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NEPA IN THE SUPREME COURT

Karin P. Sheldon*

I. INTRODUCTION

The United States Supreme Court has considered the meaning and application of the National Environmental Policy Act (NEPA)¹ on twelve occasions in the twenty years since the Act was passed.² Between 1973, when the Court heard its first NEPA case, *United States v. SCRAP*, and 1983, when it reviewed *Metropolitan Edison Co. v. People Against Nuclear Energy* and *Baltimore Gas and Electric Co. v. NRDC*, the Court took one NEPA case a year; two in 1976.

In each of these cases the Supreme Court reversed a court of appeals decision that a federal agency had failed to comply with NEPA. The Court's opinions express strong disapproval of an active role for the federal judiciary in the enforcement of NEPA and a begrudging attitude towards the concerns for protection of the environment expressed by the statute.³

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1. 42 U.S.C. § 4321-4370a (1982 & Supp. V 1987).

2. *United States v. SCRAP*, 412 U.S. 669 (1973) [hereinafter *SCRAP I*]; *Aberdeen & Rockfish R.R., Co. v. SCRAP*, 422 U.S. 289 (1975) [hereinafter *SCRAP II*]; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Robertson v. Methow Valley Citizen's Council*, 109 S. Ct. 1835 (1989); and *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851 (1989). These cases do not include *Committee for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917 (1971), and *Warm Springs Dam Task Force v. Gribble*, 418 U.S. 910 (1974), which involved requests for stays pending appellate review and were not heard by the whole Court.

3. The *Vermont Yankee* and *Baltimore Gas & Electric* opinions illustrate this point well. In both cases, the Supreme Court clearly thought the D.C. Circuit Court was meddling in substantive decisions of the Atomic Energy Commission, and, through the use of NEPA, was "engrafting [its] own notions of proper procedures upon [an] agency entrusted with substantive functions by Congress." *Vermont Yankee*, 435 U.S. at 525. *Vermont Yankee* barely mentions NEPA; the focus of the opinion is on the Administra-

In the Act's first decade, the Supreme Court reviewed the questions of standing to sue under NEPA,⁴ the effect of NEPA on other statutory obligations of the agencies,⁵ the appropriate definition of a "proposal" requiring preparation of an environmental impact statement (EIS)⁶ and the timing and scope⁷ of such statements.

The Court put a quick end to the prospects for substantive interpretation of NEPA's requirements, characterizing an agency's NEPA compliance duties as "essentially procedural."⁸ The Court cautioned against overzealous interpretation of these procedural obligations, ruling that the Administrative Procedure Act establishes the maximum requirements for agency rulemaking even under NEPA.⁹ Above all, the Supreme Court said, NEPA does not allow a court to substitute its judgment for that of the agency, regardless of the court's views about the decision reached, or to elevate environmental concerns over other appropriate factors.¹⁰

Between 1983 and 1989, the Supreme Court heard no NEPA cases, although issues of NEPA compliance continued to be considered in significant numbers by the lower courts¹¹ and in petitions for writs of certiorari filed with the Court by government agencies and private parties.¹²

tive Procedure Act, 5 U.S.C. § 553 (1976). *Baltimore Gas & Electric* stresses that NEPA's function is limited, a fact the courts must recognize. "The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas & Elec. Co.*, 462 U.S. at 97-98.

4. *SCRAP I*, 412 U.S. at 683-90.

5. *Id.* at 694-95.

6. *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

7. *SCRAP II*, 422 U.S. at 318-19; *Kleppe*, 427 U.S. at 413-15 (1970).

8. *Vermont Yankee*, 435 U.S. at 558; See also *Baltimore Gas & Elec. Co.*, 462 U.S. at 97; *Strycker's Bay*, 444 U.S. at 227.

9. *Vermont Yankee*, 435 U.S. at 548.

10. *Kleppe*, 427 U.S. at 410 n.21; See also *Vermont Yankee*, 435 U.S. at 558; *Strycker's Bay*, 444 U.S. at 227-28.

11. *Environmental Quality, the Annual Report of the Council on Environmental Quality*, reports that between 1983 and 1988, 485 NEPA cases were filed in the federal courts. Among the cases decided by the courts during this period were *Massachusetts v. Watt*, 716 F.2d 946 (1st Cir. 1983); *Save Our Ecosystems v. Clark and Merrel v. Block*, 747 F.2d 1240 (9th Cir. 1984); *National Wildlife Fed'n v. Marsh*, 721 F.2d 767 (11th Cir. 1983); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Foundation for Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985); *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986).

