.¹⁶

¹⁴ F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 16 (1973). See, e.g., *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

¹⁵ Suits contesting the decision not to prepare an EIS ("negative threshold determinations") remain the most frequently litigated issue under NEPA. Environmental Quality, Council of Environmental Quality Annual Report 209 (1987-1988). The language frequently involved in this litigation states that EISs should be prepared for proposals that are "major federal actions significantly affecting the quality of the human environment" 42 U.S.C. § 4332(2)(C); see also Mandelker, *supra* note 4, §§ 8:15, 8:21, 8:31-32. It is not within the purview of this paper to further explore the procedural aspects of NEPA law.

¹⁶ See, e.g., *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988) (EIS inadequate because

The latter requirement approaches the procedural/substantive boundary, where courts normally try to distinguish legal adequacy issues from factual adequacy issues.¹⁷

This chapter of the paper explores the substantive side of the procedural/substantive boundary; namely, whether NEPA's purpose and policy statements create substantive obligations on agencies to either choose a particular option over others because it minimizes environmental damage, or to mitigate the harmful effects of a proposed action when "other essential considerations of national policy" have tipped the scales in favor of taking the action despite the environmental harm which will result. Part A studies the early scholarly and judicial opinions which gave rise to the

cumulative effects that outer continental shelf oil activities have upon migratory mammals was not studied).

¹⁷ Courts try to avoid considering factual adequacy issues because such matters are usually within an agency's area of expertise. For example, special checklists are often used during the impact evaluation process which scale or rank the importance of the studied factors, and then weigh how well a particular alternative satisfies that factor. See, J. BALDWIN, ENVIRONMENTAL PLANNING AND MANAGEMENT 259-262 (1985). A court would normally reserve judgement as to how well an agency scales and weighs the particular factors, unless the agency was clearly "arbitrary and capricious". However, if certain factors of environment impact or particular alternatives to the proposed actions are not studied at all, the oversight might lead a court to conclude that the EIS is procedurally flawed, and thus legally inadequate. See, e.g., Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588 (9th Cir. 1988) (EIS failed to study grazing management as an alternative to using pesticides for controlling weeds).

opinion that at least some limited obligations were created. Part B discusses how the Supreme Court has strictly limited judicial review of NEPA documents to procedural issues, ignoring NEPA's purpose and policy statements. The chapter concludes with a review of NEPA trends which indicate that the Court's neglect of the substantive provisions has led to an erosion of the Act's procedural effectiveness, as predicted many years earlier.¹⁸

A. The Rise of Substantive NEPA

1. The "Committed to Agency Discretion" Test and Substantive NEPA

Any serious discussion of the substantive law contained within NEPA's policy statements needs to begin with a brief discussion of a particular aspect of judicial review under the Administrative Procedure Act (APA).¹⁹ Section 701(a) of the APA, which applies to review of decisions made pursuant to NEPA's directives,²⁰ states that agency decisions are presumptively subject to judicial review except when a

¹⁸ See note 11 *supra*.

¹⁹ 5 U.S.C. §§ 551- 559 and 701-706 (1988).

²⁰ See, e.g., *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

statute expressly prohibits judicial review (the "statutory" exception),²¹ or where "agency action is committed to agency discretion by law."²² Since NEPA does not expressly prohibit judicial review, only the "committed to discretion" exception is important here.

The Supreme Court first addressed the meaning of section 701(a)(2) in *Citizens to Preserve Overton Park v. Volpe*. The Court stated the the "committed to discretion" exception is very narrow, noting that the APA's legislative history indicated that the exception should be reserved "'for those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'"²³ The Court also cited a series of law review articles which discussed the 701(a) exceptions,²⁴ but it failed to elaborate on the articles, the exception, or the relevant legislative history.

²¹ 5 U.S.C. § 701(a)(1).

²² *Id.* § 701(a)(2).

²³ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

²⁴ Two of the mentioned authors debated the breadth of the 701(a) exceptions for a number of years. Then-professor Raul Berger's articles on the subject are: *Administrative Arbitrariness and Judicial Review*, 65 COLUMB. L. REV. 55 (1965); *Administrative Arbitrariness - A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966); *Administrative Arbitrariness - A Rejoinder to Professor Davis' Final Word*, 114 U. PA. L. REV. 816 (1966); *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967); and *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969). Relying

More recently, the Court has moved to broaden the "committed to discretion" exception in cases involving the Food and Drug Administration's refusal to take enforcement actions,²⁵ and the decision of the Central Intelligence Agency's Director to dismiss a homosexual employee for national security reasons.²⁶ In *Heckler v. Chaney*, the Court built on the distinction drawn in *Overton Park* between the "statutory" exception and the "committed to discretion" exceptions in 701(a). Justice Rehnquist wrote:

[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law")

primarily upon the text of section 701 and its legislative history, he generally concluded that a presumption of reviewability exists for all arbitrary decisions, and it may only be overcome by clear and convincing evidence of Congress' intent to preclude judicial review. Berger, 51 MINN. L. REV. at 628-32.

Professor Davis has also written numerous articles on administrative arbitrariness, which include: 4 ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965); *Administrative Arbitrariness - A Final Word*, 114 U. PA. L. REV. 814 (1966); *Administrative Arbitrariness - A Postscript*, 114 U. PA. L. REV. 823 (1966); and *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967). Davis emphasized the importance of interpreting Supreme Court behavior in its application of the APA, and he concluded that instances exist where judicial review of arbitrary decisions may not be possible, especially when the judiciary does not have the requisite expertise or political authority to overturn an administrative decision. Davis, 51 MINN. L. REV. at 645.

²⁵ *Heckler v. Chaney*, 470 U.S. 821 (1985).

²⁶ *Webster v. Doe*, 486 U.S. 592 (1988).

can be taken to have "committed" the decisionmaking to the agency's judgment absolutely.²⁷

The Court held that decisions not to enforce certain laws are unsuitable for judicial review because such decisions are "committed to an agency's absolute discretion."²⁸ Rehnquist rationalized that such decisions require administrators to balance and order the numerous and complicated factors involved in such decisions.²⁹ Justice Marshall wrote a separate concurring opinion to emphasize that courts should restrict access to judicial review only where clear and convincing evidence documents the Congressional intent to do so.³⁰

Rehnquist's opinion in *Webster v. Doe* does not alter the interpretation set out in *Heckler*. *Webster* emphasizes that the "committed to discretion" exception "requires careful examination of the statute on which the claim of agency illegality is based"³¹ Justice Scalia wrote a noteworthy dissent in part to argue a different interpretation of section 701(a)(2):

²⁷ *Heckler*, 470 U.S. at 830 (emphasis added).

²⁸ *Id.*, 470 U.S. at 831.

²⁹ *Id.*

³⁰ *Id.*, 470 U.S. 840-44 (Marshall, J. concurring).

³¹ *Webster v. Doe*, 486 U.S. at 600.

"[C]ommitted to discretion by law" refer[s] to "the 'common law' of judicial review of agency action," -- a body of jurisprudence that had marked out . . . certain issues and certain areas that were beyond the range of judicial review. That jurisprudence included principles [which] can be described no more precisely than a traditional respect for the functions of other branches reflected in the statement in *Marbury v. Madison* . . . that "[w]here the head of a department acts in a case, in which executive discretion is to be exercised; . . . it is again repeated that any application to a court to control, in any respect, his conduct would be rejected without hesitation."³²

This proposed extension of the "committed to discretion" test seems to fly in the face of the APA's general presumption of reviewability, possibly making the once-narrow exception larger than the rule.

The Court has definitely broadened the "committed to discretion" exception since it was first addressed in *Overton Park*. All that is truly clear from this discussion is that NEPA's substantive mandates were at one time very close to the "no law to apply" boundary enunciated in the APA's legislative history. Now that the Court has given itself more room to find that certain statutes commit absolute discretion to administrators, NEPA's substantive provisions lack the meaningful standards needed to judge an agency's exercise of discretion.³³ The problem lies in NEPA's

³² *Id.*, 486 U.S. at 608-09 (emphasis in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); and *Marbury v. Madison*, 1 Cranch 137, 170-71 (1803)).

³³ Like decisions not to enforce laws, decisions under NEPA normally involve competing uses of limited resources which involve balancing and ordering numerous complicated factors. See *supra* note 28 and accompanying text.

grandiose purposes: how could Congress write a statute that described in detail which particular future projects would cause enough environmental damage that the plans should be scrapped? A majority of circuit courts and scholars in NEPA's first decade recognized this problem, and concluded that the APA's presumption of reviewability allowed at least some limited form of judicial review on the merits of administrative decisions to ensure compliance with NEPA's substantive provisions. This history will be briefly summarized as a prelude to a discussion of the Supreme Court's treatment of NEPA's substantive provisions.

2. *Calvert Cliffs'* and Ensuing Cases

It is not surprising that the first case to consider judicial review under NEPA addressed administrative compliance with the policies set forth in NEPA's substantive sections. In *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,³⁴ the D.C. Circuit considered the adequacy of rules the Commission adopted to govern the consideration of environmental issues. The court believed that NEPA section 101 did impose explicit substantive duties

³⁴ 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

on agencies, and that environmental issues ought to receive consideration comparable with other statutory mandates.

Judge Skelly Wright wrote:

In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. . . . [R]eviewing courts probably cannot reverse a substantive decision on the merits, under section 101, *unless it could be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.* But if the decision was reached procedurally without individualized consideration and balancing of environmental factors -- conducted fully and in good faith -- it is the responsibility of the courts to reverse.³⁵

The opinion stressed that mere procedural compliance with NEPA's impact statement provisions would not pass muster if environmental considerations were clearly undervalued, or that the final decision was not the product of a good faith study. The case sought to establish the link between NEPA's substantive and procedural aspects: while the substantive policies allow room for discretion and do not "require particular substantive results in particular problematic instances," the EIS procedure is "designed to see that all federal agencies do in fact exercise the substantive

³⁵ *Id.* at 1113, 1115 (emphasis added).

discretion given them."³⁶ Though widely cited and quoted, some scholars felt this part of the opinion was dicta.³⁷

In *Environmental Defense Fund v. Corps of Engineers*,³⁸ the Eighth Circuit considered the merits of the Corps' decision to proceed with the Gillham Dam project on the Cossatot River in Arkansas. Drawing heavily on NEPA's legislative history and *Calvert Cliffs*', the court found that NEPA required more than a full disclosure of environmental damage, and was intended to effect substantive changes in administrative decisionmaking.³⁹ Noting that section 102(1) requires existing policies, regulations, and laws to be interpreted in accordance with NEPA's policies to the fullest extent possible, the court wrote:

"[t]he purpose [of the EIS procedure] is to 'insure that the policies enunciated in section 101 are implemented.' The procedures included in [section] 102 of NEPA are not ends in themselves. They are intended to be 'action forcing'. . . . Given an agency obligation to carry out the substantive requirements of [NEPA], we believe that courts have an obligation to review substantive agency decisions on the merits. . . . [T]he prospect of substantive review should improve the quality of agency decisions

³⁶ *Id.* at 1112.

³⁷ See, e.g., F. GRAD, 2 TREATISE ON ENVIRONMENTAL LAW § 9.04 at 9-222 (1984).

³⁸ 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

³⁹ 470 F.2d at 297.

*and should make it more likely that the broad purposes of NEPA will be realized.*⁴⁰

In so holding, the court also decided that NEPA's substantive requirements did contain "law to apply" for reviewing agency decisions.⁴¹ In setting its standard of review, the court also relied on *Overton Park*.⁴²

After it set out its rule of law, the court determined in rather summary fashion that the Corps' decision was *not* arbitrary and capricious.⁴³ It thus delayed consideration of the more difficult issue -- determining which factual circumstances would actually require courts to strike down an administrative decision -- until another time. Its holding that the judiciary's proper role under NEPA extended to a review of the merits of administrative decisions set the high water mark for future substantive review cases.⁴⁴

⁴⁰ *Id.* at 297-99, quoting S. Rep. 91-296, 91st Cong., 1st Sess. 9, 19 (1969) (first emphasis supplied by court; second emphasis added) (citations omitted).

⁴¹ 470 F.2d at 298-99 n.14.

⁴² *Id.* at 301.

⁴³ *Id.* at 301.

⁴⁴ Other cases supporting substantive review existed in the Second Circuit (*Scenic Hudson Preserv. Conference v. Federal Power Comm'n*, 453 F.2d 463 (2nd Cir. 1971), *cert. denied*, 407 U.S. 926 (1972)), and the Seventh Circuit (*Sierra Club v. Froehlke*, 486 F.2d 946 (7th Cir. 1973)). Following *Calvert Cliffs'*, the District of Columbia also sided with a limited form of substantive review. See *Natural Resources Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972). On the other hand, the Tenth Circuit rejected the proposition. See

Although it was generally agreed that the threat of judicial review on the merits would lead to better NEPA compliance in a general sense, the issue of substantive review was hotly debated by scholars. Some scholars criticized the decisions discussed above because without explicit substantive requirements and directives, they believed it required strained reasoning to find substantive law in section 101's aspirational commands.⁴⁵

Others pushed for an even more searching review on the merits. They feared that the rather narrow arbitrary and capricious test under the APA would effectively destroy meaningful substantive review.⁴⁶ For example, the Eighth Circuit in *Environmental Defense Fund v. Corps of Engineers* upheld the Corps' substantive decision, despite its extensive argument for the need of substantive review. As one judge put it, "[i]t is difficult to imagine . . . a situation in which an agency has complied with the rigorous procedural

National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

⁴⁵ See, e.g., Muskie & Cutler, *supra* note 12 at 171 n.44. At the same time, however, Muskie and Cutler realized that if NEPA was merely construed in a procedural manner, "we can expect these meager procedural guidelines will stand in the way of the usual substantive decisions of the federal missions agencies as David, minus his slingshot, would have stood before Goliath." *Id.* at 173.

⁴⁶ Robie, *Recognition of Substantive Rights Under NEPA*, 7 NAT. RESOURCES LAW. 387, 410-11 (1974).

requirements of NEPA and yet the decision could be held to be arbitrary and capricious."⁴⁷

The heart of the substantive review question under NEPA thus seemed twofold: on the one hand, the lack of substantive review would seem to encourage a languid approach to the preparation of EISs. This leads to an avoidance of NEPA's central purpose -- better decisions through a heightened awareness of environmental damage, as disclosed in the EIS. On the other hand, if courts gave heightened scrutiny to all decisions made pursuant to NEPA processes, citizen groups could be seen as having a veto power over actions thought to contradict NEPA's policies, a result which would appear undesirable. Furthermore, such scrutiny might upset the balance of power under which the administrative agencies operate as an arm of the electorate, while judges would become "super policy makers." In the meantime, the Council of Environmental Quality interpreted NEPA and the judicial decisions previously mentioned to mean that "after an agency has considered environmental effects, its decision to act is subject to the limited judicial review afforded by the traditional arbitrary or capricious and substantial evidence tests."⁴⁸

⁴⁷ Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).

⁴⁸ Council on Environmental Quality, ENVIRONMENTAL QUALITY -- THIRD ANNUAL REPORT 253-54 (1972). The CEQ held this view

B. NEPA at the Supreme Court: Extinguishing
Substantive Review

The Supreme Court's general record is worth mentioning before discussing their role in limiting substantive review. The 11 Supreme Court decisions⁴⁹ concerning NEPA's provisions form the most important group of precedential decisions when considering the common law of NEPA.⁵⁰ The Court has never

through 1978. See Council on Environmental Quality, ENVIRONMENTAL QUALITY -- NINTH ANNUAL REPORT 403 (1978).

⁴⁹ There seems to be a discrepancy in how many cases the Court has considered: some scholars count 12 cases, but differ in the 12th case. (Compare Sheldon, *NEPA in the Supreme Court*, 25 LAND & WATER L. REV. 83 n.2 (1990), (including U.S. v. SCRAP (SCRAP I), 412 U.S. 669 (1973), a case far more famous for the doctrine of standing than for what was said about NEPA), with Shilton, *Is the Supreme Court Hostile to NEPA?: Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990). Shilton includes Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), a case challenging outer continental shelf lease sales under the Outer Continental Shelf Lands Act.)

I believe those cases mainly focused on legal issues beyond NEPA's reach. I agree with Rossmann's (1990) listing of the Court's NEPA decisions. Rossmann, *NEPA: Not So Well at Twenty*, 20 Env'tl. L. Rptr. 10,174 n.4 (1990).

