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NEPA at 21: Over the Hill Already?

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NEPA AT 21: OVER THE HILL ALREADY?

INTRODUCTION

President Richard Nixon signed the National Environmental Policy Act (NEPA)¹ into law on January 1, 1970. At the time, Nixon, Congress, academia, and the environmental movement all felt that this first federal environmental law heralded the arrival of a time to “reclaim[] . . . our living environment.”²

One of the few who felt that NEPA had severe problems was Theodore J. Lowi, a professor of government at Cornell University.³ He opined that “[NEPA] states a whole lot of lofty sentiments . . . [b]ut there is no law to be found anywhere in the act.”⁴ Professor Lowi’s words of warning appear to have been quite prophetic. Since the Supreme Court decided *Strycker’s Bay Neighborhood Council v. Karlen*⁵ in 1980, a number of law review articles have announced NEPA’s lessening importance.⁶ At an age when it should be reaching full maturity and vitality, NEPA instead appears quite sickly.

The first part of this Comment will briefly review the somewhat meteoric rise of NEPA including the increase in public awareness which led to federal action, its projected effect, and the manner in which the courts seemed to be heading in their treatment of NEPA. The Comment will then review the decline of NEPA due to subsequent Supreme Court decisions. Finally, the Comment will consider possible remedies for the present anemic condition of this first federal environmental statute.

THE RISE OF NEPA

A Growing Awareness

From the time that Europeans first began to explore and colonize the New World, many have felt that its natural resources were practically limitless and worthwhile only if subdued and put to traditional use.⁷ Average citizens had no reason to believe differently until after World War II when the new interstate

¹ National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4370c (West 1977 & Supp. 1991) [hereinafter NEPA].

² N.Y. Times, Jan. 2, 1970, at A12, col. 6.

³ N. ORLOFF & G. BROOKS, THE NATIONAL ENVIRONMENTAL POLICY ACT 15 (1980).

⁴ T. LOWI, THE POLITICS OF DISORDER 179 (1971).

⁵ *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

⁶ See, e.g., Comment, *National Environmental Policy Act: An Ambitious Purpose; A Partial Demise*, 15 TULSA L.J. 553 (1980) and Murchison, *Does NEPA Matter? — An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557 (1984)

⁷ T. HOBAN & R. BROOKS, GREEN JUSTICE: THE ENVIRONMENT AND THE COURT 1 (1987) [

highway system, recent affluence, and an increase in leisure time combined to open vast areas of the country to them.⁸ Suddenly the vacationing family could appreciate firsthand the great expanses and wondrous beauty about which they had previously only read. Many of these same people became interested in preserving the natural wonders which they had seen.⁹

Congressional response to this growing public awareness soon followed. In 1959, the Resources and Conservation Act¹⁰ proposed to establish both a “unified statement of conservation, resource, and environmental policy” and a high-level council in the executive branch.¹¹ Similar but less comprehensive bills were also rejected in the mid-1960s.¹² The push for a conservation policy at the federal level regained momentum in 1968. Congress issued two reports that summer which again brought environmental concerns to the forefront of public awareness.¹³ One of their primary messages was that mission-oriented federal agencies overstressed the benefits of development while insufficiently exploring alternatives.¹⁴

The events of the following eighteen months brought environmental and ecological concerns to the attention of the general American populace.¹⁵ With the country riding the crest of an economic wave and generally optimistic about the possibilities of modern science, America seemed ready to correct some of its recent environmental wrongs.¹⁶

What NEPA Was Meant to Accomplish

Throughout the 1960s, many voices cried out for federal action concerning the

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ S. 2549, 86th Cong., 1st Sess. (1959).

¹¹ R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE: IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT 7 (1976). This bill seems to have been ten years ahead of its time as these same two provisions were the main pillars of the final draft of NEPA in 1969. See NEPA §§ 101 and 202.

¹² R. ANDREWS, *supra* note 11, at 7.

¹³ Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L. J. 205, 212 (1989). The first of these was the Subcomm. on Science, Research, and Dev. to the House Comm. on Science and Astronautics, 90th Cong., 2d Sess., *Managing the Environment 1-3* (Comm. Print 1968). It portrayed a society focused solely on economic and technological advancement. The second was the Senate Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess., *A National Policy for the Environment: A Special Report* (Comm. Print 1968). This study, prepared by Professor Lynton Caldwell, warned of environmental costs which were a natural side effect of a productive economy and urged Congress to adopt a national environmental policy.

¹⁴ See also Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 47 IND. L.J. 645, 658 (1972).

¹⁵ In 1969 alone, the FDA prevented 28,000 pounds of Lake Michigan salmon from going to market because of excessive pesticide levels; scientific studies reported that phosphate-induced plant growth was choking the Great Lakes; medical research showed DDT levels of four times greater than that considered “safe for human consumption” in the breast milk of American mothers; and the Santa Barbara area was affected by oil spill. T. HOBAN & R. BROOKS *supra* note 7, at 3-4.

¹⁶ *Id.* at 60-61.

environment.¹⁷ One of the strongest of these advocates was Professor Lynton Caldwell, government professor at Indiana University.¹⁸ At a Senate hearing on the NEPA bill, Professor Caldwell argued in favor of a national environmental policy which would include an action-forcing, operational aspect.¹⁹ Professor Caldwell urged the Senate to adopt a policy which would compel Executive agencies “to take the kind of action which [would] protect [the environment].”²⁰ To this end, he implored the Senate to adopt a policy capable of implementation, “not merely a statement of things hoped for, not merely a statement of desirable goals or objectives”²¹ Senator Henry Jackson, one of NEPA’s major sponsors, agreed with Professor Caldwell: “[W]hat is needed in restructuring the governmental side of the problem is to legislatively create . . . an action-forcing procedure the departments must comply with. Otherwise, these lofty declarations are nothing more than that.”²² This interchange caused Senator Jackson to amend S. 1075 (i.e., the bill which was to eventually become a major portion of NEPA) to include an action-forcing section.²³ When the Senate Committee on Interior and Insular Affairs reported on S. 1075, the Committee noted that Senator Jackson’s amendment had been “designed to assure that all Federal agencies plan and work toward meeting the challenge of a better environment,”²⁴ and that the amendment helped to “insure that the policies enunciated in section 101 are implemented.”²⁵

Later in the legislative process,²⁶ explaining the addition of “to the fullest extent possible” to the language of NEPA § 102,²⁷ the conference committee stated,

¹⁷ See F. ANDERSON, D. MANDELKER & A.D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 4-5 (1990); *The Environment: A National Mission for the Seventies* (Editors of *Fortune* 1970).

