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# OFF-SITE MITIGATION AND THE EIS THRESHOLD: NEPA'S FAULTY FRAMEWORK

MARC R. BULSON\*

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The National Environmental Policy Act (NEPA)<sup>1</sup> requires federal agencies to consider the potential environmental impact of certain proposed federal actions,<sup>2</sup> in part, through the disclosure of these impacts.<sup>3</sup> In addition to educating and informing agencies, NEPA's disclosure requirement provides the public with an opportunity to scrutinize an agency's assessment of a project's environmental ramifica-

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1. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1988)) [hereinafter NEPA].

2. See *Scientists' Inst. for Pub. Inform., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973). The court defined what constitutes a federal action under NEPA as follows:

There is "Federal action" within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party, private or governmental, to take action affecting the environment.

*Id.* at 1088-89 (citations omitted).

3. To ensure that federal agencies comply with this mandate, NEPA requires every federal agency involved in the planning of a major federal action significantly affecting the environment to prepare a detailed statement regarding:

tions and to suggest possible measures to mitigate any detrimental impacts.<sup>4</sup> Citizen suits brought against agencies serve as the only mechanism to prevent the agencies from ignoring or inadequately reviewing potential environmental impacts.<sup>5</sup>

Congress created the Council of Environmental Quality (CEQ) to

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- (i) the environmental impact of the proposed action,
  - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
  - (iii) alternatives to the proposed action,
  - (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
  - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

42 U.S.C. § 4332(2)(C) (1988).

NEPA's policy statement, included in part in 40 C.F.R. § 1500.2 (1990) states: Federal agencies shall to the fullest extent possible:

...  
 (e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means . . . to . . . avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

*Id.* See Park County Resource Council, Inc. v. United States Dep't of Agric., 817 F.2d 609, 620 (10th Cir. 1987) ("NEPA . . . reflects an important public policy of this nation: the avoidance of precipitous federal decision making at the agency level which may fail to adequately consider the environmental ramifications of agency actions."); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982) (noting that NEPA is essentially a procedural and disclosure statute, enacted to ensure that federal agencies generate information concerning the potential impacts of federal actions on the environment).

4. See, e.g., Thomas O. McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 TEX. L. REV. 801, 806 (1977) (noting that NEPA ensures the public's awareness of the environmental consequences of federal actions).

5. See Daniel A. Dreyfus & Helen M. Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 255 (1976) (noting that "[t]he threat of litigation was intended as an incentive to agencies to make a fair appraisal"). See also Hanna J. Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act of 1969*, 16 NAT. RESOURCES J. 323, 334 (1976) (noting that "to the extent implementation of NEPA requirements has been achieved, judicial activity has been the primary catalyst of change").

help federal agencies implement NEPA's policy.<sup>6</sup> Pursuant to its congressional mandate, the CEQ has promulgated a series of regulations setting forth procedural guidelines that federal agencies must follow to comply with NEPA's disclosure requirement.<sup>7</sup> These regulations require that the "action agency," prior to approving a federal action, prepare an environmental assessment (EA)<sup>8</sup> documenting the proposed action's potential impact on the environment. The "action agency" must then decide whether to prepare a more comprehensive environmental impact statement (EIS)<sup>9</sup> or to issue a finding of no significant

6. See 40 C.F.R. § 1515.2 (1990). In Exec. Order No. 11,991(1), 3 C.F.R. 123, 124 (1977), President Carter declared that CEQ regulations bind the agencies acting under NEPA. *Id. Cf.*, Note, *NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality*, 66 VA. L. REV. 843, 844-45 (1980) (stating that CEQ regulations are entitled to substantial deference).

7. See 40 C.F.R. §§ 1500.1-1500.6 (1990). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality." *Id.* at § 1500.1(b).

8. 40 C.F.R. § 1500.1(b). 40 C.F.R. § 1501.4(b) (1990) provides that "[i]n determining whether to prepare an environmental impact statement the Federal agency shall . . . prepare an environmental assessment." *Id.* However, 40 C.F.R. § 1501.4(a)(2) (1990), provides an exception to this requirement if the project "[n]ormally does not require either an environmental impact statement or an environmental assessment." *Id.* CEQ regulations define an environmental assessment:

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

*Id.* at § 1508.9.

9. See *supra* note 3 and accompanying text for a discussion of environmental impact statements. 42 U.S.C. § 4332(2)(C) (1988) outlines the circumstances under which an agency must prepare an EIS. See also 40 C.F.R. § 1502.1 (1990) (providing that the purpose of an EIS is to "provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts"). Similarly, in *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 814 (9th Cir. 1987), *rev'd on other grounds sub nom.* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the court noted:

There are two purposes served by preparation of an EIS. The statement should "provide decision-makers with an environmental disclosure sufficiently detailed to

impact (FONSI).<sup>10</sup> A FONSI reflects the agency's determination that there is no need for an EIS.<sup>11</sup>

Commonly, agencies include mitigation techniques in the proposed plan during the EA's preparation to circumvent the EIS requirement.<sup>12</sup>

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aid in the substantive decision whether to proceed with the project in light of its environmental consequences," as well as "provide the public with information and an opportunity to participate in gathering information."

*Id.* (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974) and *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985)). See also Charles F. Weiss, Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?*, 86 MICH. L. REV. 777, 786 n.36 (1988) (stressing the importance of the role the EIS plays in agency decision-making (citing O'Hare, *Improving the Use of Information in Environmental Decision Making*, 1 ENVTL. IMPACT ASSESSMENT REV. 229 (1980))). See generally SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* (1984).