⁵⁰ Mandelker, *supra* note 4, at § 1:05 at 10 notes:

NEPA jurisprudence . . . has been substantially influenced by the several NEPA decisions decided by the Supreme Court. . . . Its decisions have diluted NEPA's environmental decision making responsibilities. The Court also has taken a deferential view of agency decision making that has influenced the lower federal courts.

expanded NEPA's application, and has consistently reversed generous rulings from the Courts of Appeal.⁵¹ None of the decisions have even partially favored environmental plaintiffs suing under the Act, and there have only been three cases in which dissenting opinions have been filed.⁵²

Foreseeing extensive judicial intervention in administrative decisionmaking under NEPA, the Court began limiting the effect of the various circuit court decisions.⁵³ Perhaps because no court actually overturned a decision on its merits, the early Supreme Court cases used strong dicta in their effort to change the direction of the circuits and the CEQ.

1. *Kleppe, Vermont Yankee, and Foreshadowing Language*

*Kleppe v. Sierra Club*⁵⁴ involved the Department of Interior's decision not to prepare an EIS to study regional

It is this influence, both on the lower federal courts and the state courts looking to the federal courts for guidance in interpreting their "little NEPAs," that makes the Supreme Court's decisions so important.

⁵¹ Rossmann, *supra* note 49, at 10,174.

⁵² Shilton, *supra* note 49, at 553-54.

⁵³ See Zillman & Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 503 (1990).

⁵⁴ 427 U.S. 390 (1976).

cumulative impacts that might result from the development of coal reserves in the Northern Great Plains. Though unrelated to the Court's holding,⁵⁵ Justice Powell declared in a footnote that "[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. . . . [A court] cannot interject itself within the area of discretion of the executive as to the choice of action to be taken."⁵⁶ While, the Court indicated that it did not want the judiciary actively interfering in administrative decisions, it stopped short of saying that the judiciary should not review EISs to ensure the final decision was not arbitrary.

The Court renewed its attack against substantive NEPA in its 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.⁵⁷ This case involved decisions of the Atomic Energy Commission to licence nuclear reactors in Vermont and in Michigan. As far as substantive NEPA is concerned, the Court added an observation after it disposed with the salient legal issues in the case:

⁵⁵ The Court's holding was confined to the issue of whether NEPA required the preparation of regional EISs in addition to national and local EISs.

⁵⁶ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

⁵⁷ 435 U.S. 519 (1978).

NEPA does set forth significant substantive goals for the Nation, but its mandate is essentially procedural. It is to ensure a fully informed decision, not necessarily a decision that the judges of the Court of Appeals would have reached had they been member of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context . . . only for procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached.⁵⁸

While more specific in its direction than the footnoted comments in *Kleppe*, there still might have been some room to find that a NEPA decision was arbitrary, following a test like the D.C. Circuit's in *Calvert Cliffs'*. Further, the last quoted sentence seemed to say that a decision could be set aside for substantive reasons as mandated by statute. The Court failed to say that NEPA's substantive sections were without "law to apply," and therefore, the prospect that substantive decisions could be set aside by a court still existed.

For those who wanted courts to review the merits of NEPA decisions, the door was still ajar. Perhaps because some scholars recognized how weak the NEPA scheme would be without the threat of searching review from the judiciary, the CEQ continued clinging to its belief that NEPA could still be used by courts as a decision rule.⁵⁹ In any event, it was

⁵⁸ 435 U.S. at 558 (emphasis added) (citations omitted).

⁵⁹ ENVIRONMENTAL QUALITY -- NINTH ANNUAL REPORT 403 (1978). See e.g., Henderson & Pearson, *Implementing Federal Environmental Policies: The limits of Aspirational Commands*, 78 COLUMB. L. REV. 1429, 1458 (1978) ("[U]nless the courts would be willing to review agency action on its merits, the utility of a

clear that the Court felt that agency NEPA decisions should be upheld if all procedures were proper and the agency acted in good faith.

2. *Strycker's Bay*

It took the court six short sentences in a per curiam opinion to finally dispense with judicial review of NEPA's substantive mandate. *Strycker's Bay Neighborhood Council, Inc. v. Karlen* is the Court's strongest opinion on the issue, as the sole legal question was whether an agency's decision could be invalidated because it gave insufficient weight to environmental values. The facts involved the Department of Housing and Urban Development's (HUD's) decision to change an urban renewal plan in New York City by allowing a higher percentage of the new housing units to be occupied by low-income people.⁶⁰ Upon its first review of the case, the Second Circuit Court of Appeals held that NEPA required the agency to develop alternative plans, even though the decision would not have significant environmental effects.⁶¹

statute that only imposed the obligation to prepare a statement would seem doubtful.").

⁶⁰ The original plan called for 30% to be allocated for low-income families, while the revised plan called for 70% of the units to be so reserved.

⁶¹ 523 F.2d 88, 92-95 (2d Cir. 1975).

On remand, HUD prepared a lengthy environmental document to study alternatives, but it did not prepare an EIS. HUD concluded that more evenly distributing some of the low-income units would require an additional delay of at least two years. Consequently, HUD decided that the problems caused by the additional delay outweighed the environmental benefits of a more even income distribution, and that the project should go ahead as planned. In its second review of the case, the Second Circuit again struck down HUD's actions as arbitrary. This time the court did not fault the environmental document: the action was arbitrary because the court felt that the concentration of low-income housing would fail to fulfill the agency's obligations under section 101 of NEPA.⁶² The court felt that HUD gave the delay determinative weight, when it should have given the adverse social and environmental effects determinative weight.⁶³ Until the Supreme Court considered it, the Second Circuit set the new high water mark for reviewing the merits of decisions under substantive NEPA provisions.⁶⁴

⁶² *Karlen v. Harris*, 590 F.2d 39, 43-44 (2d Cir. 1978). The court used NEPA section 101(b)(1), which directs the federal government to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."

⁶³ *Karlen v. Harris*, 590 F.2d at 43-44.

⁶⁴ *Charting the Boundaries of NEPA's Substantive Mandate: Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 10 ENVTL. L. RPTR. 10,039, 10,043 (1980).

The Supreme Court's abbreviated consideration of the matter suggests that it will not stand for the notion that NEPA allows reviewing courts to consider the merits of decisions. The first three sentences quoted language from the *Vermont Yankee* opinion previously discussed. The Court continued:

[O]nce an agency has made a decision subject to NEPA's procedural requirements, *the only role for a court is to insure that the agency has considered the environmental consequences*; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."⁶⁵

NEPA requires nothing more than a consideration of the environmental consequences of its decision.⁶⁶ Since HUD did in fact consider the environmental consequences, the Court reversed the Second Circuit's opinion. Oddly, the Court never mentioned that NEPA's substantive policies lacked "law to apply;" in fact, the Court seemed to avoid such statements, although at least one commentator has read this into *Strycker's Bay*.⁶⁷ The Court's decision left Justice Marshall and others wondering why courts reviewing NEPA decisions are left "the essentially mindless task of

⁶⁵ *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (emphasis added) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

⁶⁶ *Id.*, 444 U.S. at 228.

⁶⁷ Mandelker, *supra* note 4 at § 10:12.

determining whether an agency 'considered' environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion."⁶⁸

3. Methow Valley

After a five year respite from considering NEPA cases, the Supreme Court concurrently decided two cases during its 1989 term. While *Robertson v. Methow Valley Citizens Council*⁶⁹ is the more important case in terms of NEPA's substantive mandates, both cases confirm the directives of *Strycker's Bay* in strong dicta.⁷⁰

⁶⁸ 444 U.S. at 231 (Marshall, J., dissenting). Marshall felt the decision misread *Vermont Yankee*, and undermined the well-established notions that reviewing courts give a "searching and careful" judicial inquiry when reviewing administrative decisions. *Id.*, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

⁶⁹ 109 S. Ct. 1835 (1990).

⁷⁰ The other case, *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1990), principally addressed the standards used by courts to review the decision not to prepare supplemental EISs when conditions change after a project has begun. However, the Court still commented on the substantive issue: "NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing government and public attention on the environmental effects of the proposed action." *Id.*, at 1857-58 (citing NEPA § 2).

Methow Valley involved the Forest Service's decision to issue a special use permit for the development and operation of a ski resort in the Okanogan National Forest in northern Washington. The Forest Service claimed that the minor impacts the resort would have on wildlife and air quality in the region could be mitigated, and its EIS, based on this belief, recommended issuing the permit.⁷¹ The Ninth Circuit found that the EIS was inadequate as a matter of law because it failed to develop or assess any specific mitigation measures to address the impacts.⁷² The Court of Appeals read NEPA's section 102 provisions to impose a duty on agencies to develop mitigation measures and assess their effectiveness before allowing projects to continue, and it further believed that a substantive requirement existed to mitigate the adverse effects of major federal actions that will have significant impacts.⁷³

Justice Stevens opened his discussion of the legal issues by addressing NEPA's purposes. Noting that section 101 of NEPA declares broad national commitments to protecting

⁷¹ Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987).

⁷² *Id.* The court also found fault with the EIS because it did not contain a "worst case analysis" study. Since the CEQ deleted this requirement from its regulations in 1986, this aspect of the Ninth Circuit's and the Supreme Court's opinions will be ignored.

⁷³ *Id.* at 819.

environmental quality, he skipped to the "action-forcing" EIS procedures in section 102(2)(C). The EIS serves two main purposes in the Court's eyes: to ensure agencies consider environmental impacts, and to *disclose* the relevant information to the public.⁷⁴

The Court then went a step farther in its limited reading of NEPA. Stevens wrote:

Although these [EIS] procedures are almost certain to affect the agency's substantive decision, *it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . .* Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uniformed -- rather than unwise -- agency action.⁷⁵

This discussion served as the backdrop for the Court's consideration of the mitigation issue. While recognizing that EISs need to contain a "reasonably complete" discussion of possible mitigation measures in order to accomplish the two purposes listed above, Stevens continued:

There is a fundamental distinction . . . 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. . . . *[I]t would be inconsistent with with NEPA's reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will*

⁷⁴ Robertson v. Methow Valley, 109 S. Ct. 1835, 1844-45 (1989).

⁷⁵ *Id.* at 1846 (emphasis added).

mitigate environmental harm before an agency can act.⁷⁶

Thus the Court further limited NEPA's application, and the room reviewing courts have to exercise meaningful judicial review. The Court's role in reviewing decisions made pursuant to NEPA's procedures, according to this modern modern reading of the law, is essentially mindless. While many of the words used parallel those used by Judge Skelly Wright in *Calvert Cliffs'*, the Court is directing the lower courts to assume a more relaxed posture when reviewing NEPA decisions.

Importantly, no source of law supports Stevens' assertions other than the Court's own common-law under NEPA.⁷⁷ The Court seemed to say flat-out that NEPA contains no substantive provisions.⁷⁸ Nothing in NEPA's legislative history, purpose and policy statements, or the CEQ regulations supports this limited interpretation. In fact, since the legislative history and the purpose and policy

⁷⁶ *Id.* at 1847 (emphasis added).

⁷⁷ Accord, Mandelker, *NEPA Alive and Well: The Supreme Court Takes Two*, 19 ENVTL. L. RPTR. 10,385 (1989).

⁷⁸ Perhaps the Court was finally determining whether NEPA's substantive sections contain "law to apply," though the Court never used these words. It is clear that the legislators felt that NEPA did indeed contain substantive provisions, as the purpose and policy statements are referred to as such in the legislative history. See, e.g., comments of Senator Jackson, the bill sponsor, at 115 CONG. REC. 40,415 (1969).

statements demonstrate Congress' sweeping desire to accomplish a better relationship between man and the environment, the Court's approach to NEPA's substantive provisions in *Vermont Yankee*, *Strycker's Bay*, and now *Methow Valley* have drastically limited NEPA's punch.⁷⁹ Correctly or not, the Court has sounded the death knell for NEPA's substantive sections. Only time will tell if the same death knell tolls for NEPA's remaining sections as well.

⁷⁹ Explanatory statements abound in the legislative history describing Congress' goals. For example, the reason the law contains no "substantive result-based standards," is that NEPA attempts to deal with environmental problems in a preventive and anticipatory basis. 115 CONG. REC. 40,416 (1969). Environmental laws containing substantive, result-based standards address environmental problems that are already in existence; hence, they are retrospective rather than prospective.

Furthermore, section 101's purpose is to "provid[e] a statutory foundation to which administrators may refer to for guidance in making decisions which find environmental values in conflict with other values." *Id.* (comments of Senator Jackson). By ignoring this part of NEPA, the court ignores the central purpose of the act. See also Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL. L. RPTR. 50,032 (1976) ("The impact statement was required to force the agencies to take the substantive provisions of the Act seriously, and to consider the environmental policy directives of the Congress in the formulation of agency plans and procedures.").

Numerous statements in the legislative history pertaining to the need to improve the environment could also be seen as endorsing a more forceful interpretation of the Act. See, e.g., comments of Senator Jackson: "If we can send men to the moon, . . . we can monitor and improve the quality of the air our children breathe and the open spaces they play in." 115 CONG. REC. at 40,417.

C. *The Perils of NEPA Procedures Sans NEPA Substance*

Today, we are faced with the prospect that many commentators predicted: environmentally unwise agency decisions occur despite the impeccable execution of NEPA procedures. "[T]he absence of any meaningful substantive review by the courts allows affected agencies to 'jump through the hoops' of NEPA's procedural requirements without giving any real weight to environmental consequences."⁸⁰ Once agencies properly "consider" the environmental impacts of the proposal, they retain unfettered discretion to continue projects despite the potential environmental costs.⁸¹ Following the *Methow Valley* decision, the agency might even avoid performing mitigation measures that were only vaguely alluded to in an EIS. If courts only enforce NEPA's process while allowing agencies to ignore the underlying values, scholars, legislators, and administrators need to contemplate whether NEPA can still achieve its purpose of elevating environmental concerns in federal

⁸⁰ Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 372 (1989).

⁸¹ Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L. REV. 205, 210 (1989).

agencies whose missions do not involve environmental protection.

This section studies a few trends in NEPA law in an attempt to measure whether administrative implementation of NEPA procedures has been affected by the Court's misconstruction of the Act's substantive provisions. As a practical matter, measuring the extent of NEPA's implementation is no small task. Many factors are involved, and the Act's impact is often elusive.⁸²

Nonetheless, three important trends have emerged which merit further study: government agencies are preparing fewer EISs in recent years than they did during the seventies; fewer suits have been filed against government agencies claiming NEPA violations; and the Supreme Court is receiving fewer petitions to review the decisions lower courts made in NEPA cases. The impact any one trend has on the application of NEPA might be rationalized away by those who believe serious problems concerning NEPA's future do not exist. However, the *combination* of the data which follows demonstrates that NEPA is far from the best of times, and is in fact besieged by the worst of times. The data signal that NEPA's substantive downfall has been accompanied by a serious procedural erosion as well.

⁸² Council on Environmental Quality, ENVIRONMENTAL QUALITY -- SIXTH ANNUAL REPORT 626 (1975).

1. EIS Preparation Down

The environmental impact statement is the most visible public evidence that an agency produces to demonstrate that it adequately considered the environmental effects of proposed actions.⁸³ It is the heart of the environmental review process set out in NEPA:⁸⁴ Congress adopted the provision to ensure NEPA's policies were not ignored by agencies.⁸⁵ More than full-disclosure documents, impact statements are to be used in the decisionmaking process by administrators.⁸⁶

Despite these facts, federal agencies are ignoring the impact statement process. Figure 1 demonstrates the dramatic decline in the number of impact statements prepared by federal agencies each year. While an average of 1,463 EISs per year were prepared in NEPA's first decade, that number

⁸³ *Id.* at 628.

⁸⁴ See, e.g., Mandelker, *supra* note 4 at § 1:01.

⁸⁵ 40 C.F.R. § 1502.1 (1990) ("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.") See also Caldwell, *supra* note 8, 6 THE ENVTL. FORUM 18 at 20; and 115 CONG. REC. 40,416 (1969).

⁸⁶ 40 C.F.R. § 1502.1.