¹⁸ Professor Caldwell authored a study, *Senate Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess., A National Policy for the Environment: A Special Report* (Comm. Print 1968), which the committee decided to print.

¹⁹ *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess.* 116 (1969) [hereinafter “Senate Hearings”].

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ This amendment became, with minor revisions, NEPA § 102(A)-(E). R. ANDREWS, *supra* note 11, at 9.

²⁴ S. REP. No. 296, 91st Cong., 1st Sess. 9 (1969).

²⁵ *Id.* at 19.

²⁶ A number of distinguished commentators have traced the legislative history of NEPA. See, e.g., Andreen, *supra* note 13, at 212-23; R. ANDREWS, *supra* note 11, at 7-19; F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 1-14 (1973); R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 10-35 (1976); Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

²⁷ In pertinent part, that section reads

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall — (A) utilize a systematic . . . approach . . . in . . . decisionmaking which may have an impact on man’s environment; (B) identify and develop . . . procedures . . . which will insure that . . . environmental . . . values may be given appropriate consideration . . . ; (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the . . . environment, a detailed statement by the responsible official on—(i) the environ-

"[T]he purpose of the language is to make clear that each agency . . . shall comply with the directives set out in subparagraphs (A) through (H) unless the existing law . . . expressly prohibits or makes full compliance . . . impossible."²⁸ To Senator Jackson, this meant that "the policies and goals [of NEPA would be] infused into the ongoing programs . . . of the Federal Government [I]f there are to be departures from this standard of excellence they should be exceptions to the rule"²⁹

The Early Years of Promise

Initially, the judicial role in implementing NEPA was unclear. Controversy existed as to whether NEPA's effect on the decisionmaking process of federal agencies was even subject to judicial review.³⁰ The federal courts soon proved to be more than willing to enter this fray.³¹ Some courts were willing to review only the procedural aspects of an agency's actions.³² As one of these courts posited, federal agencies could continue to ignore environmental considerations in their decision-making processes; however, NEPA assured that "they [would] . . . do[] so with their eyes wide open."³³

The Court of Appeals for the District of Columbia took the lead in giving NEPA some "bite" in *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*.³⁴ In that case, the Atomic Energy Commission (AEC)³⁵ issued guidelines concerning how NEPA would affect nuclear power plant licensing procedures.³⁶ These guidelines curtailed AEC's duty when considering

mental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided . . . , (iii) alternatives . . . ; (E) . . . describe appropriate alternatives to recommended courses of action

NEPA § 102 (emphasis added).

²⁸ H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. 9 (1969) (emphasis added).

²⁹ 115 Cong. Rec. 40, 416 (1969).

³⁰ An early version of the bill which eventually became NEPA stipulated that every person had a right to a healthful environment. This would clearly have created a public interest capable of judicial enforcement. F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *supra* note 17, at 784. The final version did not expressly provide for judicial review. *Id.* at 782. Some portions of the legislative history even seem to indicate that the principal means of enforcement was to be the budgetary review process. *Senate Hearings, supra* note 19, at 116-17. Professor Caldwell appears to have believed that Congress and the Office of Management and Budget would be the primary enforcers of NEPA. F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *supra* note 17, at 786.

³¹ An early NEPA decision held that the act contained no law to apply. *Bucklein v. Volpe*, 2 Env't. Rep. Cas. (BNA) 1082 (N.D. Cal. 1970). The court felt that NEPA was "simply a declaration of Congressional policy." *Id.* at 1083.

³² Courts that did so were likely to find that Congress did not intend NEPA § 101 to create any substantive duties. *See, e.g., Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army*, 325 F. Supp. 749, 755 (E.D. Ark. 1971) (granting injunction), *vacated*, 342 F. Supp. 1211 (E.D. Ark. 1972), *aff'd*, 470 F.2d 289 (8th Cir. 1972).

³³ *Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army*, 325 F. Supp. at 759.

³⁴ *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

³⁵ That agency eventually became the Nuclear Regulatory Commission (NRC).

environmental impacts in its license issuing procedures.³⁷ In addition to acting as the final decisionmaker in granting nuclear plants operating licenses, the AEC alone would decide which data to consider in making those decisions.³⁸ Plaintiffs brought suit to challenge this arrangement.³⁹

Judge Skelly Wright, a well known judicial activist,⁴⁰ announced the decision of the court. Although Judge Wright appeared less than enthusiastic about the lack of legislative history of NEPA⁴¹ and the lack of specificity within the statute,⁴² he emphatically declared that NEPA was “perhaps the most important of the recent [environmental] statutes”⁴³ Amidst these broad declarations, Judge Wright clarified two very important issues. First, NEPA established judicially enforceable obligations.⁴⁴ This effectively settled the controversy over the judiciary’s role in NEPA enforcement. Second, agencies could not treat NEPA § 102(2)(C) statements (environmental impact statement, EISs) as nuisances to be attached to a final report.⁴⁵ Judge Wright apparently interpreted the “to the fullest extent possible” language of NEPA § 102 in accord with Senator Jackson’s expressed desire.⁴⁶ Although Judge Wright recognized that “reviewing courts probably [could not] reverse a substantive decision on the merits,”⁴⁷ he warned that the courts would be forced to reverse agency decisions reached “without individualized consideration and balancing of environmental factors.”⁴⁸ Judge Wright interpreted NEPA § 101 as allowing courts to reverse agency decisions *on the merits* if the “balance of costs and benefits . . . was arbitrary or . . . gave insufficient weight to environmental values.”⁴⁹

By almost assuming that NEPA required a “balancing” between costs and benefits, Judge Wright seemed to suggest that NEPA imposed substantive responsibilities on the agencies affected by it.⁵⁰ Although several commentators criticized

³⁷ F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *supra* note 17, at 786.