12. For example, during the 1983-84 term, the Supreme Court denied a petition for a writ of certiorari in *Clark v. Southern Or. Citizens Against Toxic Sprays*, 720 F.2d 1475 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984), which ruled that a worst case analysis was required for BLM's herbicide spraying program because of scientific uncertainty as to safe levels of exposure. In 1984-85, the Court denied certiorari petitions for *County of Del Norte v. United States*, 732 F.2d 1462 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 958 (1985), which involved the procedural requirements for filing an EIS with EPA, and *Gee v. Hudson*, 746 F.2d 1471 (4th Cir. 1984), *cert. denied, sub nom. Gee v. Boyd*, 471 U.S. 1058 (1985), which presented the issue of whether courts should apply the "arbitrary and capricious" or "reasonable" standard when determining agency compliance with NEPA. In 1985-86, the Supreme Court denied a certiorari petition in the case of *River Road Alliance Inc. v. Army Corps of Engineers*, 764 F.2d 445 (7th

The Supreme Court ended its silence on NEPA with its decision in *Robertson v. Methow Valley Citizens Council*,¹³ and its companion case, *Marsh v. Oregon Natural Resources Council*,¹⁴ issued May 1, 1989. Although it is early to predict the influence of these decisions on federal agency compliance with NEPA and on enforcement of the statute by the federal courts, particularly since past prophecies about the chilling impact of the Supreme Court's NEPA decisions have underestimated the statute's vigor and the independence of the federal courts, the *Methow Valley* and *Marsh* decisions appear to have greater potential to undermine the accomplishment of NEPA's purposes than any other decisions of the Supreme Court. While the Court's earlier NEPA decisions reveal a lack of understanding of the public's concern for the protection of the environment and a somewhat crabbed and grumpy approach to the Act, these decisions display an active hostility to an interpretation of NEPA that insists on full agency compliance with its requirements, and to the critical role of the courts in ensuring that compliance occurs.

Some commentators argue that the Court's hostility has existed all along.¹⁵ Although they may be correct, NEPA's vitality, the depth of public concern for protection of the environment, and the limited scope of the Supreme Court's cases have blunted its effect.¹⁶ NEPA has blossomed in spite of the Supreme Court. NEPA caselaw is characterized more by *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*¹⁷ than by *Strycker's Bay Neighborhood Council v. Karlen*.¹⁸ In the hands of creative environmental lawyers and a responsive judiciary, NEPA has been the "catalyst" for the development of an effective environmental common law that has been "the source of NEPA's success."¹⁹

Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986), which also concerned the appropriate standard of review for an agency's decision not to prepare an EIS.

13. 109 S. Ct. 1835 (1989).

14. 109 S. Ct. 1851 (1989).

15. See, e.g., Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1 (1983).

16. Rodgers, *A Hard Look at Vermont Yankee: Environmental Law under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

17. 449 F.2d 1109 (D.C. Cir. 1971). In this case, the Court of Appeals for the D.C. Circuit called NEPA "the broadest and perhaps most important of the recent statutes" passed by Congress. *Id.* at 1111. "[T]he very purpose of NEPA is to tell federal agencies that environmental protection is as much a part of their responsibility as is the protection and promotion of the industries they regulate." *Id.* at 1122. The "duty" of a court reviewing an agency's decision regarding NEPA "is to see that [the statute's] important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Id.* at 1111.

18. 444 U.S. 223 (1980). The Court rejected the Court of Appeals' reliance on NEPA for the "substantive standards necessary to review the merits of agency decision. . . ." It held that the statute's limited role is to insure a fully informed decision. *Id.* at 227.

19. *Kleppe*, 427 U.S. at 420-21 (Marshall, J., dissenting). Justice Marshall was not persuaded by the majority's conclusion that "the procedural duty imposed on the agencies by § 102 (2)(c) is 'quite precise' and leaves a court no authority to depart from the statutory language." To the contrary, concluded Marshall, NEPA is a "vaguely worded statute" seemed designed to serve as a "catalyst" for the development of a common law of NEPA. Marshall found the Court of Appeals decision well supported and a "sensible" test for enforcing NEPA. *Id.*

Continuing this success in the 1990s is more problematic. Environmental issues have become increasingly complex and serious. Federal agencies exhibit less ability and willingness to shoulder their NEPA obligations. Some are virtually moribund. In these circumstances the *Methow Valley* decision is particularly unfortunate. Unlike the rulings in the earlier Supreme Court cases, the *Methow Valley* decision goes to the heart of the NEPA process—to the evaluation of the consequences of a proposed action and reasonable alternatives to it. The Supreme Court's decision invites poor environmental analysis and inadequately supported decisions. Moreover, it will exacerbate what has already become a strong agency predilection to put off for later the critical hard look at the consequences of proposed federal action that is supposed to precede agency decisionmaking.²⁰

This article will examine the first decade of Supreme Court NEPA decisions and their impact on the development of NEPA caselaw in the 1970s and 1980s. Thereafter, it will contrast the *Methow Valley* decision with these decisions in order to offer some conclusions about the impact of the latest Supreme Court pronouncement on the continued development of NEPA common law in the 1990s.