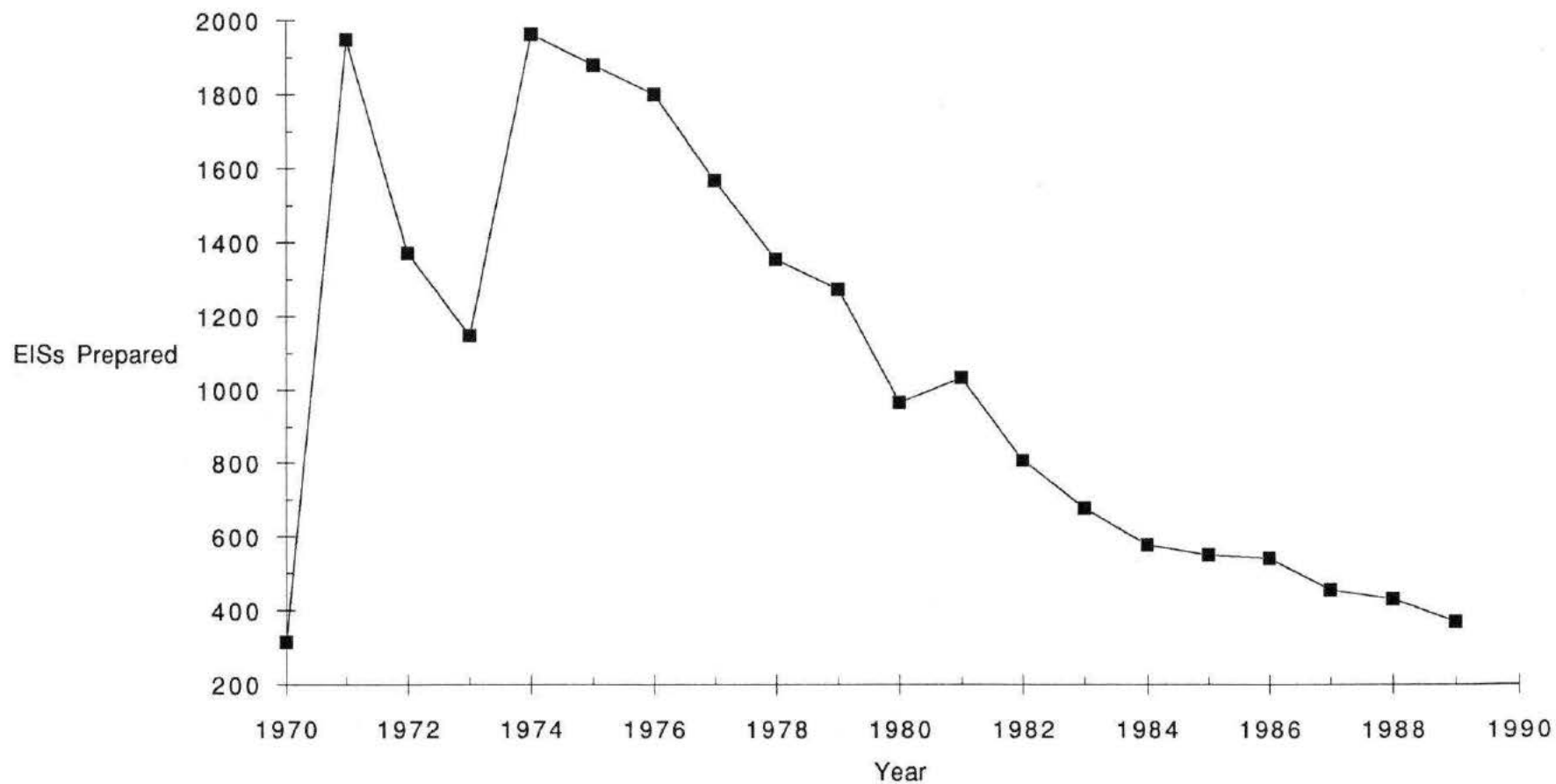


FIGURE 1. Number of EISs Prepared Per Year

Source: Annual Report of the Council on Environmental Quality (1973, at 243), (1974, at 389), (1990, at 397-99); Montange, 9 VA. ENVTL. L.J 1, 6-7 n.44 (1989).

dropped 56% in NEPA's second decade, when agencies wrote an average of only 641 EIS per year.⁸⁷ Fewer EISs were prepared in 1989 than any other year except 1970, NEPA's first year. Over the last five years, agencies prepared an average of 469 EISs per year, less than one third the number of EISs averaged during NEPA's first decade.

These numbers are staggering. They are not mere aberrations: the long-term trend shows that agencies have received the message that they need not follow NEPA's procedures as closely as they once did. Even with the advent of Reaganism in the 1980s, it would not seem that all agencies of government are considering 55% fewer actions with significant environmental impacts than they did just 10 to 15 years earlier.⁸⁸ This trend shows that agencies are thumbing their noses at Congress' attempt to encourage the consideration of environmental effects in administrative decisionmaking.

⁸⁷ The CEQ gathers these figures and incorporates them in their yearly reports.

⁸⁸ Since Reagan took office, "the various federal agencies and the courts . . . de-institutionalized meaningful consideration of environmental effects, and, as a result, took numerous actions without minimizing adverse environmental consequences or securing otherwise available environmental benefits." Montagne, *NEPA in an ERA of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 VA. ENVTL. L.J. 1, 6 (1989).

2. NEPA Lawsuits Down

Even though administrative compliance with the preparation of EISs has dropped significantly, one would think that lawsuits with NEPA claims would be on the rise, since the most frequent complaint by plaintiffs suing agencies for non-compliance with NEPA is that no impact statement was prepared when the circumstances required it.⁸⁹ The data shows that fewer cases have been filed under NEPA in recent years, and that this trend is generally in a downward direction as well.

Figure 2 shows that this trend is weaker than the EIS preparation trend discussed above. The 1982-1983 years are specially marked in Figure 2 for a reason. The trend of the data is interrupted during these years, which I believe should be attributed to the rather extreme management policies of James Watt, Secretary of Interior for Reagan. The Department of Interior was the most frequently sued NEPA defendant during those years, the first time it held that

⁸⁹ Council on Environmental Quality, ENVIRONMENTAL QUALITY -- TWENTIETH ANNUAL REPORT 391-92 (1990).

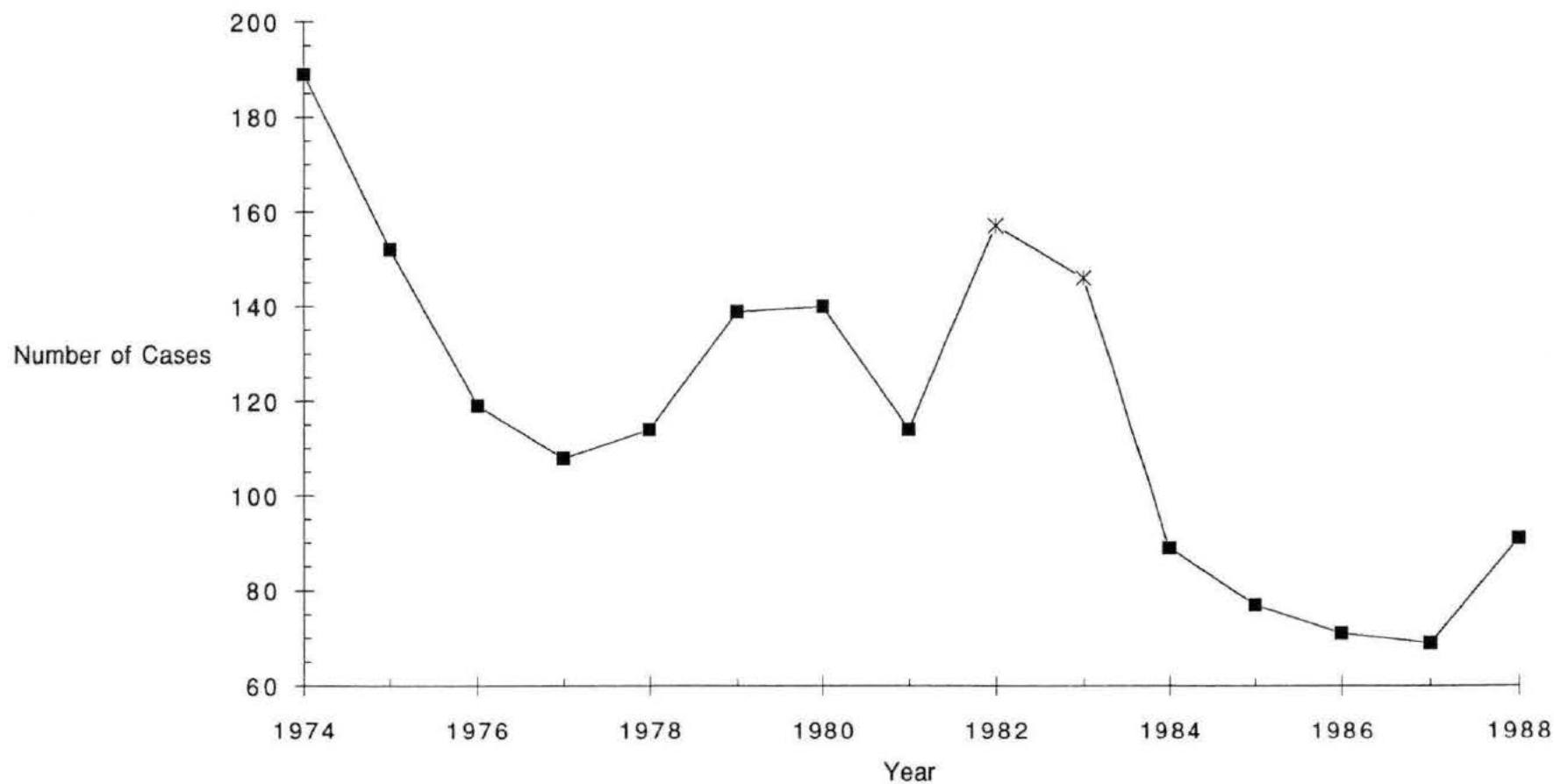


FIGURE 2. NEPA Cases Filed Per Year

Source: Environmental Quality, 20th Annual Report of the Council on Environmental Quality 392 (1990).

distinction.⁹⁰

During the last five years, an average of only 79 cases per year were filed. This figure is down 42% when compared to the period from 1974-1979. One would expect that even higher numbers of suits were entertained during NEPA's first few years, but such statistics were not kept by the CEQ then.

This trend is disturbing because citizen suits are the means that ensure agencies follow NEPA procedures to the letter. Further, this trend has no easy explanation: perhaps it demonstrates an unwillingness on the part of environmental groups to continue enforcing NEPA procedures when no substantive NEPA remedy is available. The best "remedy" that can be gained through a NEPA suit is a delay until the adequate paperwork has been prepared. It seems that most groups feel that the remedy available under NEPA does not merit the cost of undertaking litigation in the first place. Still, this is odd, considering that some commentators believe that more litigation has occurred under NEPA than any other environmental law.⁹¹

⁹⁰ *Id.* at 392. See also Coggins & Nagel, "Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of Interior on Federal Land Law and Policy, 17 B.C. ENVTL. AFF. L. REV. 473, 475-78 (1990) (explaining how Watt's land management philosophies differed markedly from his predecessor's philosophies, especially in Watt's attempts to gain increase privatization and development of natural resources on federal lands).

⁹¹ *Id.* at 208, citing J. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3-4 (1987).

3. Supreme Court Petitions

This final trend is the least surprising of the three, considering that every NEPA case considered by the Court has resulted in a strong opinion issued against environmental plaintiffs.⁹² Still, the fact that only a couple of petitions for certiorari are filed per year is an indication that these restrictive precedents will continue to affect NEPA jurisprudence unless and until they are legislatively overruled.

During the seventies, an average of 3.9 petitions were filed per year at the Supreme Court; that average fell to 1.6 over the past seven years. As with the dwindling number of cases filed per year under NEPA, this seems to be a sign that citizen's groups are now unwilling to risk large sums of money on litigation which will likely create harmful precedential outcomes.

Again, any of the above trends might be considered a strange aberration that a series of factors might have caused. Taken together however, the trends demonstrate that the NEPA process is failing in significant ways. Fewer suits are being filed to challenge administrative violations of the Act's provisions, despite the fact that agencies seem to be

⁹² See *supra* nn. 49-50 and accompanying text.

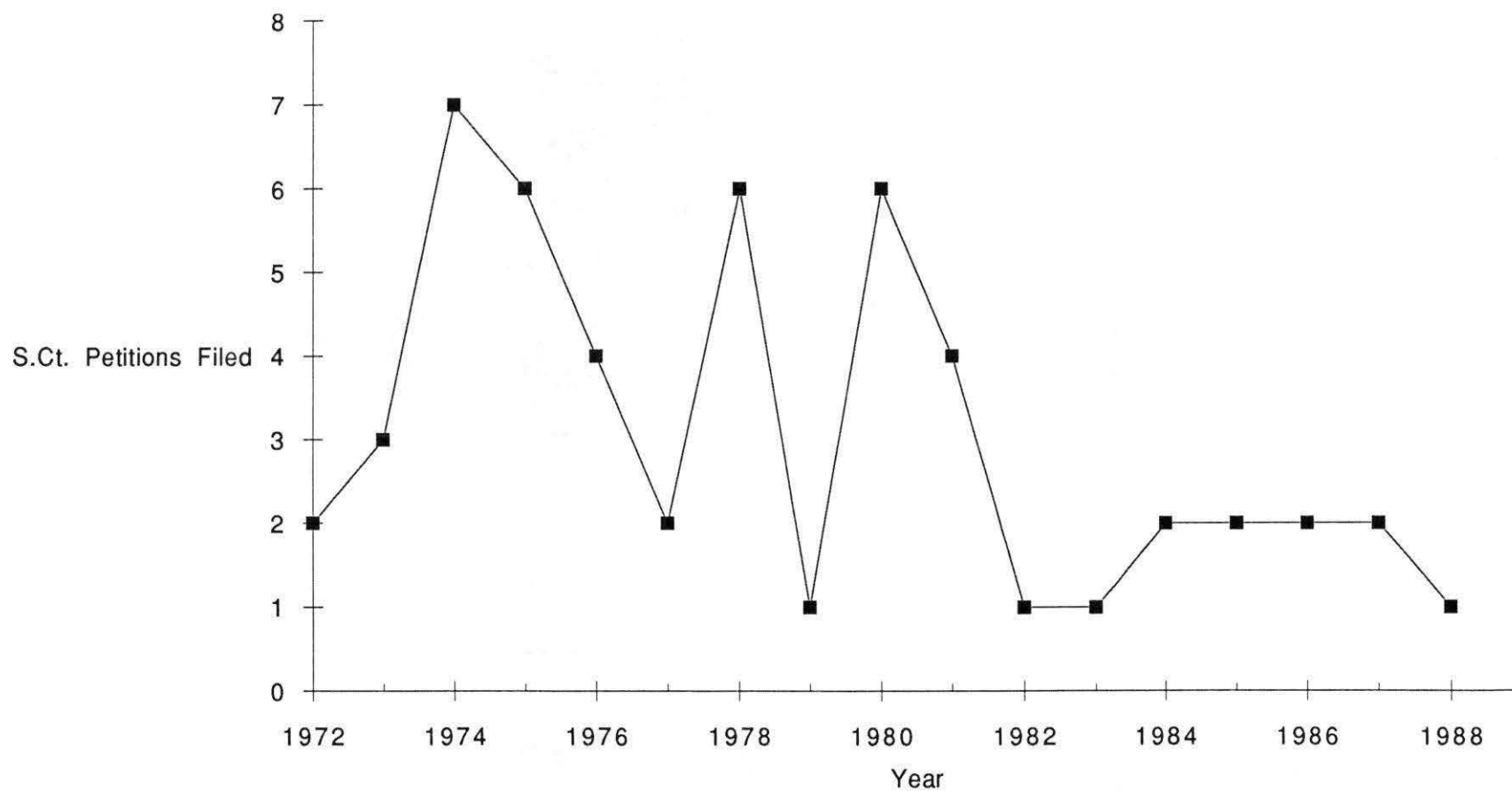


FIGURE 3. S.Ct. Petitions for Certiorari in NEPA Cases Per Year

Source: Shilton, *Is the Supreme Court Hostile to NEPA?: Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551 (1990).

ignoring NEPA's procedures more than ever. Since the Supreme Court forbade application of NEPA's substantive provisions by reviewing courts, little seems to be gained by requiring the preparation of documents which can be largely ignored due to the deference accorded to administrative agencies under the arbitrary and capricious standard. Moreover, the Court's opinions considering NEPA have been so hostile towards environmental plaintiffs that there appears to be little hope of a shift in NEPA's common law interpretation.