³⁸ T. HOBAN & R. BROOKS, *supra* note 7, at 62.

³⁹ *Calvert Cliffs*, 449 F.2d at 1111-12.

⁴⁰ Murchison, *supra* note 6, at 563. For a review of his judicial career, see A. MILLER, *A CAPACITY FOR OUTRAGE: THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT* (1984). Judge Wright himself revealed some of the bases of his judicial philosophy in a law review article published near the time that the Calvert Cliffs decision was announced. Wright, *Professor Bicket, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

⁴¹ *Calvert Cliffs*, 449 F.2d at 1126 (calling it “meager”).

⁴² *Id.* at 1111. Professor Caldwell even admitted that NEPA was a sweeping, rather than a specific, law, i.e., a “statesman’s law rather than a lawyer’s law.” R. ANDREWS, *supra* note 11, at 17 (citing Caldwell, *The National Environmental Policy Act: Status and Accomplishments*, in *Natural Resources and National Priorities: Proceedings of the 38th North American Wildlife and Natural Resources Conference* (1973)).

⁴³ *Id.*

⁴⁴ *Id.* at 1112, 1115.

⁴⁵ *Calvert Cliffs*, 449 F.2d at 1114-15. See also T. HOBAN & R. BROOKS, *supra* note 7, at 62.

⁴⁶ See *supra* note 29 and accompanying text.

⁴⁷ *Calvert Cliffs*, 449 F.2d at 1115.

⁴⁸ *Id.* See also *Schiffler v. Schlesinger*, 548 F.2d 96, 101-02 (3d Cir. 1977) (judicial review warranted even where agency’s actions under enabling legislation “committed to [its own] discretion.”).

⁴⁹ *Id.*

⁵⁰ F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *supra* note 17, at 787.

the underlying idea,⁵¹ this language⁵² became the basis for holdings in a number of federal cases.⁵³ One of the most important of these was the Eighth Circuit's decision in *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*.⁵⁴ As a basis for its belief that an agency's attempted compliance with NEPA constituted substantive, reviewable action,⁵⁵ the court stated, "The . . . intent of NEPA is to require agencies to . . . give effect to the environmental goals set forth in the Act, not just to file detailed impact studies . . ." ⁵⁶ The court felt that it could substitute its own judgment for that of the agency's on whether NEPA required a cost-benefit analysis and whether the benefits of a particular project had to outweigh its costs for that project to even have a chance to proceed past the proposal stage.⁵⁷ Although the court refused to substitute its judgment as to the weight to be accorded environmental values,⁵⁸ it did feel that the policies set forth in NEPA § 101 formed a basis for reviewing an agency's "weight setting" procedure under an "arbitrary and capricious" standard.⁵⁹ This interpretation of NEPA's substance has become the most prevalent one.⁶⁰

Another subject of early NEPA litigation was the effect of the words "major" and "significantly" in NEPA § 102(2)(C) on the decision of whether to prepare an EIS at all.⁶¹ The first case to define the standard of review for this type of decision was *Hanly v. Kleindienst*.⁶² Although the language of NEPA § 102(2)(C)⁶³ would seem to suggest dual tests (i.e., one for size and another for importance),⁶⁴ *Hanly* held that "major" makes size merely a large consideration in the truly important test of "significance."⁶⁵ The court went on to adopt the "arbitrary and capricious" standard

⁵¹ See, e.g., ANDERSON, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 301-02 (1974); Muskie & Cutler, *A National Environmental Policy: Now You See It, Now You Don't*, 25 ME. L. REV. 163, 188-89 (1973) [hereinafter "Muskie"].

⁵² See *supra* notes 48-49 and accompanying text.

⁵³ For a listing of cases following this balancing approach, see W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 746 n. 55 (1977).

⁵⁴ 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). See also *supra* note 32.

⁵⁵ *Id.* at 298 ("[C]ourts have an obligation to review substantive agency decisions on the merits.").

⁵⁶ *Id.*

⁵⁷ *Id.* at 300-01. See also Weinstein, *Substantive Review Under NEPA After Vermont Yankee IV*, 36 SYRACUSE L. REV. 837, 846-47 (1985).

⁵⁸ *Id.* at 300.

⁵⁹ *Id.* at 300-01.

⁶⁰ Weinstein, *supra* note 57, at 847 n. 71.

⁶¹ Murchison, *supra* note 6, at 566. See also F. ANDERSON, D. MANDELKER & A. D. TARLOCK, *supra* note 17, at 789-802.

⁶² 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

⁶³ In pertinent part, the statute reads

[A]ll agencies of the federal government shall— . . . (C) include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
(i) the environmental impact of the proposed action

NEPA § 102(2) (emphasis added).

⁶⁴ Comment, *Shall We Be Arbitrary or Reasonable: Standards of Review for Agency Threshold Determinations Under NEPA*, 19 AKRON L. REV. 685, 687 (1986).