II. NEPA IN THE SUPREME COURT - 1973-1983: RULES WITHOUT IMPACT

The first ten Supreme Court decisions on the National Environmental Policy Act, for the most part, can be grouped in categories under a statement of the rule for which the group stands. The rules are relatively few in number: NEPA does not repeal by implication any other statute.²¹ It does not require an agency to use administrative procedures not called for by the Administrative Procedures Act in the conduct of rulemaking.²² An environmental impact statement must be prepared only for an actual proposal for major federal action.²³ Requests for congressional appropriations are not "proposals" within the meaning of the statute.²⁴ While NEPA's goals are substantive, the duties it imposes on federal agencies are essentially procedural. A court is not to substitute its judgment for that of the agency.²⁵ Although NEPA requires a court to take a "hard look" at the agency's action, it does not elevate environmental concerns over other appropriate considerations.²⁶

20. What the Forest Service did in the *Methow Valley* case is typical. The agency approved the ski development at issue after concluding that the impacts on the mule deer herd in the area would be insignificant "with the implementation of mitigation measures." The Forest Service had not identified or developed these measures, much less assessed their effectiveness. *Methow Valley*, 833 F.2d at 817.

21. *SCRAP I*, 412 U.S. at 694; *SCRAP II*, 422 U.S. at 317, 319; *Flint Ridge*, 426 U.S. at 788.

22. *Vermont Yankee*, 435 U.S. at 548; see also *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

23. *Kleppe*, 427 U.S. at 399.

24. *Andrus*, 442 U.S. at 348-49.

25. *Vermont Yankee*, 435 U.S. at 558; *Strycker's Bay*, 444 U.S. at 227; *Baltimore Gas & Elec. Co.*, 462 U.S. at 100.

26. *Baltimore Gas & Elec. Co.*, 462 U.S. at 100; *Strycker's Bay Neighborhood Council*, 444 U.S. at 227-28; *Kleppe*, 427 U.S. at 410 n.21.

Despite the fact that these rules have become almost talismanic, the early NEPA decisions, as a body of opinion from the nation's highest court, have had remarkably little impact on the development of the common law of NEPA. Part of this stems from the limited nature of the facts and circumstances of several of the cases, which restricts their applicability to other situations.²⁷ Obviously, the opinions did set important boundaries on the use and interpretation of the statute and foreclosed the possibility of some innovative approaches to the considerations of environmental problems in agency decisionmaking.²⁸ They were more than counterbalanced, however, by activities in Congress and the lower courts.

A. *The SCRAP Case - A Liberal Construction of Standing*

Although the Supreme Court's treatment of NEPA has been generally conservative, not all of its rulings have been restrictive or narrow. In its very first NEPA case, *SCRAP I*, the Court declared that NEPA created a right of action in adversely affected parties to enforce agency obligations to consider environmental issues in connection with major federal actions.²⁹ *SCRAP* (Students Challenging Regulatory Agency Procedures) argued that its members had suffered economic and environmental harm as a result of the Interstate Commerce Commission's (ICC) approval of increases in rates charged by the railroads for the shipment of recyclable materials. According to *SCRAP*, these rate increases would discourage the use of recyclables and contribute to the further depletion of natural resources. The ICC decision to approve the rate increases therefore required preparation of an EIS under NEPA.³⁰

27. For example, the Court considered the issue of the proper timing of an EIS in the *SCRAP* cases, *United States v. SCRAP*, 412 U.S. 669 (1973) (*SCRAP I*), and *Aberdeen & Rockfish Railroad v. SCRAP*, 422 U.S. 289 (1975) (*SCRAP II*), which concerned the operation of NEPA in the ICC's singular procedures for setting railroad freight rates. The facts make it difficult to apply the Court's ruling to other situations. The issue of when an impact statement is required was reviewed in the context of, *inter alia*, *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139 (1981), and *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). *Weinberger* involved a decision of the Navy concerning a facility capable of storing nuclear weapons. Much of the information which would have been disclosed in the EIS was classified. The Court's ruling that no EIS is required if the information to be included is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1966), *Weinberger*, 454 U.S. at 143-44, has limited application since the vast majority of agency actions do not involve secret military operations. *Metropolitan Edison* held that the "cognizable impacts" of agency action to be discussed in an EIS do not include damage to human psychological health. 460 U.S. at 776. Again, this is not a frequent issue in NEPA cases.

28. Several members of the Court recognized the consequences of this restrictive reading of the statute's requirements at the time. For example, in dissenting to the decision in *Kleppe*, Justices Marshall and Brennan chided the majority for by-passing the opportunity to affirm the appellate court's "different and effective" remedy for those cases where judicial intervention, prior to the time an EIS is required, is appropriate to insure the consideration of environmental factors throughout the decisionmaking process. The Justices saw the majority's decision as preventing a federal court from "remedy[ing] a NEPA violation—no matter how blatant—until it is too late for an adequate remedy to be formulated." *Id.* at 415 (Marshall, J., dissenting).

29. 412 U.S. at 686-87.

30. *Id.* at 675-76.