10. A FONSI provides the public and the courts with a statement of the agency's reasons for its decision not to prepare an EIS. 40 C.F.R. § 1508.13 (1990) provides: "Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

*Id.*

See also DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 7.10 (1984) (outlining CEQ regulations and the process agencies must follow to ascertain whether an EIS is necessary); Debra L. Donahue, Comment, *Taking a Hard Look at Mitigation: The Case for the Northwest Indian Rule*, 59 U. COLO. L. REV. 687, 695 (1988) (discussing the principles underlying the preparation of a FONSI). 40 C.F.R. § 1501.3 (1990) provides the circumstances under which an EA must be prepared and Section 1501.4 (a)-(c) (1990) outlines when an EIS should be prepared. In addition, 40 C.F.R. § 1508.9(a)(1) (1990), which defines an EA, requires an EA to contain enough information to determine whether to prepare an EIS or a FONSI. Federal actions which require neither the filing of an EIS nor an EA are called "categorical exclusions." 40 C.F.R. § 1508.4 (1990). See also 40 C.F.R. § 1507.3(b) (1990). It is also possible for an agency to prepare an EIS without first preparing an EA. See 40 C.F.R. § 1501.3(a) (1990).

11. An agency's decision to forego preparing an EIS is commonly called the "threshold issue." See *Maryland-Nat'l Capital Park and Planning Comm'n v. United States Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973) (noting that "in cases involving genuine issues as to health, and environmental resources, there is a relatively low threshold for impact statements").

12. See Albert I. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 *ECOLOGY L.Q.* 51 (1986) (dis-

The agencies adopt mitigation measures to effectively minimize "significant" environmental impacts so that they can avoid preparing an EIS and, instead, issue a FONSI.<sup>13</sup> Traditionally, agencies changed their proposed plans with on-site mitigation techniques.<sup>14</sup> On-site mitigation involves minimizing a project's impact on the environment by implementing limits on the degree or magnitude of the agency action at the project site itself.<sup>15</sup>

In recent years, agencies have also adopted off-site mitigation measures to support a FONSI.<sup>16</sup> Off-site mitigation occurs when the federal

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cussing the use of mitigation in EAs to support the issuance of a FONSI); *see also* Paul G. Kent & John A. Pendergrass, *Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation*, 5 TEMP. ENVTL. L. & TECH. J. 11 (1986) (citing statistics showing that most NEPA litigation involves challenges to agency decisions to not prepare an EIS).

13. *See* Herson, *supra* note 12, at 52 (contending that although CEQ regulations require an EIS to discuss mitigation measures, they do not explicitly state whether mitigation measures can support a FONSI); *see also* Eric Glitzenstein, *Project Modification: Illegitimate Circumvention of the EIS Requirement or Desirable Means to Reduce Adverse Environmental Impacts?*, 10 ECOLOGY L.Q. 253 (1982).

14. *See, e.g.,* LaFlamme v. FERC, 852 F.2d 389, 399 (9th Cir. 1988) (noting that mitigation measures can justify an agency's explanation of no significant environmental impact); Park County Resource Council, Inc. v. United States Dep't of Agric., 817 F.2d 609, 622 (10th Cir. 1987) (noting that the Forest Service's imposition of stipulatory controls for operations subsequent to the issuance of federal oil and gas leases can mitigate unacceptable environmental impacts); Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986) (explaining that an agency's decision not to prepare an environmental impact statement may be justified by conditions mitigating environmental effects); Steamboaters v. FERC, 759 F.2d 1382, 1394 (9th Cir. 1985) (noting that "[m]easures designed to mitigate the environmental consequences of a project may justify an agency's decision not to prepare an EIS"); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682-83 (D.C. Cir. 1982) (noting that the Forest Service's decision not to prepare an EIS in relation to exploratory drilling in a wilderness area was not arbitrary where it conducted a thorough analysis of the proposed action and imposed mitigation measures to address areas of environmental concern); Greenpeace U.S.A. v. Evans, 688 F. Supp. 579, 586 (W.D. Wash. 1987) (noting that the National Marine Fisheries Service violated NEPA because it did not perform an EIS).

15. *See, e.g.,* Cabinet Mountains Wilderness, 685 F.2d at 680. In *Cabinet Mountains Wilderness*, the agency imposed mitigation measures to minimize the impact that drilling would have on the grizzly bear population. *Id.* These measures included limiting drilling, prohibiting on-site overnight camping, and restricting daily helicopter flights. *Id.*

16. *See, e.g.,* Missouri Coalition for the Env't v. United States Corps of Eng'rs, 678 F. Supp. 790 (E.D. Mo. 1988) (noting that the U.S. Army Corps of Engineers purchased a parcel of wetlands to mitigate for the loss of wetlands due to a construction project), *aff'd*, 866 F.2d 1025 (8th Cir.), *cert. denied*, 493 U.S. 820 (1989); Friends of the Earth v. Hintz, 800 F.2d 822, 838 (9th Cir. 1986) (noting that off-site mitigation could consist of the substitution of wetlands so that an EIS is not required). *See also*

agency suggests or approves the purchase of land at another location to replace the land altered at the project site.<sup>17</sup> The most controversial implementation of off-site mitigation plans involves replacing natural wetlands degraded in federal projects with man-made wetlands.<sup>18</sup>

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Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985), where the court held that mitigation measures, including extensive land dedications, conclusively supported the agencies' decision not to prepare an EIS. *Id.* at 987. The court stressed that such mitigation measures need not "completely compensate for any possible adverse environmental impacts stemming from the original proposal." *Id.* (quoting *Cabinet Mountains Wilderness*, 685 F.2d at 682 (emphasis added)). Similarly, in *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859-60 (9th Cir. 1982), the court held that the Boise redevelopment agency reasonably concluded there was no significant impact on the historic environment and that an EIS was unnecessary.