It thus appears that ignoring the substantive policies that form the foundation of NEPA has caused once-sound procedures to become ineffective. Our national environmental policies are completely adrift. One commentator noticed that in a document called the *Blueprint for the Environment*, the national environmental community asked the President for an executive order to establish "'a government-wide process to ensure that all the environmental consequences of proposed decisions . . . are taken into account.'"⁹³ Congress intended NEPA to accomplish this. No matter what is used as the yardstick to measure NEPA's performance, the statute is falling woefully short of its goals.

Environmental groups must now focus on the difficulties of amending NEPA in two specific areas. First, NEPA's

⁹³ Montange, *supra* note 86 at 9, quoting *Blueprint for the Environment* 32 (K. Maize, ed. 1988).

substantive mandate needs strengthening so that the policies underlying the statute are more fully incorporated into administrative decisionmaking. Second, courts must exercise a higher level of scrutiny for reviewing the merits of NEPA decisions without substituting their judgment for the administrator's at will. While this seems a tall order, some potential amendments to the national environmental planning scheme might be found in a study of the "little NEPAs" in various states.

CHAPTER III

THE SUBSTANCE OF THREE LITTLE NEPAs

As previously mentioned, nearly 30 states now have laws that were derived from NEPA.⁹⁴ In this instance of reverse federalism,⁹⁵ the states have borrowed much of NEPA's statutory and common law in developing their own environmental planning schemes. Interestingly, some states have gone beyond the protections offered by the federal law, requiring more environmental protection than NEPA's procedures provide.

This section of the paper studies three different state environmental policy acts to assess their effectiveness in implementing a higher level of substantive law than their federal counterparts. The "little NEPAs" of California, Washington, and New York will be compared to each other and to NEPA. The issue the reader should bear in mind throughout this section is whether NEPA could be improved by

⁹⁴ See Robinson, *supra* note 13 at 1157.

⁹⁵ This phrase was coined by Nicholas Yost, in his article *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL. L. RPTR. 50,090 (1974).

incorporating these provisions into subsequent amendments of the federal law.⁹⁶

A. *The California Environmental Quality Act*

1. Overview of Statutory Scheme and Substantive Language

Enacted in November of 1970,⁹⁷ the California Environmental Quality Act (CEQA)⁹⁸ was one of the first state laws patterned after NEPA. Its mechanical aspects are very similar to NEPA's, requiring the preparation of an Environmental Impact Report (EIR) for proposed state and local projects that may have a significant effect on the environment.⁹⁹ CEQA's statutory scheme significantly differs

⁹⁶ It should be noted that a comprehensive review of every aspect of California's, Washington's and New York's little NEPAs lies beyond the scope of this chapter, which focuses on the substantive elements of these laws and the methodology employed by each state's courts in reviewing little NEPA decisions.

⁹⁷ Seneker, *The Legislative Response to Friends of Mammoth: Developers Chose the Will-O'-The-Wisp*, 48 CAL. ST. B.J. 127, 128 (1973).

⁹⁸ CAL. PUB. RES. CODE §§ 21000-21176 (West 1986 & Supp. 1991).

⁹⁹ CAL. PUB. RES. CODE § 21100. CEQA sets out three purposes that EIRs serve; identifying a project's significant effects on the environment, identifying a project's alternatives, and indicating methods to mitigate or avoid significant effects. *Id.* §§ 21002.1(a); 21061.

from NEPA's brief but grand language: for starters, CEQA spans six chapters and over 150 pages of California's Public Resources Code. The California Legislature, unlike Congress, has been quick to amend or edit CEQA's provisions.¹⁰⁰

California's legislature enacted 14 separate provisions to specify the intent behind CEQA.¹⁰¹ The seven policy commends in section 21000 are aspirational in nature, and in that sense are similar to NEPA's sections 2 and 101.¹⁰² The

For a good treatment of CEQA processes, see M. REMY, T. THOMAS, S. DUGGAN & J. MOOSE, GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) (4th ed. 1990) [hereinafter GUIDE TO CEQA].

¹⁰⁰ The Act has undergone numerous amendments -- 13 that this author has counted -- in 1972, 1976, 1977, 1979, 1981, 1982, 1983, 1984, 1985, 1987, 1988, 1989, 1990. NEPA has never been amended since its enactment.

¹⁰¹ CAL. PUB. RES. CODE §§ 21000(a)-(g), 21001(a)-(g).

¹⁰² Section 21000 reads:

The Legislature finds and declares as follows:

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of state wide concern.

(b) It is necessary to provide a high quality environment that at all times is helpful and pleasing to the senses and intellect of man

(d) The capacity of the environment is limited, and it is the intent of the legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached

(g) It is the intent of the legislature that all agencies which regulate activities . . . which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.

intent statements set out in section 21001, however, give agencies and courts a more concrete idea of what CEQA compliance entails. These provisions declare California's policies to "take *all action* necessary to protect, rehabilitate, and enhance the environmental quality of the state,"¹⁰³ and "[t]ake *all action* necessary to provide [California's citizens] with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities" ¹⁰⁴ Additionally, the state's policy to "[p]revent the elimination of fish or wildlife species due to man's activities,"¹⁰⁵ and to "[e]nsure that the long term protection of the environment . . . shall be the guiding criterion in public decisions"¹⁰⁶ adds more substantive muscle to CEQA. More importantly, these provisions provide a basis for interpreting CEQA which contains sufficient "law to apply" that a court considering an agency's decision could

For purposes of comparison, NEPA §§ 2 and 101 were set out in note 10, *supra*.

¹⁰³ CAL. PUB. RES. CODE § 21001(a) (emphasis added).

¹⁰⁴ *Id.* at § 21001(b) (emphasis added).

¹⁰⁵ *Id.* at § 21001(c).

¹⁰⁶ *Id.* at § 21001(d).

find it in violation of CEQA's substantive directives.¹⁰⁷

The California legislature clearly intended such a result.¹⁰⁸

Two other important provisions help incorporate CEQA policies into administrative activities. The first, CEQA's mitigation requirement, actually derived from the California supreme court's interpretation of CEQA's policies and legislative intent.¹⁰⁹ In section 21002 California adopted a forceful mitigation policy which directs public agencies not to approve projects as proposed "if there are feasible alternatives or feasible mitigation measures available which would substantively lessen the significant environmental effects" of the projects.¹¹⁰ Public agencies are further directed that they "shall mitigate or avoid the significant effects on the environment of projects . . . whenever it is

¹⁰⁷ But see *Sierra Club v. Gilroy City Council*, 222 Cal. App. 3d 30, 271 Cal. Rptr. 393 (1990).

¹⁰⁸ "The Legislature finds and declares that it is the policy of the State that *noncompliance . . . with [the] substantive requirements of this division may constitute a prejudicial abuse of discretion* within the meaning of [CEQA's judicial review provision]." CAL. PUB. RES. CODE § 21005 (emphasis added).

¹⁰⁹ Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CALIF. L. REV. 112, 117 (1981). The relevant opinion, *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), will be discussed *infra*.

¹¹⁰ CAL. PUB. RES. CODE § 21002.

feasible to do so."¹¹¹ Additionally, the EIR must include a discussion of the project's balance between the local, short-term benefits to the proposed use of the environment when weighed against the maintenance and enhancement of long-term productivity.¹¹² These are the kinds of substantive provisions that courts need in order to ensure that CEQA's policies are not lost amidst administrative bureaucracy.

Like all planning statutes, however, CEQA has provisions which allow agencies not to mitigate under certain circumstances. Should *specific* economic, social, or other conditions make the potential alternatives or mitigation measures infeasible, individual projects may still be approved despite their significant environmental effects.¹¹³ This determination is left to the discretion of the lead decisionmaking agency so long as the project is otherwise permissible.¹¹⁴ While this provision seems to be the exception to the general rule requiring the use of feasible alternatives or mitigation measures, the "other conditions"

¹¹¹ *Id.* at § 21002.1(b) (emphasis added).

¹¹² *Id.* at § 21100(e). This requirement helps make sure the legislature's policy goal to ensure the long-term protection of the environment is incorporated into administrative decisionmaking. See *id.* § 21001(d).

¹¹³ *Id.* at § 21002.

¹¹⁴ *Id.* at § 21002.1(c).

language is broad enough that the exception might swallow the rule if it is improperly construed. Further, all ministerial activities are expressly excluded from all CEQA processes.¹¹⁵

The alternatives and mitigation requirements are commonly read as requiring a two-step inquiry.¹¹⁶ First, environmental impacts are identified, and possible alternatives or mitigating measures are proposed to remedy the significant effects of a project. The next step questions the *feasibility* of the possible alternatives and mitigating measures proposed. As defined in CEQA, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technical factors."¹¹⁷ If an agency finds particular alternatives or mitigation measures unfeasible, it must have "specific" economic, social, or other reasons for so finding.¹¹⁸

In addition to the alternatives and mitigation requirements, CEQA contains another mechanism besides the EIS to ensure its policies are carried out in practice. Section

¹¹⁵ CAL. PUB. RES. CODE § 21080(a), (b)(1).

¹¹⁶ See Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 261-62 (1984).

¹¹⁷ CAL. PUB. RES. CODE § 21061.1.

¹¹⁸ *Id.* at §§ 21002, 21081(c).

21081 requires agencies to issue a "findings statement" when approving projects subject to CEQA processes.¹¹⁹ The findings requirement forces agencies to disclose the rationale underlying their decisions in a short, brief document. When administrative decisions under an EIS find alternatives or mitigation measures unfeasible, agencies must specifically articulate the reasons for this finding, indicating what economic, social or other considerations tipped the balance in favor of the unmitigated project despite its harmful effects. The mechanism ensures that decisionmaking agencies have at least superficially considered a project's alternatives and mitigation measures.¹²⁰ Both the alternatives and mitigation

¹¹⁹ Section 21081 reads:

Pursuant to the policies stated in sections 21002 and 21002.1, no public agency shall approve or carry out a project . . . which identifies one or more significant effects thereof unless such public agency makes one, or more, of the following findings:

(a) Changes or alternatives have been required in, or incorporated into, such project which mitigate or avoid the significant environmental effects . . . identified in the [EIR].

(b) Such changes or alterations are within the responsibility and jurisdiction of another public agency and such changes have been . . . or can and should be adopted by such other agency.

(c) Specific economic, social, or other considerations make infeasible the mitigation measures or protect alternatives identified in the [EIR].

¹²⁰ Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County, 191 Cal. App. 3d 886, 236 Cal. Rptr. 794, 800 (1st Dist. 1987).

requirement, and the findings requirement help to incorporate CEQA's policy provisions and give them some force and effect, even though some of those provisions are vague and aspirational in nature.

2. CEQA's Judicial Review Provisions

As discussed above, NEPA contains no judicial review process of its own: judicial review for NEPA processes occurs under the standards and rules set out by the APA.¹²¹ The California legislature took a different approach to the issue, enacting specific provisions concerning the timing of review, the scope of review, and the remedies available to appellants of CEQA decision.

The timing provisions set out a clear legislative policy to speed the judicial review process along, thus preventing unduly expensive and wasteful delays. The statute of limitations provisions are very short; the longest period runs for only 180 days when an agency either has not determined whether a project has significant effects, or when a project is undertaken without a formal CEQA decision.¹²² In all other situations the limitations period will either be

¹²¹ See *supra* notes 14-33 and accompanying text.

¹²² CAL. PUB. RES. CODE § 21167(a).

30¹²³ or 35¹²⁴ days after the particular decision documents have been filed. All EIRs not challenged within 30 days after a agency files its notice that it will proceed with the project are conclusively presumed to comply with CEQA's mandates unless conditions subsequently change, necessitating a supplemental EIR.¹²⁵ When CEQA causes of action are litigated with other claims having different limitations periods, the longer litigation periods will not extend the review period available for the CEQA claims.¹²⁶ To speed the review process even further, all courts are directed to give challenges raised under CEQA preference over all other civil actions.¹²⁷

123 *Id.* at § 21167(b), (c), and (e) (applying when appellants claim an agency improperly determined to proceed after an EIR was proposed, or that no significant effects will result from its action and a "negative declaration" is then prepared under § 21080(c); or when appellants claim the EIR is deficient).

124 *Id.* at § 21167(d) (used when appellant claim an agency improperly determined that CEQA does not apply to the project pursuant to either § 21080(b) [listing 16 specific exemptions], § 21085 [concerning the reduction of the number of housing units as an alternative or mitigation measure for housing development projects], or § 21172 [exempting projects repairing facilities following a disaster]).

125 CAL. PUB. RES. CODE § 21167.2

126 GUIDE TO CEQA, *supra* note 99 at 219.

127 *Id.* at § 21167.1.

Two sections, 21168 and 21168.5, govern the appropriate standard of review to be applied in CEQA cases. Generally, section 21168 applies when the agency action being challenged has held a hearing pursuant to its other statutory requirements, received evidence, and issued factual findings. Such "quasi-judicial decisions" are reviewed under California's Code of Civil Procedure in section 1094.5. Before judicial intervention, that section requires a "prejudicial abuse of discretion," which is established if the agency "has not proceeded in the manner required by law, if the order or decision is not supported by the findings, or the findings are not supported by substantial evidence."¹²⁸ Section 21168.5 sets the standard for review in all other actions, which are deemed to be "quasi-legislative." An abuse of discretion under that provision is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."¹²⁹

It is fairly obvious that an abuse of discretion means almost the same thing under either section, prompting a debate about the differences between the two provisions.¹³⁰

¹²⁸ CAL. CIV. PROC. CODE § 1094.5(b) (West 1986 & Supp. 1990).

¹²⁹ CAL. PUB. RES. CODE § 21168.5.

¹³⁰ Cf. Selmi, *supra* note 116 at 222 ("[t]he only possible difference between the two sections is that section 21168.5 may allow the trial court to receive evidence outside the

The California supreme court recently wrote that this debate is largely academic "because the standard of review is essentially the same under either section, i.e. whether substantial evidence supports the agency's determination."¹³¹

The remedies provision in CEQA allows successful appellants to receive much of the same relief that successful NEPA plaintiffs receive; namely, a voidance of the agency's flawed decision, a suspension of all activities occurring pursuant to the agency's flawed decision, and a mandate that the agency take specific action to bring the flawed decision into compliance with CEQA.¹³² The remedies available, however, have been limited: "nothing in [section 21168.9] authorizes a court to direct any public agency to exercise its discretion in any particular way."¹³³ This factor, combined with the substantial evidence requirement as interpreted by the California supreme court accords agencies

administrative record"); with Comment, *supra* note 109 at 121 ("the court is to review questions of fact under the substantial evidence test, although it is not constrained by that test when reviewing questions of law").

¹³¹ Laurel Heights Improvement Ass'n v. University of California, 47 Cal. 3d 376, 392 n.5, 764 P.2d 278, 253 Cal. Rptr. 426 (Cal. 1988).

¹³² CAL. PUB. RES. CODE § 21168.9(a).

¹³³ *Id.* at § 21168.9(c).

considerable latitude.¹³⁴ The result is something which looks completely analogous to the deferential review accorded under NEPA.

In California, however, appellants must make an additional showing before obtaining relief: beyond mere legal errors, appellants must also demonstrate that those errors were "prejudicial," a showing required by section 21005. Under that provision courts reviewing CEQA determinations under sections 21168 and 21168.5 are directed to "follow the established principle that there is no presumption that error is prejudicial."¹³⁵ This provision gives courts latitude to ignore valid CEQA claims if the error is not "prejudicial." CEQA does not specifically define this term, although section 21005 also provides that noncompliance with CEQA's substantive requirements *may* constitute a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions."¹³⁶ Certainly, the tenor of judicial review under CEQA is clear: once an

¹³⁴ "As a result of this standard, '[t]he court does not pass upon the correctness of the EIR's conclusions, but only upon its sufficiency as an informative document.'" *Laurel Heights*, 47 Cal. 3d at 392, quoting *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 189, 136 Cal. Rptr. 396 (3d Dist. 1977).

¹³⁵ CAL. PUB. RES. CODE § 21005.