⁶⁵ *Hanly v. Kleindienst*, 471 F.2d at 830-31.

as the appropriate measure of judicial review in this type of case.⁶⁶ Although the court gave deference to the agency's decision, it did require the agency to compile a record which adequately documented its decisionmaking process.⁶⁷ In other words, the court was concerned that the agency's decision not be an arbitrary one. Even when an agency might merely believe that a proposal could have a significant impact on the environment, *Hanly* required that agency to prepare an EIS.⁶⁸

After a few years of working with NEPA and seeing how the courts were handling it, many of those involved seemed to think that it would become, if it were not already, a "force" in the day-to-day workings of the federal government.⁶⁹ One of NEPA's most outspoken supporters was the director of the Environmental Law Institute, Frederick Anderson. He considered the courts' early treatment of NEPA as the basis for a hope, but not a promise, that the government's manner of considering the environment in the making of administrative decision was undergoing a positive change.⁷⁰ In 1974, he declared that progress in the bureaucratic decisionmaking process, which had traditionally neglected environmental values and/or costs, had been made.⁷¹ At the same time, he warned that a "fundamental administrative revolution," for which he believed NEPA called, had yet to occur.⁷² Anderson's enthusiasm was at least matched by Professor William Rodgers of Georgetown University. Rodgers felt that the effect of judicial review of agency action with respect to NEPA *would be* somewhat revolutionary.⁷³ Other commentators, however, were far less enthusiastic.⁷⁴ One of the most outspoken was Joseph Sax.⁷⁵ He concluded that NEPA was nothing more than legislative fluff⁷⁶ and that hopes for agency-initiated self-reform were no more than pipe dreams.⁷⁷

Perhaps if the courts had continued to treat NEPA as they did in the early 1970s, the pronouncements of Anderson and Rodgers would have been more prophetic. Nevertheless, subsequent Supreme Court decisions gutted much of the substance which the Circuit courts had given NEPA.⁷⁸ These cases and other succeeding events have instead vested Professor Sax's naysaying with an accuracy rivaling that of an atomic clock.

⁶⁶ *Id.* at 829.

⁶⁷ *Id.* at 835-36.

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, R. ANDREWS, *supra* note 11, at 143-63.

⁷⁰ *See* F. ANDERSON, *supra* note 26, at vii-ix.

⁷¹ ANDERSON, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 410 (Dolgin & Guilbert eds. 1974).

⁷² *Id.*

⁷³ W. RODGERS, *supra* note 53, at 697.

⁷⁴ *See, e.g.*, *supra* note 4 and accompanying text.

⁷⁵ Sax, a professor at the University of Michigan, was one of the architects of Michigan's environmental protection statute. Murchison, *supra* note 6, at 588 n. 175.

⁷⁶ Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 245 (1973).

⁷⁷ *Id.*

⁷⁸ *See infra* note 79-155 and accompanying text.

NEPA'S DECLINING EFFECT

Saying that one act of Congress or one Supreme Court decision drained NEPA of most of its "life" would be too simplistic. A combination of events, including a decline in the public's willingness to sacrifice financially due to the OPEC embargo and the resultant rise in energy prices, which made "sacrifices" for the environment more costly, over a number of years gradually reduced the effectiveness of NEPA.

Although no single Supreme Court decision caused NEPA's demise, a series of unconnected, unrelated decisions contributed to its lessening impact. Rather than some sort of nefarious master plan to undermine a laudable federal policy, the individual decisions are quite logical, with seemingly minor impacts on NEPA's overall effectiveness. Yet, when taken together, their effect has been devastating. NEPA now appears to be no more than the "paper tiger" which Professor Rodgers feared it might become.⁷⁹

Strict Judicial Scrutiny Abandoned

Although not directly dealing with or even addressing NEPA, the Supreme Court severely restricted judicial (environmental) "activism" in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁸⁰ Respondent NRDC challenged the Environmental Protection Agency's (EPA) interpretation of the 1977 Amendments to the Clean Air Act through which the EPA allowed the states to adopt a plantwide definition of the term "stationary source."⁸¹ The Court of Appeals for the District of Columbia Circuit set aside the EPA regulations based on this interpretation.⁸² The Court set forth the manner in which courts should review an agency's interpretation of a statute.⁸³ If Congress had not spoken directly on the issue in question, the agency's interpretation need only be a reasonable one.⁸⁴ The Court thereby effectively reprimanded the District of Columbia Circuit Court for substituting its view of the legislation's purpose for that of the EPA.⁸⁵

One of the major effects of *Chevron* was to curtail judicial activism.⁸⁶ Federal courts were no longer free to substitute their interpretations of particular statutes for

⁷⁹ W. RODGERS, *supra* note 53, at 697.

⁸⁰ 467 U.S. 837 (1984).

⁸¹ *Id.* at 840-41 (NRDC argued that each point of pollution emission should constitute a stationary source). The EPA's interpretation is set forth at 40 C.F.R. § 51.18(j) (1) (i) and (ii) (1983).

⁸² *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (1982).

⁸³ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43.

⁸⁴ *Id.*

⁸⁵ *Id.* at 845.

⁸⁶ The relative benefits and drawbacks of judicial activism are the subject of continued debate. Compare Pierce, *Chevron and Its Aftermath: Judicial Review of Agency Interpretation of Its Statutory Provisions* 41 VAND. L. REV. 301 (1988) with Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L. J. 387 (1987).⁸

that of the agencies.⁸⁷ Thus, the courts were less able to intimately scrutinize agency compliance with NEPA's mandates. In fact, one wonders whether Overton Park, a large municipal park in the center of Memphis, Tennessee, would have survived under this tighter standard of review of agency interpretation. The case deciding the fate of that park⁸⁸ precluded judicial review in only two, very narrow circumstances.⁸⁹ Justice Marshall went on to state that a reviewing court was to "engage in a substantial inquiry."⁹⁰ This language became the basis for the "hard look" doctrine⁹¹ which thereafter often appeared in environmental decisions.⁹² In fact, Judges Wright and Leventhal of the District of Columbia Circuit Court used this doctrine in reviewing the EPA Administrator's decision to restrict the use of lead in gasoline.⁹³

Although not directly affecting NEPA, *Chevron* did represent a fairly clear notice by the Supreme Court to the federal courts that they should abandon the "hard look" doctrine when reviewing an agency's interpretation of complex statutes.⁹⁴ The decision thus intimated that the Court would henceforth frown on similar judicial activism.