17. A common example of off-site mitigation occurs when, prior to commencing construction, a private developer applies to the Army Corps of Engineers (Corps) for a permit to develop wetlands. See *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986); *Missouri Coalition For the Env't v. United States Corps of Eng'rs*, 678 F. Supp. 790 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025 (8th Cir.), *cert. denied*, 493 U.S. 820 (1989). Under NEPA, the Corps issues a permit when it is satisfied, after either preparing an EA or an EIS, that the development will not significantly impact the environment. See *supra* notes 8-9 and accompanying text for a discussion of EA and EIS. Thus, even though the development will destroy existing wetlands, the Corps may issue a FONSI on the pretense that the planned implementation of the off-site mitigation measures (*i.e.*, the purchase or replacement of wetlands elsewhere) technically reduces the impact to below significant levels. See *Hintz*, 800 F.2d at 838.

While the replacement of degraded wetlands may be the most widely cited example of off-site mitigation, wetlands are not the only environmental resource subject to this technique. Land supporting deer herds has been purchased and preserved and fish hatcheries constructed to mitigate the impact of a federal action. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 343-44 (1989) (noting that "[o]ff-site options discussed in the [EIS] included the use of zoning and tax incentives to limit development on deer winter range and migration routes, encouragement of conservation easements, and acquisition and management by local government of critical tracts of land"); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 367 (1989) (mitigating the effect of proposed dam construction on the migration and spawning of a large number of anadromous fish through the construction of a hatchery).

18. See Thomas H. Kean, *Protecting Wetlands - An Action Agenda*, 6 ENVTL. FORUM, Jan.-Feb. 1989, at 20 (noting that the EPA recently initiated a National Wetlands Policy Forum). The author discusses the federal mitigation policy and its negative effect on the environment and the preservation of wetlands. *Id.* at 22-23. The most significant complaints allege a lack of uniformity in implementing plans and the absence of any explicit guidelines to which agencies can refer when implementing off-site mitigation proposals. *Id.* at 23. Critics of the off-site mitigation policy also charge that there is no scientific body of evidence to prove that man-made wetlands are a substitute for natural wetlands. See *infra* note 20 and accompanying text for a discussion of the feasibility of converting wetlands.

Despite these concerns, the Bush administration has recently set forth a new wetlands policy which relies even more heavily on off-site mitigation or "mitigation banking." See *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, 56 Fed.

The proliferation and ready acceptance of off-site mitigation calls into question the thoroughness of agency decision-making.<sup>19</sup> Off-site mitigation proposals differ from on-site measures and involve unique considerations and interests deserving of exhaustive analysis. For example, when land is purchased to mitigate the harm caused at the project site, that land often must undergo extensive development for conversion into a habitat similar to the one being destroyed.<sup>20</sup> Presently, there are no guidelines in effect that specify how effective the conversion must be in order to mitigate the impact at the project site to insignificant levels.<sup>21</sup>

Occasionally, an off-site mitigation plan simply involves the purchase of an identical existing ecosystem.<sup>22</sup> The practical result is the destruction of one ecosystem when there were originally two. Agencies, however, have construed such plans as effectively mitigating the harm to the environment even though a net loss in resources results.<sup>23</sup> Significantly, in both of the above stated examples, a significant level of damage to the environment remains at the project site. Under NEPA, any significant impact at the project site requires the preparation of an EIS.<sup>24</sup> Unfortunately, agencies have been permitted to over-

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Reg. 40,446 (1991) (proposed Aug. 14, 1991). The mitigation banking system would use "mitigation credits" to offset the loss of wetlands by restoring or creating new wetlands.

19. Telephone interview with Fred Niermann, Army Corps of Engineers (Jan. 20, 1989).

20. See Jan Goldman-Carter, *New Legislation Not "Business as Usual,"* 6 ENVTL. FORUM, Jan.-Feb. 1989, at 20 (1989). Discussing the feasibility of converting wetlands and calling for more EPA sponsored research in this area, the author notes that "[a]ny mitigation plan based on wetlands creation must recognize that created wetlands will almost never fulfill the full range of functions of natural wetlands. Consequently, one acre created for one acre destroyed will rarely compensate for the loss and so does not achieve the goal of no net loss." *Id.* at 22.

21. See *infra* notes 92-94 and accompanying text for a discussion of the usage of off-site wetlands.

22. See, e.g., *Missouri Coalition for the Env't v. Corps of Eng'rs of the United States Army*, 678 F. Supp. 790, 796 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025 (8th Cir.), *cert. denied*, 493 U.S. 820 (1989) (agency purchased a thirteen acre parcel of already-existing wetlands to replace the land the federal action was destroying).

23. See generally Goldman-Carter, *supra* note 20, at 22. The EPA recently commenced the National Wetlands Policy Forum to consider different perspectives on how to implement a no net loss wetlands program. *Id.* at 20-22. When a federal agency purchases wetlands to replace the wetlands it destroys, the net result is that where once two wetlands existed only one remains. *Id.* Thus, there is a net loss. *Id.*

24. See *supra* note 3 and accompanying text for a discussion of the NEPA mandates.



look this procedural mainstay of NEPA because the legislature has failed to establish a statutory framework that clearly outlines the scope and required sufficiency of off-site mitigation measures.

The unique nature of off-site mitigation also highlights the insufficiency of judicial review. In reviewing agency decisions to forego preparation of an EIS, courts have interpreted NEPA as limiting their analysis to a review of the agency's suggested mitigation measures so as to avoid discussing whether the agency plan ultimately results in insignificant environmental impacts.<sup>25</sup> The courts' focus is on the means employed by the agencies and not necessarily the results ultimately achieved from their implementation. Imprecision of existing statutory procedures prevent courts from engaging in a review which addresses the unique problems inherent in off-site plans.<sup>26</sup> Although recent cases and commentary illustrate that a majority of courts are taking a "harder look" at mitigation proposals,<sup>27</sup> the failure to distinguish off-site measures makes such review inadequate.