¹³⁶ *Id.*

EIR is found to be legally adequate, courts cannot second-guess the substance of the administrative decision. However, if the substantive CEQA aspects discussed above are ignored throughout the EIR process, this may prejudice administrative discretion to a degree that further CEQA compliance will be required by the courts.

3. Substantive CEQA in California's Courts

It has been said that the threat of rigorous judicial enforcement of CEQA by California's judicial system has had a dramatic effect in ensuring administrative compliance with the Act.¹³⁷ However, recent judicial opinions have not carried quite the same tone set by earlier California supreme court and lower court decisions.

In the first and most famous opinion, *Friends of Mammoth v. Board of Supervisors*,¹³⁸ the California supreme court used both CEQA's strong legislative intent, and the spirit of the then-recent *Calvert Cliff's* opinion¹³⁹ to hold CEQA processes fully applicable to private development activities which require a governmental permit or approval. The court's

¹³⁷ Selmi, *supra* note 116 at 208.

¹³⁸ 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

¹³⁹ See *supra* nn. 34-37 an accompanying text.

interpretation of legislative intent led it to the oft quoted conclusion that CEQA should be "interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."¹⁴⁰ More important for substantive CEQA, however, was the court's interpretation of the EIR requirements for considering mitigation and alternatives: "[o]bviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved. In making these determinations, concrete concepts, not mere aphorisms or generalities, must be considered."¹⁴¹ These statements were considered important enough that they were both subsequently codified.¹⁴² Other decisions of this era also gave CEQA the benefit of the broadest possible interpretation.¹⁴³

¹⁴⁰ 8 Cal. 3d at 259.

¹⁴¹ *Id.* at 263 n.8.

¹⁴² See CAL. PUB. RES. CODE § 21065(c) (defining "project" to include the issuance of entitlements); § 21002.1(b) (requiring adoption of mitigation or alternatives where feasible).

¹⁴³ See, e.g., *No Oil Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974) (holding EIR requirement applicable to a city zoning ordinance allowing oil drilling within city limits); *San Francisco Ecology Center v. City and County of San Francisco*, 48 Cal. App. 3d 584, 590, 122 Cal. Rptr. 100 (1st Dist. 1975) (CEQA's legislative history "supports the view that environmental

More recently, the California courts seem to rely less on policy or legislative intent grounds while strictly adhering to CEQA's express statutory requirements. In *Laurel Heights Improvement Association v. University of California*,¹⁴⁴ the supreme court found an EIR prepared for the relocation of a biomedical facility inadequate because it failed to adequately discuss alternate locations to the one proposed. While noting that "the chief goal of CEQA is the mitigation or avoidance of environmental harm,"¹⁴⁵ the court gave significant warnings as to the scope of its review: courts should not "'pass upon the correctness of the EIR's conclusions, but only pass upon its sufficiency as an informative document.'"¹⁴⁶ The court added:

A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. . . . Our limited function is . . . "to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot,

values are to be assigned greater weight than the needs of economic growth.").

144 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426 (1988).

145 *Id.*, 47 Cal. 3d at 403.

146 *Id.* 47 Cal. 3d at 392, quoting *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 189, 139 Cal. Rptr. 396 (3rd Dist. 1977).

guarantee that these decisions will always be those that favor environmental considerations."¹⁴⁷

The court in *Laurel Heights*, then, continued strictly enforcing EIR requirements while also strictly reading its own limitations concerning the scope of review under CEQA.

This principle was recently reiterated in another supreme court case, *Citizens of Goleta Valley v. Board of Supervisors*.¹⁴⁸ After quoting the *Laurel Heights* passages set out above, the court wrote "[w]e may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements."¹⁴⁹ The opinion went on to uphold a county's EIR decision to allow a coastal hotel development even though the EIR failed to discuss alternative sites to the private developers' proposal.¹⁵⁰ It relied on a narrow reading of the term "feasible alternatives" and even cited *Vermont*

¹⁴⁷ 47 Cal. 3d at 393, quoting *Bozung v. Local Agency Formation Comm.*, 13 Cal. 3d 263, 283, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975) (citations omitted).

¹⁴⁸ 52 Cal. 3d 553, 801 P.2d 1161, 276 Cal. Rptr. 410 (1990).

¹⁴⁹ *Id.*, 276 Cal. Rptr. at 416 (emphasis added).

¹⁵⁰ *Id.*, 276 Cal. Rptr. at 417-18. The three alternatives considered in the EIS involved various scaled-down scenarios involving fewer rooms than the original development, and a no-action alternative. A supplemental EIR also considered one off-site alternative.

Yankee¹⁵¹ in finding that "CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR."¹⁵² The court distinguished *Laurel Heights* as a case reviewing an EIR where no alternatives were discussed, from the present case where only those few alternatives found "feasible" by the county board were discussed.¹⁵³

Finally, the California court of appeals in *Sierra Club v. Gilroy City Council*¹⁵⁴ recently decided a case construing CEQA's specific policy provision concerning the elimination of fish and wildlife species due to man's activities.¹⁵⁵ In that case the plaintiffs challenged an EIR decision to rezone a parcel of land for a planned residential housing development. Part of their challenge involved a claim that the California Tiger Salamander, a rare amphibian that lived in 15 to 30 acres of the affected 1,716 acre parcel, would be threatened below perpetuation levels should the development continue.¹⁵⁶ The court, in responding to the plaintiff's

¹⁵¹ See *supra* nn. 56-58 and accompanying text.

¹⁵² 276 Cal. Rptr. at 417.

¹⁵³ *Id.* at 419.

¹⁵⁴ 222 Cal. App. 3d 30, 271 Cal. Rptr. 393 (6th Dist. 1990).

¹⁵⁵ CAL. PUB. RES. CODE § 21001(c).

¹⁵⁶ 271 Cal. Rptr. at 394-98.

claim that CEQA's policy provision and the known existence of the Tiger Salamander on the tract should have prevented county approval of the EIR, noted that unlike the "essentially procedural" NEPA, CEQA contains substantive provisions with which agencies must comply.¹⁵⁷ In considering the policy provision at issue, however, the court was unwilling to "graft a new substantive provision onto CEQA, requiring public agencies to deny approval of any project where the perpetuation of rare or endangered species on the site cannot be guaranteed."¹⁵⁸ In the court's opinion, creating such a duty would undermine "numerous other provisions of CEQA which permit a public agency to approve a project that will cause significant adverse impacts on the environment if it finds that 'specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the [EIR].'"¹⁵⁹ The court reasoned in a footnote that policy statements such as those in section 21001 do not create substantive causes of action unless there is a contrary legislative intent, and the

¹⁵⁷ *Id.* at 398.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

short statute of limitations period for challenging the adequacy of EISS did not demonstrate such an intent.¹⁶⁰

In this particular case, however, there was substantial evidence demonstrating that the California Tiger Salamander was not threatened by dropping below self-perpetuating levels. The animal had been found in 117 other locations in 27 different California counties.¹⁶¹ Eleven of the sites found were fully protected from development.¹⁶² Therefore, the court was not really faced with the ultimate substantive question posed by the policy statement it construed: what would be required of agencies under section 21001(c) if a proposed project *does* threaten a species' ability to propagate itself? That, it seems, would require agencies (and reviewing courts) to balance the scales differently, and address this policy concern as part of the substance of the EIR decision.

In sum, CEQA adds significant substantive requirements to the framework provided by NEPA. Its most effective, and therefore most important substantive directions are those that that are "non-aspirational" in nature, such as the feasible alternatives or mitigation requirement, and the

¹⁶⁰ *Id.* at 398 n.4.

¹⁶¹ 271 Cal. Rptr. at 395.

¹⁶² *Id.* at 399.

findings statements required to show the specific rationale behind administrative EIR decisions. These provisions are effective because agencies are held to them by reviewing courts; these requirements, in the California supreme courts words, are "legislative mandated." CEQA's other substantive policy provisions, like NEPA's, are largely ignored and distinguished by California's judiciary, which will not second-guess the ultimate administrative decisions once they are certain that the agency has properly followed the required procedures, or at least given reasons why mitigation measures or alternatives were rejected. In this aspect of NEPA law, California's courts have followed the approach taken by federal courts under NEPA, requiring nothing of agencies that falls beyond the strict scope of legislative mandates.

B. Washington's State Environmental Policy Act

1. Overview of Statutory Scheme and Substantive Language

Washington followed California's lead by enacting its State Environmental Policy Act (SEPA)¹⁶³ in 1971. Textually, most of SEPA's original provisions are carbon copies of

¹⁶³ WASH. REV. CODE ANN. §§ 43.21C.010 - 43.21C.910 (1983 & Supp. 1991).

NEPA.¹⁶⁴ There are, however, a few differing statutory provisions worth emphasizing before discussing the common law of substantive SEPA in Washington's courts.

The first major difference appears in a slightly altered version of a particular policy statement. Section 43.21C.020(3) states that the "legislature recognizes that each person has a fundamental and inalienable right to a healthful environment"¹⁶⁵ This was the language used by the Senate in its original version of NEPA's section 101(c), but the language was subsequently changed by NEPA's conference committee.¹⁶⁶ There was no similar provision in the House's version of NEPA,¹⁶⁷ and no reason for the federal change is immediately apparent from the legislative history. One early Washington Supreme Court decision felt this

¹⁶⁴ An early Washington supreme court decision made these comparisons:

WASH. REV. CODE ANN. § 43.21C.010 with NEPA § 2
 WASH. REV. CODE ANN. § 43.21C.020(1)-(3) with NEPA § 101(a)-(c)
 WASH. REV. CODE ANN. § 43.21C.030(a)-(h) with NEPA § 102(A)-(G)
 WASH. REV. CODE ANN. § 43.21C.040 with NEPA § 103
 WASH. REV. CODE ANN. § 43.21C.050 with NEPA § 104
 WASH. REV. CODE ANN. § 43.21C.060 with NEPA § 105.

Eastlake Community Council v. Roanoke Assoc., 82 Wash. 2d 475, 488 n.5, 513 P.2d 36 (1973).

¹⁶⁵ For comparison, NEPA § 101(c) reads "Congress recognizes that each person should enjoy a healthful environment"

¹⁶⁶ 115 CONG. REC. 40,416 (1969).

¹⁶⁷ *Id.* at 40,923 (1969).

language "indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. It is a far stronger policy statement than that found in the National Environmental Policy Act."¹⁶⁸ The provision, however, has not to this point been a major factor in providing additional environmental protection beyond that provided by NEPA's framework.¹⁶⁹

Amendments to SEPA in 1984 further distinguished it from its federal counterpart. Most significantly, the Washington legislature codified a Washington supreme court decision which read SEPA to confer upon agencies the "substantive authority" to condition or even deny actions that were previously ministerial because of environmental concerns.¹⁷⁰ Section 43.21C.060 provides that

[a]ny governmental action may be conditioned or denied pursuant to this chapter: Provided, [t]hat such conditions or denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency . . . as possible bases for the exercise of authority pursuant to this chapter.

¹⁶⁸ Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wash. 2d 271, 279-80, 525 P.2d 774 (1974).

¹⁶⁹ Professor William Rodgers reached a similar conclusion seven years ago. Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 34 (1984).

¹⁷⁰ WASH. REV. CODE ANN. § 43.21C.060, as amended, partially codified the court's decision in *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 578 P.2d 1039 (1978).

This statement of authority is fairly unique among NEPA-type statutes:¹⁷¹ most commentators have been concerned with whether particular administrative actions should be *mandated* by NEPA-type policies, and thus have not given much thought to whether these policies should empower environmentally-conscious administrators with the authority to deny approval of projects subject to environmental concerns.

The agency must endure certain specific procedures before exercising its substantive authority to totally deny a project. First, the agency must find in a final or supplemental EIS that the proposed action would result in significant adverse effects.¹⁷² Additionally, the agency must find that "reasonable mitigation measures are insufficient to mitigate the identified impact."¹⁷³ Subsequent SEPA cases have strictly construed these requirements.¹⁷⁴ Such has also been the case with the

¹⁷¹ NEPA § 105 states that NEPA's policies and goals "are supplementary to those set forth in existing authorizations of Federal agencies," but the Conference Report clearly states that "the policies and goals set forth in this Act are supplementary to *but do not modify* . . . existing authorizations of Federal agencies." 115 CONG. REC. 40,420 (1969). This indicates that Congress did not intend federal agencies to have any substantive authority which extends beyond their original mandate.

¹⁷² WASH. REV. CODE ANN. § 43.21C.060.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *Couger Mountain Assoc. v. King County*, 111 Wash. 2d 742, 765 P.2d 264 (1988); *West Main Assocs. v.*

requirement that the policies underlying the denial or the mitigating conditions be based on the agency's identified policies.¹⁷⁵ In the case that conditions are placed on the project to mitigate expected environmental harms, the conditions must mitigate *specific* harms identified in an EIS or other environmental documents prepared under SEPA, and the mitigation measures must be reasonable.¹⁷⁶

Nothing in the text of SEPA mandates particular substantive results on an EIS decision, and nothing in the text of SEPA mandates that environmental effects be mitigated.

The 1983 amendments also gave SEPA a judicial review section. Judicial review was still available prior to 1983:¹⁷⁷ the new provision codifies the principle that SEPA "provides a basis for challenging whether governmental action is in compliance with this chapter,"¹⁷⁸ while also spelling out the procedure for bringing an action into court. For the

Bellevue, 49 Wash. App. 513, 742 P.2d 1226 (1987), rev. den. 112 Wash. 2d 1009 (1989).

¹⁷⁵ Levine v. Jefferson County, 116 Wash. 2d 575, 807 P.2d 363 (1991).

¹⁷⁶ WASH. REV. CODE ANN. § 43.21C.060.

¹⁷⁷ See, e.g., Stempel v. Dept. of Water Resources, 82 Wash. 2d 109, 508 P.2d 166 (1973).

¹⁷⁸ WASH. REV. CODE ANN. § 43.21C.075(1).

most part, this simply means appellants must exhaust an administrative appeal before raising their claim in court.¹⁷⁹ This process creates a record,¹⁸⁰ which provides the basis for any further judicial appeals.¹⁸¹

Section 43.21C.090 specifies that in actions attacking governmental determinations under SEPA, the government's decision "shall be accorded substantial weight."¹⁸² This provision has not been extensively cited existing law which prevented courts from substituting their judgement for the agency's judgement on disputed factual issues.¹⁸³ No other provision in SEPA speaks to the standard of review to be applied by the courts; these standards have been developed by Washington's common law of SEPA.

2. SEPA in Washington's Courts

Washington courts have added to SEPA law in much the same manner that the federal courts have developed a common

¹⁷⁹ *Id.* § 43.21C.075(4).

¹⁸⁰ *Id.* § 43.21C.075(2)(c).

¹⁸¹ *Id.* § 43.21C.075(6)(a).

¹⁸² *Id.* § 43.21C.090.

¹⁸³ Roe & Lean, *The State Environmental Policy Act of 1971 and its 1973 Amendments*, 49 WASH. L. REV. 509, 545 (1974).

law of NEPA. For starters, Washington courts have developed a somewhat different standard of review for SEPA decisions.

Two different standards of judicial review are used by courts reviewing SEPA decisions. Most decisions receive arbitrary and capricious review,¹⁸⁴ but occasionally, when the court wants extra freedom, a "clearly erroneous" test is used. The clearly erroneous test gives the administrative decision a higher degree of scrutiny than the former test, overturning agency actions only after the court has examined the entire record and all the evidence in light of the underlying legislation, and the court is "left with a definite and firm conviction that a mistake has been committed."¹⁸⁵ The standard, in the opinion of the Washington supreme court, calls for a higher degree of scrutiny than what is normally appropriate for administrative actions.¹⁸⁶

Thus far Washington courts have only applied this heightened scrutiny in two situations. The first is known as

¹⁸⁴ Arbitrary and capricious review is quite deferential, overturning only those actions which are willful and unreasonable, without consideration, and in disregard of the facts. *Barrie v. Kitsap County*, 93 Wash. 2d 843, 850, 613 P.2d 1148 (1980).

¹⁸⁵ *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 69, 578 P.2d 1309 (1978). See also Note, A standard for Judicial Review of Administrative Decisionmaking Under SEPA - *Polygon v. City of Seattle*, 54 WASH. L. REV. 693 (1978).