The Supreme Court found SCRAP "aggrieved" within the meaning of Section 10 of the Administrative Procedure Act.³¹ The injury to SCRAP's "aesthetic and environmental well-being" constituted an injury within the zone of interests protected by NEPA.³² The Court construed broadly the zone of interests protected by NEPA, essentially finding that all persons are potentially within the zone. Since *SCRAP I* was decided, the sole inquiry on standing in NEPA cases has been the question of injury in fact.³³

B. Vermont Yankee - An Out-of-Step View of Administrative Procedures

The Court did not welcome environmental plaintiffs with a similarly expansive interpretation of the claims available at bar.

One of the most significant limitations considered by the Court was the effect of NEPA on federal agency rulemaking procedures. The Court's opinions, which were fully explained in *Vermont Yankee*, and subsequently applied in *Baltimore Gas & Electric*, were previewed in *SCRAP I* and *Kleppe v. Sierra Club*³⁴ when the Court stated that the procedural duty imposed upon the agencies by NEPA is "quite precise and the role of the courts in enforcing that duty is similarly precise."³⁵ A court has no authority to devise factors not provided for by the language of the statute to be considered in determining agency compliance with it. "Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA."³⁶

In *Vermont Yankee* and *Baltimore Gas & Electric*, the Supreme Court held that the Court of Appeals for the D.C. Circuit erred in ruling that NEPA required the Atomic Energy Commission to formulate and use additional administrative procedures in its rulemaking on the environmental impacts of the reprocessing and disposal of spent nuclear fuel from nuclear power plants. In *Vermont Yankee*, the Court held that the Administrative Procedure Act "establishe[s] the maximum procedural requirements which Congress [is] willing to have the courts impose on agencies in conducting rulemaking procedures."³⁷

The Court was emphatic that, in the absence of "extremely compelling circumstances,"³⁸ courts should refrain from directing agencies

31. *Id.* at 686-87. The Court applied the tests of *Data Processing Services v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), which recognize standing for parties who show injury in fact within the zone of interests protected by the applicable statute. *SCRAP I*, 412 U.S. at 686-87.

32. *SCRAP I*, 412 U.S. at 686. "It is undisputed that the 'environmental interest' that the appellees seek to protect is within the zone of interests protected by NEPA. . . ." *Id.*

33. F. GRAD, *TREATISE ON ENVIRONMENTAL LAW*, VOL. II, § 9.04 at 9-236 (1987).

34. 427 U.S. 390 (1976).

35. *Id.* at 406.

36. *Id.*

37. 435 U.S. at 524.

38. *Id.* at 543.

to use procedures beyond those of the APA.³⁹ Although the Court recognized that the Court of Appeals had not ordered the agency to follow any specific procedures, it asserted "there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate."⁴⁰ According to the Court, NEPA cannot serve as the basis for a substantive revision of the carefully constructed procedural specifications of the APA. As long as the Atomic Energy Commission used the APA "statutory minima," the appellate court could not overturn the rulemaking on the basis of the procedures used.⁴¹

Professor William Rodgers has called the *Vermont Yankee* decision "a relic the day it was handed down," an illustration of how far out of step the Supreme Court was with the development of environmental law in Congress and the courts.⁴² He points out that, even before the *Vermont Yankee* decision, Congress had devised procedures for administrative rulemaking well beyond the APA. For example, the Clean Air Act Amendments of 1977 include detailed provisions for the preparation of a record of decision,⁴³ the Clean Water Act Amendments of 1977 call for public hearings with the right of cross examination,⁴⁴ the Toxic Substances Control Act of 1976 contains a variety of requirements for the conduct of hearings and the preparation of the record of decision.⁴⁵

All of these provisions are consistent with the 1976 Report of the Administrative Conference of the United States which recommended the use by agencies of various procedures not called for by the APA.⁴⁶

The courts have found that NEPA itself includes a number of procedural commands not specified by the APA. In *County of Suffolk v. Secretary of the Interior*⁴⁷ and *Chelsea Neighborhood Assoc. v. U.S. Postal Service*,⁴⁸ for example, the Court of Appeals for the Second Circuit held that NEPA requires an agency to prepare a cost-benefit analysis of its proposed action. Other courts have ruled that NEPA requires an agency to disclose and consider responsible opposing scientific opinions,⁴⁹ coordinate expertise within the agency in development of a proposal,⁵⁰ and make all information concerning the impacts of the pro-

39. In "notice and comment" rulemaking, provided by the APA, 5 U.S.C. § 553(e) (1988), these *minima* include rights of notice and comment and a right to receive a concise general statement of the basis and purpose of the rule adopted.

40. 435 U.S. at 541-42.

41. *Id.* at 548.

42. Rodgers, *supra* note 16, at 718.

43. 42 U.S.C. § 7607 (1982).

44. 33 U.S.C. § 1317 (1982).

45. 15 U.S.C. § 2601 (1988).

46. See *Administrative Conference of the United States, 1976 Report* 44-45 (1977).

47. 562 F.2d 1368, 1384 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1977).

48. 516 F.2d 378, 386-87 (2d Cir. 1975).