This Article addresses whether NEPA's current procedural structure allows off-site mitigation to excuse preparation of an EIS. Further, this Article considers under what circumstances off-site mitigation should be evaluated differently from on-site mitigation, and what effect off-site mitigation measures should have on the EIS threshold question. This Article will conclude with a proposal to amend the CEQ regulations to ensure more thorough agency analysis of off-site proposals and to allow for greater judicial scrutiny.

### I. CEQ REGULATIONS, NEPA AND OFF-SITE MITIGATION: STATUTORY ACTION?

Although NEPA does not explicitly permit agencies to reduce harmful environmental impacts through mitigation, courts consistently hold

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25. See Donahue, *supra* note 10, at 691-95 (considering the relationship between a finding of no significant impact and mitigation measures). See also Geoffrey Garver, Note, *A New Approach to Review of NEPA Findings of No Significant Impact*, 85 MICH. L. REV. 191, 216 (1986) (arguing that "because NEPA is designed to influence substantive agency decisions through procedural mandates, the judicial role in reviewing agency decisions to cut short those procedures must be especially rigorous"). See generally McGarity, *supra* note 4.

26. See *infra* notes 28-48 and accompanying text for a discussion of the interrelationship between NEPA, CEQ Regulations and off-site mitigation.

27. See *infra* notes 66-67 and accompanying text for a discussion of the weight the court should give to the agency's consideration of mitigation measures.

that such an option is at least implicit in its language.<sup>28</sup> CEQ regulations, which are binding on agencies whose acts fall within NEPA's scope, support this statutory interpretation.<sup>29</sup> Furthermore, agencies assert, and the judiciary agrees, that off-site mitigation is permitted under the regulations and that such measures can support the issuance of a FONSI.<sup>30</sup> Agencies support this contention with reference to CEQ regulations which define mitigation as including "[c]ompensat[ion] for the impact by replacing or providing substitute resources or environments."<sup>31</sup>

Closer examination of the CEQ regulations, however, reveals that the CEQ included the mitigation requirement in the sections discussing the EIS and did not mention mitigation as a justification for a FONSI.<sup>32</sup> Yet the regulations do not explicitly prevent agencies from

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28. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (NEPA implicitly requires a detailed analysis of mitigation procedures). See also 42 U.S.C. § 4332(2)(C)(ii) (1988) (NEPA requires an EIS for "any adverse environmental effects which cannot be avoided"); MANDELKER, *supra* note 10, at § 10:38 (NEPA implicitly requires discussion of mitigation in impact statements).

29. See 40 C.F.R. § 1502.14(f) (1990) (requiring the agency to "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives"); 40 C.F.R. § 1502.16(h) (1990) (requiring discussions of ways "to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))").

30. See, e.g., *Friends of the Earth v. Hintz*, 800 F.2d 822, 837-38 (9th Cir. 1986) (off-site mitigation may serve "to relieve the Corps of the obligation of preparing an EIS"); cf. *Herson*, *supra* note 12, at 52. Although *Herson* does not specifically discuss off-site mitigation, he notes that "[t]he [CEQ] regulations do not discuss the issue of whether mitigation measures can justify a FONSI. Federal courts, however, have . . . upheld the use of mitigation measures to justify FONSI's." *Id.* See also *Donohue*, *supra* note 10, at 692 (author does not specifically mention off-site mitigation as a justification for a FONSI).

31. See 40 C.F.R. § 1508.20 (1990) which provides:

"Mitigation" includes:

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

*Id.*

32. See *Herson*, *supra* note 12, at 52 (stating that "CEQ regulations require only that agencies discuss mitigation measures in a full EIS and fail to discuss "whether mitigation measures can justify a FONSI." (citing 40 C.F.R. § 1502.14(f) (1985))). 40

supporting a FONSI through mitigation.<sup>33</sup> Agencies argue that if they determine at the EA stage that mitigation can minimize environmental impacts to insignificant levels, then they can forego an EIS. Technically, NEPA does not require an EIS if an agency determines that the project has no significant impact on the environment,<sup>34</sup> and courts overwhelmingly defer to an agency's interpretation of the CEQ regulations.<sup>35</sup>

A subsequent CEQ pronouncement<sup>36</sup> attempted to moot this issue and permit mitigation proposals to support the issuance of a FONSI. However, CEQ's statement, contained in its "Forty Questions" document, met with substantial criticism because it only permitted mitigation to support a FONSI under limited circumstances. CEQ's "Forty Questions" states:

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

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant.<sup>37</sup>

Agencies refused to adhere to the CEQ's stringent requirements. In addition, the courts thwarted challenges that called for the agencies to enforce these suggested mitigation guidelines and strengthened agency resolve in refusing to implement these safeguards.<sup>38</sup> Courts uniformly consider CEQ's statement on mitigation measures merely persuasive

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C.F.R. § 1502.14 "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14 (1990).

33. See 40 C.F.R. §§ 1502.14(f), 1502.16(h) (1990). See also *supra* note 29 and accompanying text.

34. See *supra* note 3 and accompanying text.

35. See, e.g., *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (holding that an EIS is not required if "the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal").

36. See *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,038 (1981) [hereinafter *Forty Questions*].

37. *Id.*

38. See *Friends of the Earth v. Hintz*, 800 F.2d 822, 838 (9th Cir. 1986).

authority because it is not a CEQ regulation.<sup>39</sup>

The result is that there are no specific guidelines ensuring the effective implementation of mitigation proposals. The lack of any clear statutory mandate concerning mitigation procedures is especially detrimental to the environment when agencies implement off-site proposals and issue FONSI's.<sup>40</sup> Although the lack of off-site mitigation guidelines permits agencies to fashion creative compromises between abandoning a project and preventing significant environmental harm, it allows agencies to leave other crucial long-term considerations unresolved.