¹⁸⁶ *Id.*, 90 Wash. 2d at 69.

negative threshold determinations; decisions which find after a preliminary review of the environmental effects that there will be no significant effects which merit the preparation of an EIS.¹⁸⁷ The test has also been used where an agency exercises its substantive SEPA authority to deny a building permit,¹⁸⁸ and to deny an application for a subdivision.¹⁸⁹

As mentioned previously, the concept of SEPA's substantive authority began as a common law inference. In *Polygon Corporation v. Seattle*, the Washington supreme court held that once SEPA processes have disclosed adverse environmental impacts, SEPA confers the necessary substantive authority on the agency to deny the project based upon the discussed impacts.¹⁹⁰ Following the amendments discussed above, these decisions must be based on identified

¹⁸⁷ WASH. ADMIN. CODE § 197-11-330. See, e.g., *Norway Hill Preservation & Protection Assn. v. King County Council*, 87 Wash. 2d 267, 552 P.2d 674 (1976); *ASARCO v. Air Quality Coalition*, 92 Wash. 2d 685, 601 P.2d 501 (1979).

¹⁸⁸ *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

¹⁸⁹ *Couger Mountain Assocs. v. King County*, 111 Wash. 2d 742, 765 P.2d 264 (1988).

¹⁹⁰ *Polygon*, 90 Wash. 2d 59, 63-65, 578 P.2d 1309. An earlier case, *Juanita Valley Community Assn. v. Kirkland*, 9 Wash. App. 53, 510 P.2d 1140 (1973) rev. denied 83 Wash. 2d 1002 (1973), held that SEPA makes previously ministerial acts legislative and discretionary. The *Polygon* decision expressly found that SEPA's substantive authority even applies to previously nondiscretionary actions. 90 Wash. 2d at 64.

administrative policies, the decision must follow the EIS process, and reasonable mitigation measures must be insufficient to relieve the environmental effects.¹⁹¹

These requirements have been vigorously enforced by recent cases: twice in the last three years the Washington supreme court has disallowed SEPA denials. In *Cougar Mountain Associates v. King County*, it was held that the County did not site with sufficient specificity the statutory or regulatory policies in conflict with a subdivision project application.¹⁹² That case also contained no detailed findings concerning the inability to successfully mitigate the environmental harm.¹⁹³ *Levine v. Jefferson County*¹⁹⁴ involved an agency's mitigation measures on a building permit imposed pursuant to the county's determination of nonsignificance. In this particular case, the record was found completely defective: there was no evidence that the perceived effects would in fact result from the plaintiff's

¹⁹¹ See *supra* notes 170 to 173 and accompanying text.

¹⁹² *Cougar Mountain*, 111 Wash. 2d 742, 751-53, 765 P.2d 264 (1988). The ordinance which denied the plaintiff's application noted the adverse environmental effects, and stated in a conclusory manner that the effects could not be resolved through mitigation. *Id.* at 753.

¹⁹³ *Id.* Two justices dissented, and would have found the SEPA denial valid. 111 Wash. 2d at 273-75 (Dore, J., and Pearson, C.J., dissenting).

¹⁹⁴ 116 Wash. 2d 575, 807 P.2d 363 (1991).

actions, there was no evidence that the county relied on previously established policies, and there was no evidence that the mitigative restrictions imposed were necessary.¹⁹⁵ Both decisions, however, indicate the importance of procedural compliance to the letter of the law before courts will uphold the administrative exercise of substantive SEPA authority.

Finally, it was noted above that nothing in SEPA mandates any particular substantive result.¹⁹⁶ At least one commentator feels that "there are duties to mitigate under SEPA, and these duties are enforceable . . . as an aspect of substantive SEPA."¹⁹⁷ That idea, perhaps an exercise of wishful thinking,¹⁹⁸ has been extracted from dicta and passed down through a series of cases as such. At best, the

¹⁹⁵ *Id.* at 366-67.

¹⁹⁶ *Cf.* ASARCO, Inc. Air Quality Coalition, 92 Wash. 2d 685, 713-14, 601 P.2d 501 (1979).

¹⁹⁷ Rodgers, *supra* note 169 at 60, citing Save Our Rural Environment v. Snohomish County, 99 Wash. 2d 363, 372, 662 P.2d 816 (1983).

¹⁹⁸ Accord R. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS § 18(c), 233 (1987 & Supp. 1990) ("It is well-established that agencies are authorized to deny or condition proposed action[s] to avoid environmental impacts repugnant to SEPA policies The unresolved question is whether agencies have a legally enforceable duty to require mitigation of a proposal's adverse impacts . . . and, if not practicable, to deny the proposal.") (emphasis in original).

requirement of mitigating measures only arises under certain factual circumstances, as where one county's zoning decision will adversely affect the environment of another county's residents.¹⁹⁹ This, it was held, violated the neighboring community's fundamental and inalienable right to a healthful environment.²⁰⁰ No Washington case that this author has found states that all agencies have a duty to mitigate whenever possible, and as in the federal NEPA, no statutory provision absolutely requires such an interpretation.²⁰¹

Clearly, the outer boundaries of substantive SEPA have not yet been reached.²⁰² At some point in the future, Washington courts will be confronted with the issue of whether SEPA *mandates* agencies to mitigate harmful environmental effects. Only when that issue is directly addressed by the Washington supreme court will we know whether "Washington will be best known as the state where SEPA elevates substance over form."²⁰³

¹⁹⁹ Such was the case in *Save A Valuable Environment v. Bothell*, 89 Wash. 2d 862, 867-71, 576 P.2d 401 (1978).

²⁰⁰ *Id.*, 89 Wash. 2d at 871.

²⁰¹ See *supra* nn. 69 to 79 for a discussion of *Robertson v. Methow Valley*, 109 S. Ct. 1835 (1989).

²⁰² See *Settle*, *supra* note 198 at § 18(c) 235 ("If SEPA has a substantive standard, it is a prohibition *not* of choosing environmental harm but of *unreasonably* choosing environmental harm.") (emphasis added).

²⁰³ *Rodgers*, *supra* note 169 at 68.

C. *New York's State Environmental Quality Review Act*

1. Statutory Scheme and Substantive Language

Drawing on NEPA, CEQA, SEPA and 11 other states with little NEPA laws,²⁰⁴ New York enacted its State Environmental Quality Review Act ²⁰⁵ (SEQRA) in 1975. The passage of SEQRA culminated a five year battle over proper legislative course for an environmental planning law.²⁰⁶ The final bill faced no substantial resistance, and passed into law without requiring a conference committee.²⁰⁷

²⁰⁴ See, Robinson, *SEQRA's Siblings: Precedents From Little NEPA's In The Sister States*, 46 ALB. L. REV. 1155, 1159-60 (1982). Other states with little NEPA's at the time of SEQRA's enactment were Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, North Carolina, South Dakota, Virginia and Wisconsin. *Id.*

²⁰⁵ N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & 1991 Supp.).

²⁰⁶ Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114, 1115-19 (1982).

²⁰⁷ *Id.* at 1119. Before the law was signed by Governor Carey, it was strongly opposed by local governments and developers. Partly to soothe these complaints, SEQRA was enacted and subsequently amended to create a phased implementation plan. The Act became fully effective on November 1, 1978. *Id.* at 1120-26; N.Y. ENVTL. CONSERV. LAW § 8-0117(4), (5)(d).

SEQRA's purpose and policy sections are highly reminiscent of NEPA's purpose and policy statements.²⁰⁸ One major provision is an exception: the New York legislature directs that its public agencies "shall regulate . . . activities so that due consideration is given to preventing environmental damage."²⁰⁹ This statement of intent clearly distinguishes SEQRA from NEPA, as it attempts to ensure that agencies focus their attention not only on proceeding environmental documents, but also on the prevention of environmental damage.²¹⁰ The provision was slightly toned down in a 1977 amendment which changed the original "major consideration" wording to the present "due consideration" wording better demonstrating that environmental, economic, and social considerations must all be balanced when decisions are made on proposed activities covered by SEQRA.²¹¹ Even

208 Compare:

N.Y. ENVTL. CONSERV. LAW § 8-0101 with NEPA § 2
 N.Y. ENVTL. CONSERV. LAW § 8-0103(2) with NEPA § 101(c)
 N.Y. ENVTL. CONSERV. LAW § 8-0103(6) with NEPA § 102(1)
 N.Y. ENVTL. CONSERV. LAW § 8-0103(8) with NEPA § 101(B)(1).

209 N.Y. ENVTL. CONSERV. LAW § 8-0102(9).

210 "In contrast [to NEPA], SEQRA requires agencies to mitigate the environmental harm of their projects - a mandate expressed not only in [section 8-0103(9)] but section 8-0109(1)" Weinberg, *Commentary to New York Environmental Conservation Law*, Section 8-0103 (McKinney 1984).

211 *Id.*, N.Y. ENVTL. CONSERV. LAW § 8-0103(7) (directing that protection and enhancement of the environment, human, and

with the amendment, the provision directs administrative attention towards the prevention of environmental harm, and establishes such prevention as an element of legislative intent underlying SEQRA. Nothing in NEPA focuses so tightly on the prevention of environmental damage.

The heart of substantive SEQRA lies amidst its provisions requiring impact statement preparation. These requirements are twofold, and both are tempered with clauses which further require consistency with "social, economic, and other essential considerations."²¹² The first requirement can be found in section 8-0109(1), which directs that agencies "shall use all practicable means to realize the policies and goals set forth in [SEQRA], and *shall act and choose alternatives which . . . to the maximum extent practicable, minimize or avoid adverse environmental*

community resources be appropriately weighted against social and economic considerations).

²¹² N.Y. ENVTL. CONSERV. LAW § 8-0109(1) and (8). This language is quite similar to that found in California's CEQA. See *supra* nn. 109-112 and accompanying text; CAL. PUB. RES. CODE § 21002. The only real difference is that California refers to *specific* economic, social, or other considerations, while New York describes these considerations as *essential*.

effects"213 This directive goes beyond the laws previously studied by imposing upon agencies the duty to choose an environmentally favorable alternative.²¹⁴

The second substantive requirement arises after an agency approves or carries out an activity which was the subject of an EIS.²¹⁵ When an agency approves such an activity, it must make explicit findings that it has met section 8-0109's requirements and that the disclosed adverse environmental effects will be minimized or avoided to the maximum extent practicable.²¹⁶ Although not expressly

213 N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (emphasis added).

214 California's substantive requirements are similar, but they are worded so that either mitigation measures or alternatives are required if this lessens the significant environmental effects of the project. See *supra* nn. 108-112 and accompanying text.

Contrariwise, section 8-0109(1)'s directive requires the selection of alternatives which minimize or avoid adverse environmental effects. This puts the initial spotlight on alternatives, rather than mitigation measures. Accord Weinberg, *Commentary to New York Environmental Conservation Law*, Section 8-109:1 and 5 (McKinney 1984).

215 SEQRA also sets a lower statutory threshold for the requirement that an EIS be prepared than NEPA does. Under section 8-0109(2), EISs must be prepared for any proposed or approved action which may have a significant environmental effect. Cf. NEPA § 102(2)(c) (requiring EISs for recommendations or proposals for major federal actions significantly affecting the quality of the human environment); but see *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 450-51 (7th Cir. 1985), cert. denied 475 U.S. 1055 (1986) (actions that might have a greivous impact on the environment require the preparation of an EIS).

216 N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

stated, this provision speaks more in terms of mitigation measures than alternatives: the subsection applies when actions subject to an EIS are carried out or approved, not when an environmentally favorable alternative has been approved.²¹⁷ In other words, this provision means that when the original proposed action remains the agency's favored choice even after the study of the environmental impacts and feasible project alternatives in an EIS, the adverse impacts must be mitigated to the maximum extent practical so that they are minimized or avoided.²¹⁸

These mandates are among the strongest studied in this paper, at least insofar as they focus on feasible project alternatives. Agencies must traverse five specific steps before approving a project that has been the subject of an EIS under SEQRA: they must fully consider the final EIS; they must make a written finding that SEQRA's requirements have been met; they must make written findings that the project, to the maximum extent practicable, is consistent with social, economic and other essential considerations, and that it minimizes or avoids adverse environmental effects;

²¹⁷ Accord S. TAHER, J. DEAN, & V. RAVASCHIERE, New York Environmental Law Handbook 32-33 (1990).

²¹⁸ *Id.* Recall that like section 8-0109(1), this requirement is also tempered with the requirement that the action be "consistent with social, economic, and other essential considerations" *Id.*

the agency must ensure that the practicable mitigating measures are implemented; and finally, the agency must explain in writing how issues were resolved through its balancing process.²¹⁹ Unfortunately, New York's courts have not received SEQRA warmly, and the statute's substantive mandates seem to be getting lost in the bureaucratic shuffle. New York's highest court, the court of appeals, has even said that "[n]othing in [SEQRA] requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice" ²²⁰ This is an odd result for a court which does acknowledge SEQRA's substantive elements. How did this get read into the law?

SEQRA, like its federal counterpart, has no provision concerning judicial review. Courts have looked to the limiting language in the substantive provisions, enabling them to find that agencies have considerable discretion under SEQRA. Furthermore, they have adopted a very narrow scope of review. The "cumulative effect" of these two facts is that challenging a decision on its merits remains a difficult task, even with SEQRA's stronger policy provisions.²²¹

²¹⁹ Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1249-50 (1982).

²²⁰ Jackson v. N.Y. State Urban Development, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

²²¹ TASHER, DEAN, RAVASCIERE, *supra* note 217 at 33-34.

2. Judicial Review of SEQRA Decisions

Review of governmental decisions made pursuant to SEQRA is obtained through an "article 78 proceeding."²²² Administrative determinations are undertaken by the court as a "mandamus to review."²²³ The scope of review under these provisions is very similar to what is allowed in federal courts for NEPA decisions reviewed under the APA: courts may only questions those determinations which are arbitrary and capricious or an abuse of discretion.²²⁴ Administrators have broad discretion in their applications of the law under these standards.²²⁵ Petitioners for review of article 78 proceedings have four months to commence their action.²²⁶

New York courts frequently cite *Jackson v. N.Y. State Urban Development Corp.* for the proposition that the courts must not "weigh the desirability of any action or choose

²²² N.Y. CIV. PRAC. LAW R. §§ 7801-7806 (McKinney 1981 & Supp. 1991).

²²³ McLaughlin, *Commentary to Article 78, Section 7802:3*, (McKinney 1981).

²²⁴ N.Y. CIV. PRAC. LAW R. § 7803(3); McLaughlin, *Commentary to Article 78, Section 7803:4* (McKinney 1981).

²²⁵ McLaughlin, *supra* note 223 at Section 7801:3.

²²⁶ *Village of Westbury v. Dept. of Transp.*, 75 N.Y.2d 62, 72, 549 N.E.2d 1175, 550 N.Y.S.2d 604 (1989).

among alternatives, but . . . assure that the agency itself has satisfied SEQRA procedurally and substantively."²²⁷ In general terms, the court of appeals requires a two step process in its "supervisory review" of administrative decisions; the first ensures that the administrative procedures employed were lawful, and the second is a review of the record to ensure that the agency took a "hard look" at the environmental issues and made a "reasonable elaboration" about thee issues in its decision.²²⁸

The court will review substantive decisions in light of a "rule of reason."²²⁹ In this regard, it is noted that the legislature accorded agencies "considerable latitude in evaluating environmental effects and choosing among alternatives."²³⁰ Finally, the court cites *Vermont Yankee*, one of the Supreme Court's most restrictive decisions under NEPA,²³¹ for the proposition that SEQRA's substantive provisions do not require agencies to reach particular substantive decisions.²³² The *Jackson* court also held that

²²⁷ *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 416, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

²²⁸ *Id.* 67 N.Y.2d at 417.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *supra* nn. 56-57 and accompanying text.

²³² *Jackson*, 67 N.Y.2d at 417.

agencies need not impose "every conceivable mitigation measure," or even any particular mitigation measure.²³³

Quite clearly, the court of appeals is satisfied leaving the substantive decisions in the hands of the administrators; the "rule of reason" rhetoric also applies to the judicial review of the agency's choice of alternatives.²³⁴

Despite the court of appeals deferential approach concerning the mandates of substantive SEQRA, the court is clearly not blind to those provisions, and readily acknowledges that SEQRA demands more of agencies than NEPA does.²³⁵ While recognizing that "[t]he state has made protection of the environment one of its foremost concerns . . . impos[ing] substantive duties on the agencies of government to protect the quality of the environment for the

233 *Id.*, 67 N.Y.2d at 421-22.