49. See, e.g., *Committee for Nuclear Responsibility v. Seaborg* 463 F.2d 783, 786-87 (D.C. Cir. 1971).

50. *Simmans v. Grant*, 370 F. Supp. 5, 12 (S.D. Tex. 1974).

posed action on the environment available to the public for consideration at a public hearing.⁵¹

These and other cases and statutes indicate that Congress and the lower courts have recognized the limitations of the APA as the sole framework for the making of complex, technical administrative decisions, particularly those of concern to the public. The *Vermont Yankee* decision did not reverse this trend. Rather, it illustrated that the Supreme Court was out of touch.

C. Strycker's Bay and Company - A Crabbed Approach to Substantive Review

Much has been written about the Supreme Court's steadfast refusal to interpret NEPA as providing grounds for substantive review of agency action.⁵² The Court's rulings on substantive NEPA put an end to the general trend of NEPA decisions finding that NEPA was substantive law.⁵³ Typical of these cases is *Environmental Defense Fund v. Corps of Engineers* which held that NEPA was more than a full disclosure law, but was intended to make substantive changes in agency decisionmaking.⁵⁴

The Supreme Court expressed its views on the substantive aspects of NEPA in four cases. In 1976, in *Kleppe*, the Court warned the judiciary not to "interject itself within the area of discretion of the executive as to the choice of the action to be taken."⁵⁵ Two years later, the Court stressed that NEPA's procedural duties were designed to "insure a fully informed and well-considered decision," but not necessarily "a decision the judges of the Court of Appeals or this Court would have reached had they been members of the decisionmaking unit of the agency."⁵⁶

"The final word on the substantive effect of NEPA was spoken by the Supreme Court in 1980 in a *per curiam* decision in *Strycker's Bay Neighborhood Council v. Karlen*."⁵⁷ In *Strycker's Bay*, the Court put together all of its previous remarks on substantive NEPA, quoting liberally from *Vermont Yankee* and *Kleppe*. In sum, the Court held that NEPA is not a decision rule. It does not elevate environmental concerns over other appropriate factors. Its purpose is to insure fully informed decisions, not environmentally beneficial or even preferable

51. *Keith v. California Highway Comm'n*, 4 E.L.R. 20,076 (9th Cir. 1973).

52. See W. RODGERS, ENVIRONMENTAL LAW, § 7.5 at 738 n.1 (West 1977).

53. Weinstein, *Substantive Review Under NEPA after Vermont Yankee IV*, 36 SYRACUSE L. REV. 837, 839 (1985).

54. 470 F.2d 289, 297 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

55. 427 U.S. at 410, n.21 (citing *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 828 (D.C. Cir. 1972)).

56. *Vermont Yankee*, 435 U.S. at 558.

57. 2 F. GRAD, *supra* note 33, § 9.04 at 9-215. See generally Professor Grad's discussion of NEPA as a decision rule. *Id.* at 9-209-30.

ones. The only role for a court is to satisfy itself that the agency considered the environmental consequences of the proposed decision.⁵⁸ In 1983, the Court reaffirmed the *Strycker's Bay* holding in *Baltimore Gas & Electric*,⁵⁹ one of the last two NEPA cases heard by the Supreme Court before its six year silence on the statute.

While these decisions are disappointing, and possibly ill-considered, because they ignore so much of NEPA's language, they have hardly rung a death knell to the statute's vitality or effectiveness. After all, "[s]ubstantive NEPA is a fighting issue, but not one that wins many cases."⁶⁰ NEPA cases are won because the Act works in tandem with an underlying substantive statute that gives the court with a basis for a decision on the merits.

The strength and beauty of NEPA is that it provides an environmental overlay for federal agency interpretation, implementation and enforcement of substantive statutes. It also establishes a mechanism for members of the public to challenge the decisions made and actions taken under these statutes.

III. THE STRENGTH OF PROCEDURAL NEPA

Even limited to a procedural mandate, NEPA has been extraordinarily successful. The history of protecting the environment may well be "the history of observance of [NEPA's] procedural safeguards."⁶¹ NEPA's directive to integrate environmental considerations into agency decisionmaking has had a major impact on both agency procedures and decisions. NEPA has greatly expanded the "relevant factors" to be considered by decisionmakers in carrying out substantive statutory requirements. Actions that could previously be taken by an agency if consistent with a mission oriented statute, such as the Mineral Leasing Act⁶² or the Atomic Energy Act,⁶³ must now be based on an evaluation of the potential consequences to the environment as well.

Far greater attention must be paid to potential alternatives to the proposed action than would otherwise be the case without NEPA. Among the choices an agency must consider is the option of no action at all.⁶⁴ An agency must also examine alternatives beyond its own jurisdiction and authority, if such alternatives are reasonable.⁶⁵

By expanding the factors and alternatives to be considered by an agency decisionmaker, the scope of inquiry under the Freedom of Infor-

58. 444 U.S. at 227.

59. *Baltimore Gas & Elec. Co.*, 462 U.S. at 97.