Agencies are discouraged from closely scrutinizing off-site plans which inherently involve uncertainty in both their implementation and potential effectiveness. As agencies proliferate the use of off-site mitigation to support FONSI's the environmental effects will be disastrous.<sup>41</sup> Without the benefit of in-depth political analysis, including hearings, reports and other informational data, no recognizable legal distinction exists between on-site and off-site mitigation.<sup>42</sup>

Various circumstances may account for legislative skirting of this

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39. *Id.* at 837 n.15 (“[T]he CEQ forty questions document is not a regulation, but merely an informal statement and is not controlling authority.” (citing *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986); *Cabinet Mountain Wilderness*, 685 F.2d at 682)); *but see* *Sierra Club v. Marsh*, 769 F.2d 868, 880 (1st Cir. 1985) (“Mitigation cannot, by itself, render impacts ‘insignificant’ unless the mitigation measures are ‘imposed by statute or regulation, or submitted . . . as part of the original proposal.’” (quoting *Forty Questions*, *supra* note 36, at 18,038)).

40. *See Forty Questions*, *supra* note 36 and accompanying text.

41. *See Goldman-Carter*, *supra* note 20, at 22.

42. The differences and considerations involved in each of these methods are extremely significant. Many courts, when faced with off-site mitigation proposals, have stated that on-site mitigation is preferred. Several commentators have also noted the danger of off-site mitigation in several different environmental contexts. *See, e.g.*, Helen M. Kennedy, Comment, *The 1986 Habitat Amendments to the Magnuson Act: A New Procedural Regime for Activities Affecting Fisheries Habitat*, 18 ENVTL. L. 339, 362 (1988) (suggesting that the EPA, when considering dredge and fill permits, should always “favor on-site mitigation and replacement of in-kind fisheries habitat because diverse fishery stocks are habitat specific”); *see also* *Goldman-Carter*, *supra* note 20, at 22 (arguing that “wetlands restoration and creation [an example of off-site mitigation] should be permitted as compensation only for *unavoidable* wetlands losses”); Kennedy, *supra*, at 343 n.13 (“The HEP can result in trading off harm to an entire ecological community for actions benefiting a few species.” (citing *Fish and Wildlife Part III, 1985: Hearings on H.R. 2704 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 147 (1985) (statement of Robert Davison, Legislative Representative, National Wildlife Federation))).

topic. First, off-site mitigation is an appealing option at the EA level for agencies that are increasingly burdened, as a result of NEPA, with evaluating more and more environmental impacts in their decision-making process.<sup>43</sup> Second, on its face, the substitution of resources for those destroyed at the project site appears to maintain the status quo.<sup>44</sup> Perhaps that is one reason environmental groups challenged only a handful of off-site projects as compared with on-site projects.<sup>45</sup> Environmental groups have limited resources available to monitor and challenge these seemingly harmless agency decisions.<sup>46</sup> Third, the bureaucracy finds the off-site mitigation option appealing because, in the short-term, the issuance of a FONSI is less costly and time consuming than preparing an EIS.<sup>47</sup> In addition, the public and other agencies are not permitted to partake in a review and comment period which an EIS preparation requires.<sup>48</sup>

Generally, the CEQ and judicial validation of mitigation as support for a FONSI is desirable for on-site mitigation proposals.<sup>49</sup> Site-

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43. See Kent & Pendergrass, *supra* note 12, at 12 (noting that agencies prepared approximately 1700 EISs per year in the mid-1970s while only 577 were prepared in 1984).

44. See *supra* notes 22 & 23 and accompanying text. See also Goldman-Carter, *supra* note 20, at 22 (“[A]ny mitigation plan based on wetlands creation must recognize that created wetlands will almost never fulfill the full range of functions of natural wetlands. Consequently, one acre created for one acre destroyed will rarely compensate for the loss.”); Donohue, *supra* note 10, at 713 (the status quo may not be maintained because there is “no assurance that wetland replacement would be successful”).

45. See *supra* note 19.

46. See Kent & Pendergrass, *supra* note 12, at 14 (“Environmental groups . . . generally have fewer economic resources [and] . . . partly because of these economic limits, environmental groups chose [sic] the cases they litigate very carefully.”).

47. See CEQ, *Environmental Impact Statements: An Analysis of Six Years’ Experience by Seventy Federal Agencies* 2, 43-45 (1976) (CEQ downplayed the costs and project delays resulting from EIS preparation); see also *Forty Questions*, *supra* note 36, at 18,037 (suggesting EAs be no longer than 10-15 pages); 40 C.F.R. § 1502.7 (1990) (EISs should “normally be less than 150 pages and for proposals of unusual scope or complexity . . . less than 300 pages”).

48. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 n.13 (1989) (referring to CEQ regulations mandating review and comment period after EIS prepared); 40 C.F.R. §§ 1503.1, 1506.6 (1990) (the public has less opportunity to comment on an EA than on an EIS). See also *Forty Questions*, *supra* note 36, at 18,038 (CEQ discouraged FONSIIs justified by mitigation proposals because the agencies can forego the public and agency review and comment period required for an EIS which is considered “essential to ensure that the final decision is based on all the relevant factors”).

49. See Donohue, *supra* note 10, at 695 (“[L]ogic and reason support the FONSI-

specific measures are certainly a plausible way to decrease significant environmental impacts. But off-site proposals require more stringent review. A FONSI does not provide sufficient disclosure and information to allow the agencies, courts and the public to thoroughly evaluate a solution that continues to permit significant impacts at the project site.<sup>50</sup>

## II. JUDICIAL REVIEW OF OFF-SITE PROPOSALS: CEQ AND NEPA PROCEDURAL MANDATES

Because NEPA influences substantive agency decisions through its procedural mandate, strict adherence to those procedures is crucial.<sup>51</sup> Traditionally, a FONSI is issued where the agency's EA concludes that mitigation measures reduce environmental impacts to insignificant levels.<sup>52</sup> If, however, the agency determines that the proposed activity

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mitigation rule. . . . It is reasonable not to demand a full-scale EIS if the impact truly will be insignificant.").