No EIS Necessary for Appropriation Requests

In *Andrus v. Sierra Club*,⁹⁵ a unanimous Court reversed the District of Columbia Circuit Court. The latter had required an agency to attach an EIS to an appropriation request in two situations. When the request accompanied "a 'proposal' for taking new action which significantly changed the status quo" or when "the request for . . . appropriations is one that ushers in a considered programmatic course following a programmatic review," the agency had to include an EIS.⁹⁶ The

⁸⁷ In other words, the Supreme Court condemned hard look review of agency interpretation of certain statutes (e.g., enabling statutes). Hard look review with regard to matters other than statutory interpretation has survived. See, e.g., *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (saying a reviewing court should look for a "rational connection between the facts found and the choice made."). Nevertheless, an agency need only artfully explain why it has chosen a particular path in any given situation.

⁸⁸ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁸⁹ One of these was specific, statutory preclusion. *Id.* at 410. The other was where agency action was "committed to [the] agency's discretion by law." *Id.*

⁹⁰ *Id.* at 415.

⁹¹ Judge Harold Leventhal of the District of Columbia Circuit Court appears to have coined this term. See *Greater Boston Television Corp. v. Federal Communication Comm'n*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ([C]ourt[s] . . . [should] intervene . . . [when they] become[] aware . . . that the agency has not really taken a hard look . . .").

⁹² F. ANDERSON, D. MADELKER & A. D. TARLOCK, *supra* note 17, at 123.

⁹³ *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1977). For Judge Wright's comments, see *id.* at 13-18, 34-36; for Judge Leventhal's comments, see *id.* at 68-69.

⁹⁴ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 865-66; F. ANDERSON, D. MADELKER & A. D. TARLOCK, *supra* note 17, at 128. See also *supra* note 87.

⁹⁵ *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

⁹⁶ *Sierra Club v. Andrus*, 580 F.2d 895, 903 (D.C. Cir. 1978), *rev'd*, 442 U.S. 347 (1979).

Circuit Court held that, while a rule requiring that an EIS be prepared “for virtually every ongoing program would trivialize NEPA,”⁹⁷ agencies would have to prepare an EIS in these two specific situations.⁹⁸ The Circuit Court reasoned that such appropriation requests were both “proposals for legislation” and “proposals for... major Federal actions” because of their tremendous effect on the programs which they fund.⁹⁹

The Supreme Court, however, focused its attention on the language of NEPA § 102(2)(C)¹⁰⁰ and concluded that appropriation requests were not “proposals for legislation” under that section of the statute.¹⁰¹ In doing so, the Court gave great deference to the Council on Environmental Quality’s (CEQ) interpretation of NEPA § 102(2)(C).¹⁰² That interpretation specifically excluded “requests for appropriations” from “recommendations for legislation.”¹⁰³ The Court also noted that Congress traditionally has drawn a distinction between legislation and requests for appropriation.¹⁰⁴ Thus, the Court rejected the Circuit Court’s first justification, i.e., that appropriation requests were proposals for legislation.¹⁰⁵ The Court would not even require agencies to prepare an EIS in the special situations mentioned by the Court of Appeals.¹⁰⁶ The Court also rejected the justification that appropriation requests amounted to proposals for major federal action.¹⁰⁷ The Court noted that appropriation requests fund previously-proposed actions rather than propose new ones.¹⁰⁸

At first glance, one might think that the Supreme Court’s conclusions that “an additional EIS at the appropriation stage would add nothing”¹⁰⁹ and that such a requirement would “create unnecessary redundancy”¹¹⁰ are quite reasonable. However, the Court’s reasoning ignores the possibility that legislation can be dramatically affected during the appropriation process.¹¹¹ Also, the Supreme Court seems to have concentrated on CEQ’s interpretations (of NEPA § 102(2)(C)) to such an

⁹⁷ *Id.*

⁹⁸ See *supra* note 96 and accompanying text.

⁹⁹ *Andrus v. Sierra Club*, 442 U.S. at 356.

¹⁰⁰ See *supra* note 63.

¹⁰¹ *Andrus v. Sierra Club*, 442 U.S. at 361.

¹⁰² *Id.* at 357.

¹⁰³ 43 Fed. Reg. 55978-56007 (1978). (40 C.F.R. § 1508.17 (1990) currently provides that “‘Legislation’ includes a bill or legislative proposal to Congress . . . but does not include requests for appropriations.”). These regulations effectively reversed CEQ’s prior interpretation of NEPA § 102(2)(C). CEQ had ruled that the section applied to recommendations for legislation “including requests for appropriations.” 40 C.F.R. § 1500.5(a)(1) (1977).

¹⁰⁴ *Andrus v. Sierra Club*, 442 U.S. at 359.

¹⁰⁵ *Id.* at 361.

¹⁰⁶ *Id.* at 356. ([E]ither all appropriation requests constitute ‘proposals for legislation,’ or none does.”).

¹⁰⁷ *Id.* at 361-62.

¹⁰⁸ *Id.* at 362.

¹⁰⁹ *Id.* at 363.

¹¹⁰ *Id.* at 362.

¹¹¹ Comment, *supra* note 6, 533, 558.

extent that it ignored NEPA's legislative history, which often stressed the importance of preparing an EIS early in a particular decisionmaking process.¹¹² *Andrus* held that NEPA did not require such early action.¹¹³ If the EIS is to guide an agency's actions, it needs to be available throughout the decisionmaking process.

No Substantive Requirements?