60. Rodgers, *supra* note 16, at 710.

61. *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).

62. 30 U.S.C. §§ 181-287 (1982 & Supp. V 1987).

63. 42 U.S.C. §§ 2011-2296 (1982 & Supp. V 1987).

64. *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1977); *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 92-93 (2d Cir. 1975).

65. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834-35 (D.C. Cir. 1972).

mation Act⁶⁶ and the scope of discovery under the Federal Rules of Civil Procedure have been similarly enlarged.

The principles governing review of agency actions in court have been modified as well by NEPA. For example, the courts recognize a NEPA exception to the rule that review of agency action is limited to the record made below and no new extra-record evidence may be introduced in court. This exception was articulated by the Court of Appeals for the Second Circuit in *Suffolk County v. Department of the Interior*.⁶⁷

A suit under NEPA challenges the adequacy of part of the administrative record itself— the EIS. . . . [A]llegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept “stubborn problems or serious criticism . . . under the rug,” raise issues sufficiently important to permit the introduction of new evidence in the district court⁶⁸

The Supreme Court has stressed that the purpose of NEPA is not to prevent unwise agency decisions, only uninformed ones. Informed decisions have a way of being better decisions, however, as procedures have a way of working substantive modifications of agency action. The Council on Environmental Quality, in its analysis of the first six years of NEPA compliance by federal agencies, described numerous instances of NEPA’s impact on agency decisionmaking. These included: the Interior Department’s decision to defer phosphate leasing in the Osceola National Forest pending completion of a detailed environmental study (which led ultimately to the cancellation of some phosphate leases); the Atomic Energy Commission’s cancellation of the radioactive waste disposal sites in Kansas and Georgia, and the Interior Department’s refusal to lease tracts of federal land close to a waterfowl refuge.⁶⁹

A more recent example of the effect of NEPA on agency decision-making is provided by the procedures adopted by the Department of the Interior for the processing of preference right coal lease applications.⁷⁰

The coal leasing procedures were developed following the decision in *Natural Resources Defense Council, Inc. v. Berkland* that NEPA directs the Secretary of the Interior to formulate “particularized lease terms for land reclamation and air, water and wildlife protection.”⁷¹ Further, the Secretary must consider the costs to the lease applicant

66. 5 U.S.C. § 552 (1988).

67. 562 F.2d 1368, 1384-85 n.43.

68. *Suffolk County*, 562 F.2d at 1384 (citing *Silva v. Lynn*, 482 F.2d 1282, 1295 (1st Cir. 1973)).

69. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS - AN ANALYSIS OF SIX YEARS’ EXPERIENCE BY SEVENTY FEDERAL AGENCIES 1-4 (1976).

70. 43 C.F.R. § 3430.1 (1988).

71. 458 F. Supp. 925, 936 (D.D.C. 1978), *aff’d*, 609 F.2d 353 (D.C. Cir. 1979).

of complying with these terms in deciding whether the applicant has a commercial quantity of coal and is, therefore, entitled to a lease.⁷² These principles were incorporated into the new procedures.

In sum, then, the first ten years of Supreme Court jurisprudence on NEPA has, without a doubt, shaped the statute in important ways. Some would say the major effect of the Court's pruning has been to stunt NEPA's potential growth. A close look at the over-all body of NEPA decisions and their impact suggests otherwise. NEPA has continued to be the single most useful statute for accomplishing environmental protection.

The *Methow Valley* decision, discussed below, may change this conclusion for a significant aspect of NEPA: the requirement imposed on agencies to consider ways to mitigate the consequences of their activities.

IV. *ROBERTSON V. METHOW VALLEY* - A STEP TOWARD TRIVIAL NEPA

On May 1, 1989, the Supreme Court ended its silence on NEPA with its decisions in *Methow Valley* and *Marsh*. The Court reversed decisions of the Ninth Circuit Court of Appeals that the EISs prepared by the Forest Service for the proposed Early Winters Ski Resort in Washington State and by the Army Corps of Engineers for the Elk Creek Dam in the Rogue River Basin of Oregon were inadequate because they failed to discuss and evaluate the effectiveness of measures to mitigate the adverse environmental effects of these proposed actions, even though the agencies used mitigation to justify approval of the projects.⁷³

The Ninth Circuit held that the agencies could not rely on the promise of mitigation to support their conclusions that the impacts of the projects would be minor because the mitigation measures had not been developed, much less assessed for effectiveness.⁷⁴

The Ninth Circuit was insistent that the EISs for these projects include a detailed analysis of the proposed mitigation measures, including an explanation of their effectiveness, because mitigation was critical to the agencies' assessment of the environmental consequences of the projects. The sufficiency of the discussion of mitigation was, therefore, "a determinative factor in evaluating the adequacy [of the EIS]."⁷⁵

The Supreme Court set up the Ninth Circuit's decisions to knock them down. The Court upbraided the appellate court for improperly

72. *Id.* at 938.