50. *See Methow Valley*, 490 U.S. at 350 n.13 (an agency must "discuss at appropriate points . . . any responsible opposing view which was not adequately discussed in the draft statement and indicate the agency's response to the issues raised" (quoting 40 C.F.R. § 1502.9 (1987))).

51. Courts and commentators recognize NEPA as a purely procedural statute. An agency's failure to follow NEPA's procedural mandates provides a sufficient basis for reversing its decision. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam) (emphasizing the procedural nature of NEPA and holding that a reviewing court is limited to ensuring that an agency has considered the environmental impacts); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) (explaining that NEPA's mandate is essentially procedural); *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987) ("Although labeled an 'environmental statute,' NEPA is in essence a *procedural* statute."); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (NEPA creates procedural obligations "designed to insure that the agency 'stop, look, and listen' before moving ahead"); *Prince George's County, Maryland v. Holloway*, 404 F. Supp. 1181, 1183 (D.D.C. 1975) (NEPA "is essentially a procedural and disclosure statute").

52. CEQ outlines several factors the courts should consider when making this threshold determination. 40 C.F.R. § 1508.27 (1990) provides in part:

results in significant impacts, it must prepare an EIS.<sup>53</sup> The EIS must include a discussion of both avoidable and unavoidable impacts, and feasible alternatives to the proposed action.<sup>54</sup>

Consequently, an EIS and a FONSI convey significantly different messages to the public and other agencies interested in monitoring federal actions under NEPA.<sup>55</sup> While the EIS suggests a need for further environmental sensitivity, the issuance of a FONSI conveys the oppo-

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

....

(b) *Intensity*. This refers to the severity of impact. . . . The following should be considered in evaluating intensity:

....

(3) Unique characteristics of the geographic area such as proximity to . . . wetlands, wild and scenic rivers, or ecologically critical areas.

....

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

*Id.* See also *supra* note 3.

53. Courts differ in their determination of the role mitigation plays in rendering impacts insignificant. See *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985) (mitigation measures must render the environmental impacts to less than significant levels in order to support a FONSI), *cert. denied*, 475 U.S. 1044 (1986); *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (an EIS is not required when “specific mitigation measures . . . completely compensate for any possible adverse environmental impacts stemming from the original proposal”); *Maryland Nat’l Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973) (“[C]hangees [sic] in the project are not legally adequate to avoid an impact statement unless they permit a determination that such impact as remains, after the change, is not ‘significant.’”). But see *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (“In this circuit, so long as significant measures are undertaken to ‘mitigate the project’s effects,’ they need not *completely compensate* for adverse environmental impacts.” (quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982))).

54. 40 C.F.R. § 1502.1 (1990). An EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would void or minimize adverse impacts.” *Id.*

55. See *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). In acknowledging the different purposes served by an EA and an EIS, the *Marsh* court stated:

An EA aims simply to identify (and assess the ‘significance’ of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects, one against the other. . . . An EIS helps [officials] make their decision by describing and evaluating the project’s likely effects on the environment. . . . To treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment. For one thing, those outside the agency have less opportunity to comment on an EA than

site view.<sup>56</sup> Thus, under NEPA's present procedural framework, if an EIS is not prepared because of off-site mitigation, agencies and the public may not be able to adequately consider the unique environmental questions raised by the potential implementation of an off-site plan.<sup>57</sup>

Courts will not review an agency's decision not to prepare an EIS until the challenging party satisfies its initial burden of proof. Unfortunately, courts differ on what is necessary to satisfy this burden.<sup>58</sup> For some courts, a showing that the action may cause significant harm is adequate.<sup>59</sup> Other courts require the challenging party to establish that the action will have a significant impact on the environment.<sup>60</sup>

While judicial disparity continues to exist as to a challenging party's burden of proof, the Supreme Court has just recently resolved a split among the circuits involving the applicable standard of review for assessing an agency's decision not to prepare an EIS.<sup>61</sup> In *Marsh v. Ore-*

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on an EIS. For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS. *Id.* at 875 (citations omitted) (citing *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983); 40 C.F.R. §§ 1503.1, 1506.6 (1984)).

56. See *supra* note 10 and accompanying text.

57. If a federal agency makes a determination of no significant impact, the regulations require the agency to make its finding available for public review. 40 C.F.R. § 1501.4(e)(1) (1990). Public cooperation and comment are invaluable to preparing and analyzing the EIS.

58. See *Garver, supra* note 25, at 206-07 ("[C]ourts have differed over whether a challenger must show (1) that an action will have a significant impact; (2) that a substantial possibility exists that the action will have a significant impact; or (3) that the action might have a significant impact.").

59. See, e.g., *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1177-78 (9th Cir. 1982) (the plaintiff must "allege facts which, if true, show that the proposed project may significantly degrade some human environmental factor" (quoting *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 597 (9th Cir. 1981))).

60. See, e.g., *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988) ("The plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.").

61. Previously, quite a bit of confusion existed among the circuits as to the standard of review which the courts need to employ in reviewing an agency's decision to forego preparation of an EIS. See *Donohue, supra* note 10, at 717 & n.206.

The First, Second, Fourth, and Seventh Circuits reverse an agency decision only if it is arbitrary and capricious; the Fifth, Eighth, Ninth and Tenth adhere to a "reasonableness" standard of review; and the District of Columbia Circuit employs a four-part test incorporating the "hard look" doctrine. . . . The Third and Eleventh Circuits' practices are apparently in accord with the "reasonableness" approach, while the Sixth Circuit has not chosen among the standards.