234 *Schodack Concerned Citizens v. Town of Schodack*, 148 A.D.2d 130, 544 N.Y.S.2d 49, 52 (1989).

235 *See, e.g.,* *Plastics Industry, Inc. v. Suffolk*, Slip Copy, 5 (Court of Appeals of New York, May 9, 1991) (WESTLAW, New York library, NY-CS file) ("The substantive component of SEQRA goes beyond its Federal counterpart, [NEPA], in its direction that an agency *must* choose the alternatives that reduce adverse environmental effects.") (emphasis added). *Akpan v. Koch*, 75 N.Y.2d 561, 570, 555 N.Y.S.2d 16 (1990) ("SEQRA also imposes substantive requirements [which require] the lead agency to act and choose alternatives which . . . minimize or avoid adverse environmental effects.").

benefit of the people of [New York],"²³⁶ the court also writes that on review of administrative decisions under SEQRA, "the merits of the action and the ultimate impact on the petitioning party are not in question. The limited issue for review is whether the decision makers . . . took a 'hard look' at [the areas of environmental concern] and made a 'reasoned elaboration' of the basis for their determination."²³⁷ These statements are inconsistent; the court clearly has no idea what should be the standard of review for substantive decision under SEQRA. The court of appeals has said that the statute *mandates something* at the same time that it says that it *mandates no particular result*. In other words, SEQRA has a substantive mandate which requires agencies to mitigate and choose environmentally favorable alternatives "to the maximum extent practicable," but the courts only ensure that no "abuse of discretion" has occurred, and they have deemed that SEQRA provides agencies vast decisionmaking freedom. In effect, the substantive mandate means that agencies can do as much or as little as they deem appropriate, and that decision is unassailable.

²³⁶ E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 371, 520 N.E.2d 1345, 526 N.Y.S.2d 56 (1988).

²³⁷ HAR Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 529, 548 N.E.2d 1289, 549 N.Y.S.2d 638 (1989).

The flip side to this type of review is that it should provide agencies some form of substantive authority analogous to that found under Washington's SEPA.²³⁸ In other words, New York agencies should have the freedom to condition or deny projects based upon the environmental effects disclosed through SEQRA processes. Mitigating measures will be upheld in New York courts as long as they are both reasonable in scope and reasonably related to the adverse environmental effects which have been identified.²³⁹

An interesting opinion on this subject was recently handed down by the appellate division. In *Week Broadcasting Corp. v. Planning Board of Lloyd*²⁴⁰ the court overturned by a three to two vote the Planning Board's denial of a petition to build a radio transmitter tower in a scenic area based on its aesthetic impact. Although the consultant who prepared the EIS felt that the visual impact would be minor, the Board felt otherwise. The majority opined that the Board's

²³⁸ See *supra* nn. 170-176 (discussing substantive authority under Washington's SEPA).

²³⁹ *Town of Henrietta v. Dept. of Env'tl. Conservation*, 76 A.D.2d 215, 430 N.Y.S.2d 440 (1980) (upholding conditions imposed to issue a conditioned negative threshold declaration, which alleviates the need for an EIS as long as the specified mitigating measures are imposed. *Coca-Cola Bottling Co. v. Board of Estimate*, 72 N.Y.2d 674, 680, 532 N.E.2d 1261, 536 N.Y.S. 33 (1988)).

²⁴⁰ Supreme Court, Appellate Division, Third Department, April 25, 1991 (WESTLAW, New York Library, NY-CS file).

exercise of its own aesthetic judgement was unsupported by evidence in the record and held the action arbitrary. The dissent found that aesthetics were a valid basis for the permit denial, and that those subjective opinions need not be included directly in the EIS. Further, the dissenters felt the majority was employing a higher standard of review than SEQRA decisions merit. The important fact, however, is that *neither the majority nor the dissent* felt that the denial of permit approval, if supported by adequate evidence, was a *per se* abuse of discretion under SEQRA. Such a decision could open the door for benevolent agencies to deny projects when the adverse environmental effects cannot be mitigated.

In sum, SEQRA's statute sets out important substantive mandates that extend beyond the reach of the other state laws studied. Although New York's highest court recognizes that SEQRA requires agencies to choose alternatives that reduce harmful environmental effects, the extreme deference that agencies are given by the courts allows SEQRA's substantive mandates to be flouted. If there is something beneficial to come from this deference, it seems to be that agencies will be free to exercise substantive authority under SEQRA to deny projects whose environmental effects cannot be adequately reduced through mitigation.

D. Chapter Summary

These states have employed a variety of substantive measures which provide much promise for a more highly successful environmental planning scheme. The dominant substantive provisions studied have ranged from a mandate to select alternatives which are environmentally more favorable than the original proposal,²⁴¹ to a mandate that adverse environmental effects be mitigated,²⁴² to giving agencies the authority to deny proposals based upon disclosed environmental effects which cannot be mitigated.²⁴³ State courts do enforce these provisions, yet they still shy away from relying on aspirational policy statements akin to NEPA's section 2 and 101 when overturning an agency's action. At most, aspirational policy statements are recited only in judicial dicta. Even the best-drafted aspirational statements are only minimally effective at directing administrative policies. The bottom line is that courts enforce only that which is expressly mandated, not what the legislature might hope agencies aspire to.

241 N.Y. ENVTL. CONSERV. LAW § 8-0109(1).

242 CAL. PUB. RES. CODE § 21002.1(6); N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

243 WASH. REV. CODE ANN. § 43.21C.060.

If the statutory scheme is unaccompanied by a plan for judicial review, even those actions which are expressly mandated might not be achieved if it falls under the rubric of "administrative discretion." In this area, no one state's scheme has all the best answers, but California's CEQA takes a good approach by trying to detail the timing, scope, and other aspects of the review process.²⁴⁴ A meaningful review process is crucial for at least two reasons: first, there are obviously times when an agency's EIS execution or decision making falls short of what is required under the law; second, the mere *threat* of a meaningful judicial review procedure can lead to greater administrative compliance in the first place.²⁴⁵ The importance of this second point cannot be overemphasized. As NEPA's sagging statistics showed, when agencies are accorded vast deference in the administration of NEPA policies and procedures, this serves to encourage a sloth-like administrative posture.²⁴⁶

²⁴⁴ See *supra* nn. 119-134 and accompanying text.

²⁴⁵ Selmi, *supra* note 116 at 208.

²⁴⁶ Accord, Gitlen, *supra* note 219 at 1241; 1254 ("[T]he ultimate attainment of SEQRA's goals is largely dependent on the good faith and ability of those charged with implementing the act If the goals of SEQRA are ever to be achieved, the judiciary must give meaning to its jurisdiction and carefully scrutinize agency decisions . . . for compliance with SEQRA's substantive mandates")

Therefore, NEPA requires at least two adjustments; it needs an infusion of substantive law, and it needs a principled scheme for the review of administrative NEPA decisions.

CHAPTER IV

PREPARING FOR NEPA's RENAISSANCE

The first main part of this paper was written to demonstrate that as procedural tool, the EIS has been mistaken for the real "heart" of NEPA -- its substantive aims and policies. Preparation of environmental impact statements was not the goal of the National Environmental Policy Act. The EIS procedure was only developed to ensure that federal decision makers account for NEPA's substantive provisions, and to bring scientific methodology and information into public planning processes.²⁴⁷ NEPA's policies and goals, mocked to the level of the term "essentially procedural" by the Supreme Court over twelve years ago,²⁴⁸ now need revival to achieve their original purpose. These policies were written to help guide decision makers as they balance competing developmental, social, economic, and environmental concerns. NEPA directs that administrators should act "*to prevent environmental damage and to better the health and*

²⁴⁷ Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, 6 The Environmental Forum 18, 20 (November/December 1989).

²⁴⁸ Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, 435 U.S. 519 (1978).

welfare of man"249 Right now, agencies only recognize and incorporate these policies to the extent of their benevolence towards the environment. NEPA presently contains no mandate for those administrators with differing priorities, or less environmental benevolence.

The next main part of this paper studied laws similar to NEPA, but they differed because they contain substantive components to help ensure that the policies behind the environmental planning laws are implemented. In the ideal environmental planning law, the link between the substantive policies and the procedural studies and documents prepared would be stronger than the present NEPA. The ideal environmental planning law must also set forth a principled scheme for judicial review, as traditional methods of judicial review seem inappropriate for laws like NEPA, where the agency is both regulating activities under its organic statute at the same time that it is being regulated legislatively by NEPA.²⁵⁰ This part of the paper derives substantive legislative amendments to NEPA from CEQA, SEPA,

249 42 U.S.C. § 4321 (emphasis added).

250 Cf. Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1, 42-65 (1988) (categorizing several federal environmental laws applicable to agencies to determine whether injunctions should issue).

and SEQRA in an attempt to bring NEPA closer to an ideal planning law.

A. Recreating Substantive NEPA

1. Substantive Authority

A mandate that agencies disclose and fully consider environmental impacts before decision making occurs would be meaningless without the authority to fully act on the basis of the impacts disclosed.²⁵¹ There is no reason why NEPA should not confer the substantive authority to deny approval of projects pursuant to NEPA,²⁵² although the historic problem with federal agencies has been an unwillingness to act, rather than an inability to act.²⁵³

²⁵¹ See *Polygon Corp. v. Seattle*, 90 Wash. 2d 59, 64, 578 P.2d 1309 (1978).

²⁵² Because of the deference reviewing courts presently give agencies under NEPA, it is possible that federal agencies already have this authority. This result would be analogous to that reached in New York. See *supra* nn. 238-240 and accompanying text.

²⁵³ See, e.g., Montange, *supra* note 8 at 43 ("The tendency of federal agencies . . . to evade NEPA is not new."); France, *NEPA -- The Next Twenty Years*, LAND & WATER L. REV. 133, 136 ("Federal agencies again and again provide documentation of significant environmental impacts while choosing to accept such impacts in the implementation of all manner of projects and actions.").

Nonetheless when federal agency approval of a project is required, an EIS is prepared, and unmitigatable effects are disclosed, that agency might find that the balance should be tipped in favor of environmental values. Under these circumstances, an agency should be able to deny approval of the project as inconsistent with NEPA's policies and goals.

To make this substantive authority an explicit part of NEPA, section 105 of the statute should be amended to be read as follows:²⁵⁴

(a) The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

(b) *Any governmental action may be denied pursuant to the policies and goals set forth in this Act. Denials must be based upon clearly identified adverse environmental effects disclosed through an environmental impact statement prepared under section 102(2)(C).*

2. Substantive Mandates

By explicitly laying out substantive mandates for agency decisions, the policies and goals set out in sections two and 101 of NEPA will be more fully incorporated into administrative decision making. As "mandates," they will be enforceable in court should they be ignored by

²⁵⁴ NEPA § 105; 42 U.S.C. § 4335 (proposed amendment in italics).

administrators. It will be important, however, to ensure that agencies retain some freedom to balance countervailing considerations in project decision making.

The amendments proposed below draw on provisions of both CEQA and SEQRA. The language used is designed to focus more attention on alternatives and require that the feasible mitigation measures be implemented when project approval will still result in adverse environmental effects.

Courts and commentators still refer to the EIS as the "heart of NEPA." If this metaphor were carried a step further, it would be clear that project alternatives and mitigating measures would be the "soul" of the new NEPA. It is the soul then, that will ensure that morals underlying NEPA's personhood are realized.

The substantive mandates should read as follows:

NEPA Section 106 [new section]:

- (a) When considering proposed projects, agencies shall implement feasible mitigation measures to lessen the project's significant environmental effects, unless specific economic, social or other essential considerations of national policy make such mitigating measures infeasible.
- (b) When considering proposed projects which are the subject of an environmental impact statement prepared under section 102(2)(c), agencies shall select project alternatives which minimize or avoid significant environmental effects, unless specific economic, social, or other essential considerations of national policy make the proposed alternatives infeasible.
- (c) Should an agency find that specific economic, social, or other essential considerations of national

policy make either the proposed alternatives to the project, or mitigating measures infeasible, the agency shall prepare a statement of findings to clearly explain such infeasibility.

The language of this amendment accomplishes several things. First, it sets out the requirements for mitigation and the adoption of alternatives in separate provisions so that agencies cannot adopt "quick-fix" mitigation measures in lieu of studying potential alternatives which cause a smaller environmental impact. Second, the provision concerning mitigation applies whether or not an EIS is prepared. Third, each substantive provision allows an "escape hatch" for administrators to carry out proposals despite the existence of harmful unmitigated environmental effects and better project alternatives. The escape hatch is a small one, however, and if opened, agencies must fully explain why it was necessary to do so before they can successfully elude the substantive mandates.

B. Judicial Review of NEPA Decisions

Two statutes studied above which have no judicial review provisions highlight the importance of creating a judicial review scheme for NEPA. Neither NEPA nor New York's SEQRA have such provisions, and courts in these jurisdictions use standard administrative law principles to review the

environmental decisionmaking occurring under each statute. This lax review accords administrators vast discretion, reducing the reviewing court's role to mindlessly ensuring that the agency "considers" environmental factors before making its final decision.²⁵⁵ Even though SEQRA was acknowledged to create substantive law and New York's court of appeals contrasted SEQRA and NEPA in this respect,²⁵⁶ the deference given to administrators by New York courts emasculates SEQRA's substantive mandates, leaving behind discretionary provisions in place of formally mandatory provisions. Congress should learn from this experience and should steer NEPA's future away from the result reached in New York. If the substantive mandates set out above for the new NEPA are to have the force and effect intended, they *must* be accompanied by concomitant amendments which develop stronger standards for courts reviewing NEPA decisionmaking.

Some readers might wonder whether a stronger NEPA judicial review scheme would upset historic notions of judicial deference towards administrative decisionmaking. It is well-established that agencies normally receive vast discretion when interpreting and applying laws within their

²⁵⁵ Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 231 (Marshall, J. dissenting).

²⁵⁶ See *supra* note 235 and accompanying text.

special area of expertise.²⁵⁷ However, it is less clear that decisions made pursuant to NEPA's directives deserve a comparable degree of judicial deference. NEPA differs from other legislative schemes which authorize and direct agencies to administer certain programs or activities. NEPA's regulation of administrative activities overlays this other legislation; its directive is *supplementary* to other administrative programs.²⁵⁸ NEPA processes were created so that federal agencies account for and minimize the adverse environmental effects caused by these other administrative programs or activities. No good reason manifests itself for according agencies vast discretion in their accounting for and minimizing the environmental effects caused by their "mission programs." Decisions made regarding a project's environmental effects are distinguishable from project decisionmaking under an agency's other Congressional directives. Therefore, judicial review of NEPA decisions

²⁵⁷ One scholar writes:

"Deference of generalists for the views of specialists could be deemed part of the law of nature; it need not be legislated That deference of judges for the interpretations by administrators spans both the 19th and the 20th centuries is not at all surprising. That it will also span the 21st century is a reasonable expectation."

K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.16, 400 (1984).

²⁵⁸ NEPA § 105; 42 U.S.C. § 4335.

need not accord agencies a comparable degree of judicial deference as agencies receive in the administration of their other Congressional directives.

The proposed amendments set out below were conceived after careful consideration of Washington's scheme for judicially reviewing SEPA decisions, where courts apply a different level of judicial scrutiny for different types of decisions.²⁵⁹ In a similar manner (but with stronger judicial review), some form of heightened scrutiny should be applied to certain NEPA decisions. For example, decisions which select the original proposal over environmentally favorable alternatives or mitigation measures to reduce environmental impacts run counter to the intentions of NEPA, and thus deserve more judicial scrutiny. Similarly, agency threshold determinations that a proposal will have no significant impact²⁶⁰ are sometimes given along with mitigating conditions.²⁶¹ These decisions also deserve heightened scrutiny since they seem to be admitting significant impacts warranting further consideration at the

²⁵⁹ See supra nn. 184 to 189 and accompanying text (discussing the difference between Washington's "clearly erroneous" and "arbitrary and capricious standards").

²⁶⁰ Such decisions are "findings of no significant impact" or "FONSIs" for short. 40 C.F.R. §§ 1501.4(e), 1508.13.