73. *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 819-20 (9th Cir. 1987); *Oregon Natural Resources Council v. Marsh*, 820 F.2d 1051, 1055 (9th Cir. 1987). These decisions also considered the issues of when a "worst case" analysis is required under NEPA (*Methow Valley*, 833 F.2d at 817; *Marsh*, 820 F.2d at 1058-59), and when a supplemental EIS is required (*Marsh*, 820 F.2d at 1056-58). Although these are important issues, they are not considered in this article.

74. *Methow Valley*, 833 F.2d at 817; *Marsh*, 820 F.2d at 1055.

75. *Marsh*, 820 F.2d at 1055.

imposing on the agencies "a substantive requirement that a complete mitigation plan be actually formulated and adopted [in the EIS]."⁷⁶ NEPA prohibits uninformed decisions, said the Court, not unwise ones.⁷⁷ All it requires is a discussion of "possible mitigation measures," not a demonstration that measures will be implemented or effective.⁷⁸ The Circuit Court erred:

[F]irst in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions' " . . . and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action. . . ."⁷⁹

The Supreme Court overstated the Ninth Circuit's ruling in an unnecessary and harmful way. The Court of Appeals did not hold, as a matter of NEPA law, that a "fully developed plan to mitigate environmental harm" must be included in an EIS, although this is how the Supreme Court characterized the issue for review.⁸⁰ The Ninth Circuit's use of the phrase "mitigation plan" was *dicta*, a reference to the commitments made by both agencies to prepare mitigation and compensation plans and programs.⁸¹ Nor did the Court of Appeals create substantive mitigation requirements out of whole judicial cloth. To the contrary, it applied the Council on Environmental Quality's regulations which require in an EIS a discussion of "the means to mitigate adverse environmental impacts"⁸² and of "appropriate mitigation measures not already included in the proposed action or alternatives."⁸³ It also applied the rule previously announced in *Northwest Indian Cemetery Protec-*

76. 109 S. Ct. at 1847.

77. *Id.* at 1846.

78. *Id.* at 1846-47.

79. *Id.* at 1847 (quoting *Methow Valley*, 833 F.2d at 819 (quoting Stop H-3 Ass'n v. Brinegar, 389 F. Supp. 1102 at 1111 (D. Hawaii 1974))).

80. The Court adopted the petitioner's statement of the issue: "Whether the National Environmental Policy Act requires federal agencies to include in each environmental impact statement . . . a fully developed plan to mitigate . . .," *Id.* at 1838, not the respondents' more accurate expression of the Ninth Circuit's ruling: "Whether the National Environmental Policy Act requires an environmental impact statement to include a discussion of means to mitigate the adverse impacts of a proposed action and the likely effectiveness of such mitigation measures?" Brief of Respondents at i, *Marsh*, 109 S.Ct. 1851.

81. *Marsh*, 820 F.2d at 1055; *Methow Valley*, 833 F.2d at 818-19. In *Marsh* the Army Corps of Engineers committed itself to what it called a "compensation plan" for protecting wildlife. *Elk Creek Dam, Supplemental EIS*, 6. According to the Corps, the plan would "adequately offset the adverse impacts" of the dam and make up for the loss of wildlife habitat associated with the construction of the dam and reservoir. *Id.* at 86. The EIS for the Early Winters project stated that without effective mitigation measures, state air quality standards would be exceeded for most of the upper Methow Valley. *Early Winters EIS*, 145. For this reason, the Regional Forester in his Record of Decision required development of an air quality management program.

82. 40 C.F.R. § 1502.16(h) (1988).

83. *Id.* § 1502.14(f).

tive Assoc. v. Peterson, that an EIS must contain a reasoned discussion of mitigation and its effectiveness, not a “mere listing” of measures.⁸⁴

The Ninth Circuit’s *Methow Valley* decision is consistent with the treatment of mitigation in other cases. Although it has received little attention outside the courtroom, mitigation, at least until *Methow Valley*, was a firmly established element of the NEPA process.⁸⁵

The question of mitigation has often arisen in the context of an agency decision not to prepare an impact statement on the grounds that the effects of a proposed action will be reduced to insignificance by mitigation measures. The courts have allowed agencies to forego the preparation of an EIS only when they have “convincingly established” that mitigation will be effective and enforceable.⁸⁶

In cases where impact statements have been prepared, the courts have found mitigation a core concept of NEPA: “the very heart of the [issue facing an agency] in preparing [an EIS]— whether the project should proceed in view of its environmental consequences.”⁸⁷ In *Sierra Club v. Froehlke*, a suit involving a large water project, the court held that the courts “should not hesitate to require further agency consideration when a project appears to call for mitigation and yet none was considered, or only a half-hearted attempt was made.”⁸⁸ Other decisions have held impact statements deficient for failure to discuss mitigation, either inadequately or at all.⁸⁹

In all these cases the courts were emphatic that mitigation cannot substitute for the preparation of an EIS or justify a decision to proceed with a federal action unless the agency has demonstrated that the proposed measures will be effective, at least in large measure, to compensate for the adverse impacts of the proposed action, and will be enforced to achieve that result.