*gon Natural Resources Council*,<sup>62</sup> the Supreme Court held that the arbitrary and capricious standard of review applied with respect to an agency decision to prepare a supplemental EIS.<sup>63</sup> Notably, the *Marsh* Court determined that a decision to prepare a supplemental EIS is similar to a decision to prepare an initial EIS.<sup>64</sup> Thus, a fortiori, the standard of review applicable to a supplemental EIS should parallel that of an EIS in the first instance. Accordingly, the arbitrary and capricious standard of review should apply to agency decisions to prepare an EIS.<sup>65</sup>

Courts, applying the deferential arbitrary and capricious standard, must ensure that agencies take a "hard look" at the potential environmental impacts of their planned actions prior to making their decision

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*Id.* at 717 n.206. *But see* *Park County Resource Council, Inc. v. United States Dep't of Agric.*, 817 F.2d 609 (10th Cir. 1987). The court in *Park County* painted a significantly different picture as to how the courts were split. *Id.* at 621 n.4. The court found that the Tenth, Third, Fifth, Eighth, and Ninth Circuits follow the reasonableness standard while the First, Second, Fourth and Seventh Circuits follow the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. *Id.* (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982)). For an excellent discussion on the different standards of review previously employed by the circuits, see Garver, *supra* note 25, at 199-204.

62. 490 U.S. 360 (1989).

63. *Id.* at 375-76.

64. *Id.* at 374.

65. The Supreme Court, in *Marsh*, noted that a court "in making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' . . . 'must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.'" *Id.* at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). Because the arbitrary and capricious standard of review is a narrow one, it prevents a court from substituting its judgment for that of the agency. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988). Not surprisingly, a court must generally be at its most deferential when reviewing an agency decision to forego preparation of an EIS because such decisions often involve scientific determinations which require a high level of technical expertise.

When applying the arbitrary and capricious standard, courts have not distinguished FONSI's supported by on-site mitigation from those supported by off-site mitigation. For cases involving off-site mitigation, see *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986) (holding that an agency decision that a project does not require an EIS will be upheld unless unreasonable); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (same); *Preservation Coalition v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) (same); *Missouri Coalition for Env't v. United States Corps of Eng'rs*, 678 F. Supp. 790, 792 (E.D. Mo. 1988) ("The principle question presented here is whether or not the Corps acted arbitrarily, capriciously, or unreasonably concerning the environment in this cause."), *aff'd*, 866 F.2d 1025 (8th Cir.), *cert. denied*, 490 U.S. 820 (1989).

regarding whether to prepare an EIS.<sup>66</sup> Courts have construed the “hard look” analysis as requiring the agency to discuss the proposed mitigation measures and their estimated effectiveness in reducing impacts.<sup>67</sup> Review of the mitigation proposal’s effectiveness, however, essentially means that only minimal analysis must be provided that documents a proposal’s potential for success. Thus, an agency’s decision not to prepare an EIS will be affirmed unless the agency simply lists the mitigation measures that it intends to implement.<sup>68</sup>

Significantly, in addition to estimating the effectiveness of the mitigation plan,<sup>69</sup> courts reviewing off-site mitigation proposals have also re-

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66. The Supreme Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) held that courts are required to consider whether the agency took a “hard look” at the environmental consequences of their actions. *Id.* at 410 n.21. Later, in *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam), the Court limited the scope of judicial review to consideration of whether the agency satisfied NEPA’s procedural mandates and forbade courts from engaging in a substantive review of agency decisions. The Court stated that “once 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.” *Id.* at 227. See also *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (“NEPA does require that agencies take a ‘hard look’ at the environmental effects of their planned action . . .”); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (recognizing the importance of agencies taking a “hard look” at the environmental consequences of proposed federal action).

67. Courts have been unclear as to the amount of weight the agency’s consideration of mitigation measures deserves. See, e.g., *Maryland-Nat’l Capital Park & Planning Comm’n v. United States Postal Serv.*, 487 F.2d 1029 (D.C. Cir. 1973). In *Maryland-National*, Judge Leventhal laid out four criteria for the court in determining “whether the agency has supplied convincing reasons why [the] potential impacts are truly insignificant.” *Id.* at 1039-40. The court listed the following criteria:

First, did the agency take a “hard look” at the problem, as opposed to bald conclusions, unaided by preliminary investigation? . . . Second, . . . did the agency identify the relevant areas of environmental concern? . . . Third, . . . does the agency make a convincing case that the impact is insignificant? . . . [F]ourth . . . [i]f there is impact of true “significance” has the agency convincingly established that changes in the project have sufficiently minimized it?

*Id.* at 1040. Beyond the criteria of review listed by the *Maryland-National* court, agencies are provided with no other guidelines or direction as to how to implement off-site mitigation plans and the method used to determine that an EIS is not required.

68. See *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985) (explaining that merely listing mitigation measures does not satisfy NEPA’s reasoned discussion requirement), *rev’d on other grounds sub nom.* *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

69. See *Steamboaters v. FERC*, 759 F.2d 1382, 1393-94 (9th Cir. 1985) (requiring the agency preparing the environmental assessment to assess independently a project’s environmental consequences); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360

quired agencies to ensure that the implementation of the plan is a condition precedent to the issuance of a permit.<sup>70</sup> Further, the requirement restricted agency reliance on third parties to reduce the potential environmental impacts to insignificant levels.<sup>71</sup> Unfortunately, courts have failed to establish similar safeguards when evaluating off-site mitigation plans supporting the issuance of a FONSI.<sup>72</sup> The courts also remain unsympathetic to challengers of agency actions that insist upon the inclusion of the mitigation plan in the original proposal when used to justify a FONSI.<sup>73</sup> Courts have refused to hold CEQ's statement concerning the effect of mitigation measures on NEPA's EIS require-

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(1989). In *Robertson and Marsh*, the Supreme Court reversed two Ninth Circuit decisions that required agencies to formulate and adopt a fully developed off-site mitigation plan in an EIS prior to the issuance of federal permits. The Court in *Robertson* stated that "[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Robertson*, 490 U.S. at 352. Relying on this reasoning, the Court in *Marsh* reached the same conclusion. *Marsh*, 490 U.S. at 370-72.