²⁶¹ See, e.g., Eglick & Hiller, *The Myth of Mitigation Under NEPA and SEPA*, 20 ENVTL. L. 773, 777 (1990).

same time such decisions find no need for further environmental studies. A higher level of scrutiny should also be used to ensure that agencies properly exercise their substantive authority to condition or deny activities.

The real problem lies in articulating what "heightened scrutiny" requires, so that it will not become another alternative formulation of the arbitrary and capricious test.²⁶² It is nearly impossible to describe a standard of review without engaging in the practice of "adjective adjudication." In other words, no matter what phrases are chosen to articulate the proper test to be applied under the heightened scrutiny standard, judges will always have flexibility to interpret the key adjectives on an ad hoc basis, which will inevitably lead to the creation of a new common law for NEPA review. While this result is undesirable, it appears unavoidable. The heightened scrutiny standard as applied to NEPA decisions will require administrators to substantiate decisions with more evidentiary support than any other test currently used by courts reviewing administrative decisions, although it will not necessarily demand that a preponderance of the evidence in the record support such decisions. Such decisions will

²⁶² See Davis, *supra* note 257 at § 29.27, 456-60 (lamenting excess verbiage which has blurred the distinctions between the "arbitrary and capricious," "substantial evidence," "clearly erroneous," and "clear error of judgment" tests).

require agencies to have *forceful* evidence in their NEPA decision records, and identify what specific evidence was deemed forceful enough to merit a particular course of action when others might have more responsibly carried out NEPA's mandates.

Also included in the statute is an explicit statement allowing challenges to be brought in federal district court, and a limitations provision. The former merely codifies existing law, while the latter is an attempt to prevent unreasonable delays. The 90 day period chosen falls between the various limitations provisions of the little NEPAs studied.

The judicial review provisions should read as follows:

NEPA Section 107 [*new section*]:

(a) (1) This Act provides a basis for challenging whether a governmental action complies with the substantive and procedural provisions herein. Such a challenge shall be brought in Federal District Court.

(2) In order to challenge a governmental action under this section, the aggrieved party must commence an appeal within 90 days after an agency's final published decision pursuant to the requirements of this Act.

(b) In reviewing challenges to administrative decisionmaking under this section, the reviewing court must first classify the type of decision being challenged.

- (1) If the challenged decision is either
 - (A) a finding of no significant impact that includes measures designed to mitigate environmental harm, or
 - (B) an exercise of substantive authority pursuant to the provisions of this Act, or

(C) an adoption of an original proposal, after an environmental impact statement, which rejects environmentally favorable alternatives and mitigating measures that would reduce the proposal's overall impact, the reviewing court must find forceful evidence in the record to sustain the challenged decision.

(2) For all other decisions made pursuant to this Act, the reviewing court must ensure faithful compliance with the letter and spirit of the law. The reviewing court must find a rational basis for the challenged decision based upon the evidence in the record.

Obviously, the court's role is an important one, and it should not be easily brushed aside. Such a review is necessary to ensure that the substantive commands and environmental policies that NEPA embodies are returned to a prominent position in the agendas of all federal agencies. At the same time, most procedural decisions and substantive decisions which adopt project alternatives or mitigation measures will be sustained as long as these decisions are rational actions when viewed in light of the evidence in the record. This scheme should still afford room for some administrative discretion within the strong substantive mandates of the new NEPA.

To summarize, the amendments set forth above outline two forms of substantive NEPA. First, federal agencies will now have the substantive authority to deny approval of activities based upon adverse environmental effects disclosed in an EIS. Second, when an EIS is prepared, environmentally favorable

alternatives should be chosen over the original project proposal unless those alternatives are made infeasible under the terms of the statute. Third, mitigating measures should be adopted unless those measures are made infeasible under the statute. Finally, the judicial review scheme should help fully implement these mandates and NEPA's policies while providing agencies which comply with both the letter and spirit of the law a considerable amount of discretion.

CHAPTER V

CONCLUSION

The more humans study ecological process, the more we realize how much our existence depends upon the protection of the biosphere for survival.²⁶³ As our country begins to face the the ever-increasing environmental problems that the twenty-first century will bring, we will need to make greater efforts to bring human activities in line with environmental capacities.

Congress showed much foresight in 1969 when it enacted NEPA, "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment."²⁶⁴ It is now clear, however, that a mere procedural recognition of environmental impacts will not be sufficient to alter the substance of agency decisionmaking. Limiting our country's fundamental environmental statute this level is not much of an accomplishment when the real goal is preventing or eliminating damage to the environment and

²⁶³ Caldwell, *A Constitutional Law for the Environment: 20 Years With NEPA Indicates the Need*, 31 *Environment* 7, 25 (December 1989).

²⁶⁴ NEPA § 101(a), 43 U.S.C. § 4331(a).

biosphere.²⁶⁵ What was a major step forward in 1969 will not cut the muster in the 21st century.

Quite simply, the time has come for the renaissance of NEPA -- a statute which requires federal agencies to prevent or eliminate environmental damage which occurs as a result of federal actions. The amendments proposed in this paper elevate the importance of conducting federal business in a manner that minimizes environmental harm. This is what Congress sought to accomplish with the original enactment of NEPA.

The recent 20th Anniversary of NEPA's enactment has stirred much recent discussion and debate about its history. Perhaps someday we will be able to proudly look upon the years of NEPA's renaissance as the period when the original intent behind this law was finally realized.

²⁶⁵ NEPA § 2, 43 U.S.C. § 4321.

BIBLIOGRAPHY

- F. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT* (1973).
- Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L. REV. 205 (1989).
- Axline, *Constitutional Implications of Injunctive Relief Against Federal Agencies in Environmental Cases*, 12 HARV. ENVTL. L. REV. 1 (1988).
- J. BALDWIN, *ENVIRONMENTAL PLANNING AND MANAGEMENT* (1985).
- Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUMB. L. REV. 55 (1965).
- Berger, *Administrative Arbitrariness - A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966).
- Berger, *Administrative Arbitrariness - A Rejoinder to Professor Davis' Final Word*, 114 U. PA. L. REV. 816 (1966).
- Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967).
- Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969).
- Borrelli, *Environmental Ethics -- The Oxymoron of Our Time*, The Amicus Journal 39 (Summer, 1989).
- Caldwell, *NEPA Revisited: A Call for a Constitutional Amendment*, 6 The Environmental Forum 18 (November/December 1989).
- Caldwell, *A Constitutional Law for the Environment: 20 Years With NEPA Indicates the Need*, 31 Environment 7 (December 1989).
- Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL. L. RPTR. 50,032 (1976).

- Coggins & Nagel, *"Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990).
- Cohen & Warren, *Judicial Recognition of the Substantive Requirements of the National Environmental Policy Act of 1969*, 13 B.C. INDUS. & COMM. L. REV. 685, 702 (1972).
- Comment, *Charting the Boundaries of NEPA's Substantive Mandate: Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 10 Env'tl. L. Rptr. 10,039, 10,043 (1980).
- Comment, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL. L. RPTR. 50,090 (1974).
- Comment, *Substantive Enforcement of the California Environmental Quality Act*, 69 CALIF. L. REV. 112 (1981).
- Council on Environmental Quality, ENVIRONMENTAL QUALITY -- THIRD ANNUAL REPORT (1972).
- Council on Environmental Quality, ENVIRONMENTAL QUALITY -- SIXTH ANNUAL REPORT (1975).
- Council on Environmental Quality, ENVIRONMENTAL QUALITY -- NINTH ANNUAL REPORT (1978).
- Council on Environmental Quality, ENVIRONMENTAL QUALITY -- SEVENTEENTH AND EIGHTEENTH ANNUAL REPORTS (1987-88).
- Council on Environmental Quality, ENVIRONMENTAL QUALITY -- TWENTIETH ANNUAL REPORT (1990).
- DAVIS, 4 ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1965).
- DAVIS, 4 ADMINISTRATIVE LAW TREATISE §§ 29.16, 29.27 (1984).
- Davis, *Administrative Arbitrariness - A Final Word*, 114 U. PA. L. REV. 814 (1966).
- Davis, *Administrative Arbitrariness - A Postscript*, 114 U. PA. L. REV. 823 (1966).
- Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).
- Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, (1982).

- F. GRAD, 2 TREATISE ON ENVIRONMENTAL LAW § 9 (1984).
- Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTG. L. REV. 230 (1970).
- Henderson & Pearson, *Implementing Federal Environmental Policies: The limits of Aspirational Commands*, 78 COLUMB. L. REV. 1429 (1978).
- Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989).
- R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH (1976).
- D. MANDELKER, NEPA LAW & LIT. (1984).
- Mandelker, *NEPA Alive and Well: The Supreme Court Takes Two*, 19 ENVTL. L. RPTR. 10,385 (1989).
- McLaughlin, N.Y. CIV. PRAC. RULES Commentary to Article 78, Section 7802:3, (McKinney 1981).
- J. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (1987).
- Montange, *NEPA in an Era of Economic Deregulation: A Case Study of Environmental Avoidance at the Interstate Commerce Commission*, 9 VIRG. ENVTL. L.J. 1 (1989).
- Muskie & Cutler, *A National Environmental Policy, Now You See It, Now You Don't*, 25 MAINE L. REV. 163 (1973).
- Note, *A Standard for Judicial Review of Administrative Decisionmaking Under SEPA -- Polygon v. City of Seattle*, 54 WASH. L. REV. 693 (1978).
- M. REMY, T. THOMAS, S. DUGGAN & J. MOOSE, GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) (4th ed. 1990).
- Robie, *Recognition of Substantive Rights Under NEPA*, 7 NAT. RESOURCES LAW. 387 (1974).
- Robinson, *SEQRA's Siblings: Precedents From Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155 (1982).
- Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33 (1984).

- Roe & Lean, *The State Environmental Policy Act of 1971 and its 1973 Amendments*, 49 WASH. L. REV. 509 (1974).
- Rossmann, *NEPA: Not So Well at Twenty*, 20 ENVTL. L. RPTR. 10,174 (1990).
- Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).
- Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197 (1984).
- Seneker, *The Legislative Response to Friends of Mammoth: Developers Chose the Will-O'-The-Wisp*, 48 CAL. ST. B.J. 127 (1973).
- R. SETTLE, *THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT: A LEGAL AND POLICY ANALYSIS*, (1987 & Supp. 1990).
- Sheldon, *NEPA in the Supreme Court*, 25 LAND & WATER L. REV. 83 (1990).
- Shilton, *Is the Supreme Court Hostile to NEPA?: Some Possible Explanations for a 12-0 Record*, 20 Env'tl. L. 551 (1990).
- Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114 (1982).
- S. TAHER, J. DEAN, & V. RAVASCHIERE, *New York Environmental Law Handbook* (1990).
- Weinberg, *Commentary to New York Environmental Conservation Law*, Section 8-0103, 8-109:1 and 5 (McKinney 1984).
- Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL. L. RPTR. 50, 090 (1974).
- Zillman & Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 503 (1990).

FEDERAL CASES CITED

- Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).
- Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987).
- Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).
- Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).
- Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, (E.D. Ark. 1971), aff'd, 470 F.2d 289 (8th Cir. 1972), cert. denied, 412 U.S. 908 (1973).
- Heckler v. Chaney, 470 U.S. 821 (1985).
- Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978).
- Kleppe v. Sierra Club, 427 U.S. 390 (1976).
- Marbury v. Madison, 1 Cranch 137 (1803).
- Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1990).
- Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), rev'd sub nom Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835 (1990).
- National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).
- Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988).
- Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).
- Northwest Coalition for Alternatives to Pesticides v. Lyng, 844 F.2d 588 (9th Cir. 1988).
- River Road Alliance, Inc. v. Corps of Engineers of U.S. Army, 764 F.2d 445, 450-51 (7th Cir. 1985), cert. denied 475 U.S. 1055 (1986).

Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835 (1989).

Scenic Hudson Preserv. Conference v. Federal Power Comm'n, 453 F.2d 463 (2nd Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973).

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, 435 U.S. 519 (1978).

Webster v. Doe, 486 U.S. 592 (1988).

CALIFORNIA CASES CITED

Bozung v. Local Agency Formation Comm., 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (3rd Dist. 1977).

Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

Laurel Heights Improvement Ass'n v. University of California, 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426 (Cal. 1988).

No Oil Inc. v. City of Los Angeles, 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

Resource Defense Fund v. Local Agency Formation Commission of Santa Cruz County, 191 Cal. App. 3d 886, 236 Cal. Rptr. 794 (1st Dist. 1987).

San Francisco Ecology Center v. City and County of San Francisco, 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1st Dist. 1975).

Sierra Club v. Gilroy City Council, 222 Cal. App. 3d 30, 271 Cal. Rptr. 393 (1990).

WASHINGTON CASES CITED

- ASARCO v. Air Quality Coalition, 92 Wash. 2d 685, 601 P.2d 501 (1979).
- Barrie v. Kitsap County, 93 Wash. 2d 843, 613 P.2d 1148 (1980).
- Couger Mountain Assoc. v. King County, 111 Wash. 2d 742, 765 P.2d 264 (1988).
- Eastlake Community Council v. Roanoke Assoc., 82 Wash. 2d 475, 513 P.2d 36 (1973).
- Juanita Valley Community Assn. v. Kirkland, 9 Wash. App. 53, 510 P.2d 1140 (1973) *rev. denied* 83 Wash. 2d 1002 (1973).
- Leschi Improvement Council v. Washington State Highway Comm'n, 84 Wash. 2d 271, 525 P.2d 774 (1974).
- Levine v. Jefferson County, 116 Wash. 2d 575, 807 P.2d 363 (1991).
- Norway Hill Preservation & Protection Assn. v. King County Council, 87 Wash. 2d 267, 552 P.2d 674 (1976).
- Polygon Corp. v. Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).
- Save A Valuable Environment v. Bothell, 89 Wash. 2d 862, 576 P.2d 401 (1978).
- Stempel v. Dept. of Water Resources, 82 Wash. 2d 109, 508 P.2d 166 (1973).
- West Main Assocs. v. Bellevue, 49 Wash. App. 513, 742 P.2d 1226 (1987), *rev. den.* 112 Wash. 2d 1009 (1989).

NEW YORK CASES CITED

- Akpan v. Koch, 75 N.Y.2d 561, 555 N.Y.S.2d 16 (1990).

Coca-Cola Bottling Co. v. Board of Estimate, 72 N.Y.2d 674,
532 N.E.2d 1261, 536 N.Y.S. 33 (1988).

E.F.S. Ventures Corp. v. Foster, 71 N.Y.2d 359, 520 N.E.2d
1345, 526 N.Y.S.2d 56 (1988).

HAR Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 548
N.E.2d 1289, 549 N.Y.S.2d 638 (1989).

Jackson v. N.Y. State Urban Dev. Corp., 67 N.Y.2d 400, 494
N.E.2d 429, 503 N.Y.S.2d 298 (1986).

Plastics Industry, Inc. v. Suffolk, Slip Copy (court of
appeals of New York, May 9, 1991) (WESTLAW, New York
library, NY-CS file).

Schodack Concerned Citizens v. Town of Schodack, 148 A.D.2d
130, 544 N.Y.S.2d 49 (1989).

Town of Henrietta v. Dept. of Env'tl. Conservation, 76 A.D.2d
215, 430 N.Y.S.2d 440 (1980).

Village of Westbury v. Dept. of Transp., 75 N.Y.2d 62, 549
N.E.2d 1175, 550 N.Y.S.2d 604 (1989).

Week Broadcasting Corp. v. Planning Board of Lloyd, Supreme
Court, Appellate Division, Third Dept., April 25, 1991
(WESTLAW, New York library, NY-CS file) (unpublished).

STATUTES AND RULES CITED:

42 U.S.C. §§ 4321-4370a (1988).

40 C.F.R. §§ 1500-1508 (1990) (Council on Environmental
Quality).

CAL CIV. PROC. CODE § 1094.5 (West 1986 & Supp. 1991).

CAL. PUB. RES. CODE §§ 21000-21176 (West 1986 & Supp. 1991).

WASH. ADMIN. CODE § 197-11-330 (1990).

WASH. REV. CODE ANN. §§ 43.21C.010 - 43.21C.910 (1983 & Supp.
1991).

N.Y. CIR. PRAC. LAW R. §§ 7801-7806 (McKinney 1981 & Supp. 1991).

N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & 1991 Supp.).