In *Methow Valley* the Supreme Court appears to have relieved the agencies of the obligation to show the effectiveness of proposed miti-

84. 795 F.2d 688, 697 (9th Cir. 1986), *rev’d and remanded on other grounds sub nom.*, *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 108 S. Ct. 1319 (1988).

85. *See generally*, Donahue, *Taking a Hard Look at Mitigation: The Case for the Northwest Indian Rule*, 59 U. COLO. L. REV. 687 (1988).

86. *Maryland Nat’l Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973); *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) (legally enforceable conditions on dredging operations are necessary to support a finding of no significant impact); *Cabinet Mts. Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 683-84 (D.C. Cir. 1982) (exploration drilling permitted without EIS because approval conditioned on implementation of comprehensive mitigation plan designed to compensate for adverse effects); *Park County Resource Council v. U.S. Dep’t of Agric.*, 817 F.2d 609, 621-22 (10th Cir. 1987) (court must consider mitigation measures in deciding whether decision not to prepare EIS is reasonable).

87. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972).

88. 359 F. Supp. 1289, 1341 (S.D. Tex. 1973), *rev’d on other grounds sub nom. Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974).

89. *See, e.g.*, *Prince George’s County v. Holloway*, 404 F. Supp. 1181 (D.D.C. 1975); *Duck River Preservation Assoc. v. TVA*, 410 F. Supp. 758 (E.D. Tenn. 1974); *Friends of the Earth v. Hentz*, 800 F.2d 822 (9th Cir. 1986).

gation. As long as an EIS talks about possible measures it will satisfy the Supreme Court's notions of procedural NEPA requirements. By approving the EIS for the Early Winters Ski Resort and the Elk Creek Dam, the Court has blessed the use of wish lists and promises that may not be feasible or cost effective, but will substitute for upfront evaluation of both the impacts of and alternatives to proposed decisions.

The biggest danger of the *Methow Valley* decision is that it will trivialize a fundamental aspect of NEPA. Many of the decisions in the Supreme Court's first decade of NEPA review concerned issues at the edges of the statute. Mitigation is integral to two central features of the EIS process: the evaluation of the potential consequences of, and the consideration of alternatives to proposed agency action.⁹⁰

The central role of mitigation in accomplishing NEPA's purpose of protecting and enhancing the environment also has been enforced consistently by the federal courts as a fundamental aspect of NEPA's procedural mandate:

NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a pro forma ritual. Clearly, it is pointless to “consider” environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and non-duplicative stage of an agency's proceedings.⁹¹

Although it is early to predict the fate of mitigation and its function in assuring implementation and enforcement of NEPA, the *Methow Valley* decision casts a big chill at a time when the need to find ways to protect the environment and reduce the impacts of man's activities on the natural world is more pressing than ever.

V. CONCLUSION

The Congress understood in drafting NEPA, and the courts in enforcing it, that it is critical for the federal government, which daily undertakes activities with massive detrimental impacts on the air, water, land and wildlife of the country and the world, to consider how

90. The Council on Environmental Quality's regulations require that the alternatives section, the “heart of the environmental impact statement shall . . . [i]nclude appropriate mitigation measures not already included in the proposed action or alternatives.” 40 C.F.R. § 1502.14(f) (1988). Similarly, the environmental consequences section must include a discussion of “[m]eans to mitigate adverse environmental impacts (if not fully covered [in the alternatives section]).” *Id.* § 1502.16(h). These sections envision that mitigation measures will be part and parcel of the agency's proposed action or alternatives, not just add-ons to the discussion of alternatives or impacts. This message “is one of three types of alternatives that ‘agencies shall consider.’” Thus, as a form of alternative action, mitigation is itself at ‘the heart of’ the EIS.” Donahue, *supra* note 85, at 690 (emphasis in original) (footnotes omitted).

91. *Calvert Cliffs*, 449 F.2d at 1128.

to avoid and reduce these effects and to thoroughly examine alternative actions with diminished impact. The procedural mechanisms for accomplishing this are the mitigation requirements of Section 102(2)(c) and (E) of NEPA and the regulations of the Council on Environmental Quality.⁹²

By reversing decisions that call for full compliance with NEPA's mitigation requirements, the Supreme Court shows it is still out of touch with the realities of federal agency compliance with the statute. In its campaign against substantive NEPA, the Court has struck a blow against a meaningful NEPA. The agencies will rely on the *Methow Valley* decision to excuse *pro forma* environmental documents and to justify an "act now, deal with environmental consequences later approach" to projects. If the federal courts heed the directives of *Methow Valley* in the future, there is grave danger that "important legislative purposes, heralded in the halls of Congress, [will be] lost [and] misdirected in the vast hallways of the federal bureaucracy."⁹³

92. 40 C.F.R. § 1505.1 (1988).

93. *Calvert Cliffs*, 449 F.2d at 1111.