In the process of severely curtailing judicial supervision of agencies' choice of procedure under the Administrative Procedure Act,¹¹⁴ Justice Rehnquist¹¹⁵ off-handedly noted that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."¹¹⁶ This seemingly insignificant piece of dictum grew into a potential "NEPA-killing monster" two years later in *Strycker's Bay Neighborhood Council v. Karlen*.¹¹⁷

In *Strycker's Bay*, the Court reversed a decision of the Court of Appeals for the Second Circuit which had required significant consideration of NEPA.¹¹⁸ The Court disposed of the case in a terse, per curiam opinion.¹¹⁹ The opinion restated Justice Rehnquist's dictum from *Vermont Yankee*¹²⁰ and effectively chastised the Court of Appeals for ignoring that admonishment.¹²¹ To emphasize its point, the majority stated, "[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"¹²² In so doing, the Court effectively restated the "deference rule" of *Chevron*.¹²³ With regard to NEPA, reviewing courts would henceforth be limited to determining whether an agency had considered the environmental consequences of its actions rather than whether the agency

¹¹² *Id.* See also S. REP. NO. 296, *supra* note 24, at 18.

¹¹³ See *supra* notes 100-08 and accompanying text.

¹¹⁴ 5 U.S.C. §§ 551-59 (1988).

¹¹⁵ At the time of the *Vermont Yankee* decision, Warren Burger was Chief Justice.

¹¹⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 558 (1978) (emphasis added).

¹¹⁷ 444 U.S. at 223 (1980). See also *supra* note 5 and accompanying text.

¹¹⁸ *Karlen v. Harris*, 590 F.2d 39 (2nd Cir. 1978). This was the case's second trip to the Second Circuit. Originally, a group called the Trinity Episcopal School Corp. sued to enjoin the New York City Planning Commission and the Dept. of Housing and Urban Development (HUD) from following through with their plans to construct low-income housing at a particular site. *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044 (S.D. N.Y. 1974). The Court of Appeals affirmed the District Court's judgment for defendants in all respects except one. The Second Circuit remanded so that HUD could prepare a statement of alternatives. *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 95 (2d Cir. 1975). The District Court subsequently approved HUD's analysis which concluded that any relocation of the disputed housing units would result in an unacceptable delay. 445 F. Supp. 204, 220 (S.D.N.Y. 1978). The plaintiffs again appealed.

¹¹⁹ The Court devoted four and one-half pages of its opinions to a recitation of the tortuous case history. *Strycker's Bay*, 444 U.S. at 223-27. The actual decision took less than one full page. *Id.* at 227-28.

¹²⁰ See *supra* note 116 and accompanying text.

¹²¹ *Strycker's Bay*, 444 U.S. at 227.

¹²² *Id.* (emphasis added).

¹²³ See *supra* notes 83-85 and accompanying text.

had given the environmental consequences proper weight.¹²⁴

The lone dissenter in *Strycker's Bay* was Justice Marshall.¹²⁵ He argued that the majority had misused *Vermont Yankee* in supporting its opinion.¹²⁶ The "offending" passage¹²⁷ had been intended merely as a "further observation of some relevance to [that] case."¹²⁸ He stressed that *Vermont Yankee* had made clear that reviewing courts should set aside administrative decisions for "substantial procedural or substantive reasons as mandated by [NEPA]."¹²⁹ He was quite surprised to find that the "hard look" doctrine of *Kleppe v. Sierra Club*¹³⁰ had not survived *Vermont Yankee*.¹³¹ In fact, Justice Marshall refused to believe that it had not.¹³²

Despite the relatively unambiguous language which the Court used in *Strycker's Bay*, two interpretations of the decision arose.¹³³ The earliest decisions rendered after *Strycker's Bay* also showed the lower courts' uncertainty as to what the Supreme Court had intended.¹³⁴ However, the general trend seemed to be that the courts would limit their review to whether an agency had *considered* environmental factors under an "arbitrary and capricious" standard.¹³⁵ By ensuring that the agency had *considered* environmental factors, these courts were, in a sense, using substantive review; they simply were not reaching the merits (i.e., reviewing the *reasonableness* of the agency's decision once the agency had shown that it had duly considered environmental factors).¹³⁶ The effective result of this struggling over

¹²⁴ In *Strycker's Bay*, the Court noted, "[T]he District Court expressly concluded that HUD had not acted arbitrarily or capriciously and . . . the Court of Appeals . . . did not overturn that finding. Instead, the [Court of Appeals] required HUD to elevate environmental concerns over other, admittedly legitimate, considerations . . . NEPA . . . [does not] support . . . a reordering of priorities by a reviewing court." *Strycker's Bay*, 444 U.S. at 228 n. 2.

¹²⁵ *Id.* at 228.

¹²⁶ *Id.* at 229.

¹²⁷ See *supra* note 116 and accompanying text.

¹²⁸ *Strycker's Bay*, 444 U.S. at 229 (citing *Vermont Yankee*, 435 U.S. at 557).

¹²⁹ *Id.* (citing *Vermont Yankee*, 435 U.S. at 558) (emphasis in original).

¹³⁰ 427 U.S. 390 (1976) (one of only three cases the Court cited in *Strycker's Bay*).

¹³¹ *Strycker's Bay*, 444 U.S. at 229.

¹³² *Id.* at 231. ("I cannot believe that the Court would adhere to [the suggestion that *Vermont Yankee* limits a reviewing court to merely determining whether an agency had considered environmental factors even if the agency had effectively ignored those factors in reaching its conclusion] in a different factual setting.")

¹³³ Compare Goldsmith & Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 9-13 (1983) (review on the merits of NEPA now precluded); Comment, *Strycker's Bay Neighborhood Council v. Karlen*, 10 ENVTL. L. 643 (1980) (NEPA creates no substantive duties for agencies) with Liebesman, *The Council on Environmental Quality's Regulations to Implement the National Environmental Policy Act—Will They Further NEPA's Substantive Mandate?*, 10 ENVTL. L. REP. (Envtl. L. Inst.) 50, 039 (1980) (substantive mandate of NEPA § 101 survived *Strycker's Bay*).

¹³⁴ Compare *Citizens for Mass Transit v. Adams*, 630 F.2d 309 (5th Cir. 1980) (*Strycker's Bay* precluded review of reasonableness of agency's decision); *North Slope Borough v. Andrus*, 486 F. Supp. 332 (D.D.C. 1980) (agency consideration of environmental effects satisfied by a sufficiently detailed EIS), *rev'd in part*, 642 F.2d 589 (1980), with *South Louisiana Env'tl. Council, Inc. v. Sand*, 629 F.2d 1005 (5th Cir. 1980) (NEPA 101 still permitted reviewing courts to inquire whether an agency gave "sufficient weight" to environmental factors).

¹³⁵ Weinstein, *supra* note 57, at 852-53.

¹³⁶ *Id.* at 853 (especially n. 110).

how to review agency treatment of NEPA was that NEPA § 101 no longer would have the effect of substantive law.¹³⁷

Three years later, the Supreme Court clarified some of these remaining ambiguities in *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*¹³⁸ The District of Columbia Circuit Court of Appeals had reversed a Nuclear Regulatory Commission (NRC) decision on the merits due to a “violation” of NEPA’s requirements.¹³⁹ The Court of Appeals utilized the arbitrary and capricious standard of review set forth in *Strycker’s Bay*.¹⁴⁰ The underlying rationale of the appellate decision was that NEPA § 102 required agencies to consider all cost-benefit factors in their decisionmaking processes.¹⁴¹ The Supreme Court rejected this rationale¹⁴² and held that NEPA did not require any particular process¹⁴³ even though it did require consideration and disclosure of environmental costs.¹⁴⁴ Rather than stopping after this finding of “full consideration of environmental consequences,”¹⁴⁵ the Court then reviewed the reasonableness of the agency’s decision.¹⁴⁶ Thus, the Court did “substantively review NRC’s decisionmaking process”.¹⁴⁷ Exactly why the Court did so is a matter of some debate.¹⁴⁸ Nevertheless, the Court did not review the merits of NRC’s decision (i.e., the wisdom of not considering the environmental effects of the spent nuclear fuel in making licensing decision).¹⁴⁹ Instead, it reviewed the “merits” of NRC’s decisionmaking process.¹⁵⁰

¹³⁷ *Id.* at 854.

¹³⁸ 462 U.S. 87 (1983). Ironically, this case was the “lineal descendant” of *Vermont Yankee*. *Vermont Yankee* was an appeal from a D.C. Circuit decision, *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n.*, 547 F.2d 633 (D.C. Cir. 1976), *rev’d sub nom.* *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). On remand, the Court of Appeals vacated the NRC’s new rulemaking proceeding. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n.*, 685 F.2d 459 (D.C. Cir. 1982). The Court granted certiorari and heard the defendants’ appeal. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

¹³⁹ *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n.*, 685 F.2d 459, 482-86 (D.C. Cir. 1982).

¹⁴⁰ *Id.* at 475, 485.

¹⁴¹ Weinstein, *supra* note 57, at 860.

¹⁴² *Baltimore Gas & Elec. Co.*, 462 U.S. at 104-07.

¹⁴³ *Id.* at 100.

¹⁴⁴ *Id.* at 97-98.

¹⁴⁵ See *supra* note 122 and accompanying text.

¹⁴⁶ *Baltimore Gas & Elec. Co.*, 462 U.S. at 104-06.

¹⁴⁷ See *id.* at 105. See also Weinstein, *supra* note 57, at 865.

¹⁴⁸ Weinstein, *supra* note 57, at 865-73. Weinstein discusses three possible explanations for the Court’s actions. First, the Court might have found other “law to apply” in an NRC rule. *Id.* at 865-66. Second, the Court might have decided that NEPA contains enough substantive law to allow limited substantive review. *Id.* at 867-70. Third, the Court might have ignored *Overton Park’s* “law to apply” rule (see *Overton Park*, 401 U.S. 410-17) and reviewed the agency’s decision anyway. *Id.* at 870-73.

¹⁴⁹ In this sense, this Comment disagrees with Weinstein’s conclusion that the Court substantively reviewed NRC’s decision “on the merits.” See, e.g., *id.* at 865. Although the distinction (see *infra* note 150 and accompanying text) might seem like hair splitting, it makes a significant difference to a court reviewing the environmental effects of an agency’s decision. For more on the Court’s post-*Strycker’s Bay* treatment of NEPA review, see Murchison, *supra* note 6 at 598-600.

¹⁵⁰ *Baltimore Gas & Elec. Co.*, 462 U.S. at 104-06.

The practical effect of this series of decisions has been to preclude future judicial inquiry as extensive as that which occurred in *Environmental Defense Fund, Inc. v. Corps of Engineers of the United States Army*.¹⁵¹ Although some observers seem almost enthusiastic about a perceived limiting effect which *Baltimore Gas & Elec. Co.* supposedly had on the holding of *Strycker's Bay*,¹⁵² others believe the Court's restriction on judicial activism without a corresponding Congressional expansion of the duty of agencies to consider the environmental consequences of their decisions has left the cookie jar unguarded.¹⁵³ A reading of NEPA which requires little more than a "consideration of environmental factors"¹⁵⁴ does not ensure that federal agencies "plan and work toward meeting the challenge of a better environment."¹⁵⁵

TIME FOR A CHANGE

In an era where the federal government is willing to spend billions of dollars to regulate the manner in which private industries affect the environment, the irony of the government's diminishing willingness to police itself becomes apparent. As Professor Murchison¹⁵⁶ has noted, "Because NEPA failed to change the institutional pressures on federal agencies, it has not significantly affected the decisions those agencies make."¹⁵⁷ Because the Court has been unwilling to fill in the "substantive gaps", or to allow the lower courts to do the same,¹⁵⁸ the American public is left with a statute which merely requires agency bureaucrats to include environmental impact statements with their final reports which show that the agency has somehow "considered" the possible environmental consequences of its proposed action.¹⁵⁹ The only ones who benefit from this charade are "the consultants who prepare impact statements for the agencies and the law professors who . . . have a seemingly endless stream of environmentally objectionable decisions to criticize."¹⁶⁰

Senator Muskie himself advocated one possible solution in 1973.¹⁶¹ In response to calls for a more comprehensive national policy, he suggested increased legislative output of "standards-setting" laws and stronger judicial review.¹⁶² As the

¹⁵¹ See *supra* notes 54-60 and accompanying text.

¹⁵² See, e.g., Weistein, *supra* note 57, at 879-81.

¹⁵³ See Murchison, *supra* note 6, at 601-02 (reviewing the early response of the Circuit Courts to *Strycker's Bay*).

¹⁵⁴ The Supreme Court still recognizes the importance of a mandatory "hard look" by the agencies, but fails to provide for judicial oversight of the same. See *BALTIMORE GAS & ELEC. CO.*, 462 U.S. at 100,

¹⁵⁵ See *supra* note 24 and accompanying text.

¹⁵⁶ Murchison is a law professor at Louisiana State University. Murchison, *supra* note 6, at 557.

¹⁵⁷ *Id.* at 603.

¹⁵⁸ See, e.g., *supra* notes 114-24 and accompanying text.

¹⁵⁹ CEQ regulations call for EISs to "serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decision already made." 40 C.F.R. § 1502.2(g) (1990). Nobody can be certain, however, how often the former is true rather than the latter.

¹⁶⁰ Murchison, *supra* note 6, at 603 (paraphrasing Sax, *supra* note 76, at 248).

¹⁶¹ Muskie & Cutler, *supra* note 51.

¹⁶² *Id.* at 165-66.

“substantive statutes”¹⁶³ primarily affect an agency only after a particular decision has been made but fail to affect the decision itself, they do not “compel . . . the Executive agencies . . . to take the kind of action which will protect [the environment].”¹⁶⁴ Experience has proven this suggestion to be less than effective. The “substantive” statutes on the books such as the Clean Air Act and the Clean Water Act have not prevented agencies from taking many environmentally questionable actions.¹⁶⁵

Another possible solution is the amendment of NEPA.¹⁶⁶ This could be done in one of two ways: either add substantive provisions or toughen the existing procedural requirements. Deciding which substantive provisions to add would be a politically difficult task. Perhaps a more realistic approach would be to toughen existing procedural requirements.

A possible first step in addressing this task could be an effective reversal of the holding in *Andrus v. Sierra Club*.¹⁶⁷ Having an EIS already completed at the time for appropriation hearings would certainly aid in “assessing the environmental impact of proposed agency actions rather than justifying decisions already made.”¹⁶⁸ Members of Congress, environmental groups, and the public would all be better informed at a stage of the proceedings where remedial steps could still be taken. This requirement would tend to promote interaction between the legislature and the agencies and to encourage agency accountability so that America is left with a “better environment”¹⁶⁹ rather than one in which the degradation thereof was “thoroughly considered.”¹⁷⁰

If Congress were willing to go so far as to thoroughly amend NEPA, it should consider completely rewriting the Act.¹⁷¹ The present Congress would have the chance to put its stamp on environmental law and to make clear what substantive duties, with respect to the environment, it desires federal agencies to fulfill while accomplishing their individual missions.¹⁷² Much of the current statute could be

¹⁶³ This is Senator Muskie’s alternate term for “standards-setting”. See *id.* at 166, 170.

¹⁶⁴ *Senate Hearings, supra* note 19, at 116.

¹⁶⁵ See, e.g., *Sierra Club v. Morton*, 510 F.2d 813 (5th Cir. 1975) (Dept. of Interior allowed to proceed with sale of off-shore tracts of Outer Continental Shelf despite research which was “either inadequate or nonexistent in some areas”); *North Slope Borough v. Andrus*, 642 F.2d 289 (D.C. Cir. 1980) (agency allowed to proceed as long as gaps in information “identified”).

¹⁶⁶ The amendment of environmental statutes is not unknown. For example, see the Clean Air Act. The 1970 Act, 42 U.S.C. §§ 1857-58a (1970), was recodified, 42 U.S.C. §§ 7401-7642 (1977), to incorporate the 1977 amendments.

¹⁶⁷ See *supra* notes 95-108 and accompanying text.

¹⁶⁸ See *supra* note 159.

¹⁶⁹ See *supra* note 24 and accompanying text.

¹⁷⁰ See *supra* note 122 and accompanying text.

¹⁷¹ After all, the title of the act is the National Environmental Policy Act of 1969. See *supra* note 1 (emphasis added). Perhaps the time has come for a National Policy Act of 1992.

¹⁷² This would seem to be preferable to forcing the courts to search for substantive duties in what is (in its present condition) an unarguably vague statute.

merely re-enacted.¹⁷³ Its "substantive mandate" (i.e., the directions concerning what to do with the documents produced by meeting the procedural requirements), however, is currently woefully lacking in "law to apply." At present, NEPA § 101 is indeed "nothing more than [lofty declarations]."¹⁷⁴ As a national policy, NEPA as presently written is full of good intentions but practically devoid of ways to implement those intentions.

CONCLUSION

On January 1, 1991, NEPA celebrated its twenty-first "birthday." For a law which has reached the age of majority and which should be entering the prime of life, NEPA instead seems to be a ninety-eight pound weakling in search of a reason to live. Some have diligently searched for (and, to an extent, discovered) some continuing effects of NEPA as it is currently interpreted.¹⁷⁵ However, NEPA presently has only as much effect as that which agency bureaucrats choose to give it.¹⁷⁶ Congress needs to check this essentially unfettered agency discretion by rewriting NEPA to force agencies to make environmental consequences a major part of their practicability calculus and to provide for some form of direct oversight of the value given to the variables which go into that calculus.

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¹⁷³ For example, NEPA § 102 (the procedural requirements) have proven to be quite sufficient.

¹⁷⁴ See *supra* note 22 and accompanying text.

¹⁷⁵ See, e.g., Murchison, *supra* note 6, at 605-13.

¹⁷⁶ In other words, the amount of consideration given to environmental factors in the decisionmaking processes is in control of those making the decisions.