70. See *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 684 (D.C. Cir. 1982) (recognizing the agency's obligation to revoke its permission if applicants do not comply with project modifications).

71. See *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982) (holding that an agency acted improperly when it relied on public and private bodies not within its control to reduce the project's impact on air quality).

72. See *Donahue*, *supra* note 10, at 693-94. In considering whether the agency has a sound basis for determining that a mitigation proposal will accomplish the predicted reduction in impact, the author lists other factors "including the thoroughness of the agency's analysis, the number and extensiveness of the mitigation measures proposed, data provided in support of conclusions, the specificity (and site-specificity) of measures and conditions, and reliance on opinions and studies of other expert agencies." *Id.* at 694.

73. See *supra* notes 37-40 and accompanying text for a description of agencies' use of mitigation plans to support a FONSI; see also *Sierra Club v. Marsh*, 769 F.2d 868, 880 (1st Cir. 1985) (stating that unless statutes or regulations impose mitigation, or the applicant submits a mitigation plan within the original proposal, mitigation cannot render impacts insignificant). *But see* *Friends of the Earth v. Hintz*, 800 F.2d 822, 837 n.15 (9th Cir. 1986) ("The CEQ Forty Questions document is not a regulation, but merely an informal statement and is not controlling authority.") (citing *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *cert denied*, 475 U.S. 1044 (1986); *Cabinet Mountains Wilderness*, 685 F.2d at 682)). In *Sierra Club*, 717 F.2d 1409 (D.C. Cir. 1983), the court imposed an additional requirement with respect to FONSI's supported by mitigation proposals. The court held that an agency may not proceed with an action without preparing an EIS if significant impacts may later occur which the agency could not at that later time forbid or prevent. *Id.* at 1415.

ment as binding authority.<sup>74</sup>

Overall, courts have engaged in cursory and inconsistent analysis of off-site mitigation in support of a FONSI. The limited scope of review and the absence of specific agency procedures handcuff the courts from adequately reviewing agency decisions. Both the *Marsh* decision and the CEQ's failure to provide guidelines outlining how and under what circumstances off-site mitigation can support a FONSI resulted in confusion and poignantly demonstrates the insufficiency of judicial review of off-site mitigation.<sup>75</sup> Ironically, under the present NEPA framework, courts are limited to reviewing whether agencies followed procedures which ultimately fail to ensure the implementation of effective off-site measures anyway.

The CEQ regulations must be amended to provide additional procedures to ensure the safe and effective implementation of these off-site plans when the agency decides not to prepare an EIS. Presently, the CEQ regulations relating to mitigation are scattered and fail to make any distinction between the treatment of on-site and off-site mitigation, although several significant and obvious differences exist.<sup>76</sup> This lack of specificity as to what agencies are required to do when faced with an off-site mitigation proposal has undermined the efficiency of judicial review and the effectiveness of the NEPA as a whole.

### III. SETTING THE TABLE FOR CONSIDERATION OF OFF-SITE MITIGATION AND THE FONSI

Even though courts and federal agencies have found statutory support for the use of mitigation,<sup>77</sup> both fail to address the unique problems involved in the increased utilization of off-site mitigation.<sup>78</sup> In its "Forty Questions," the CEQ attempted to provide a workable

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74. See *supra* notes 36-39 and accompanying text for a discussion of CEQ's statement on mitigation measures; see also *Forty Questions*, *supra* note 36, at 18,026, 18,038.

75. See *supra* notes 65-67 and accompanying text which describes the appropriate standard courts should apply to review agency decisions to prepare an EIS.

76. See *supra* notes 14-27 and accompanying text for an overview of on-site and off-site mitigation measures and their impact on the necessity for Environmental Impact Statements.

77. See *supra* notes 28-49 and accompanying text identifying courts' and federal agencies' statutory support for the use of mitigation to reduce harmful environmental impacts.

78. See generally Herson, *supra* note 12 recommending that CEQ revise NEPA regulations to expressly validate mitigation measures' use to justify FONSI's, and that the revisions require increased public and agency review.

framework from which to fashion effective off-site mitigation guidelines.<sup>79</sup> “Forty Questions” established the presumption that agencies prepare an EIS whenever off-site mitigation is contemplated. This stringent requirement is consistent with the purpose and spirit of NEPA because off-site proposals do not actually reduce environmental impacts to insignificant levels at the project site.<sup>80</sup>

Presently, NEPA’s procedural framework allows agency and judicial analysis of off-site mitigation proposals to ignore important issues concerning the ultimate environmental effects of these actions.<sup>81</sup> In contrast to an EA’s cursory mitigation analysis,<sup>82</sup> the preparation of an EIS for off-site mitigation proposals substantially improves the decision-making process. The EIS serves to better apprise agency decision-makers of the proposed action’s environmental consequences. As a result, agencies are able to make informed decisions on whether to proceed with the action.<sup>83</sup> In addition, the EIS provides the public with an opportunity to become informed of the environmental impacts.<sup>84</sup>

The proposal outlined below is a novel way to improve both the quality of environmental analysis required under NEPA and to remove the uncertainty that agencies face in determining whether to prepare an EA or an EIS whenever off-site mitigation measures are advanced.<sup>85</sup>

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79. See *supra* notes 36-39 and accompanying text for excerpts from “Forty Questions” and a discussion of its effectiveness in establishing mitigation guidelines.

80. See *supra* notes 2-11 and accompanying text for a description of NEPA’s environmental assessment requirement.

81. See *supra* notes 40 & 41 and accompanying text for a discussion of the lack of off-site mitigation guidelines and its impact on agency behavior.

82. See *supra* note 47 (*Forty Questions* suggests that an EA be no longer than 10-15 pages, while an EIS may range between 150-300 pages). See also *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985) (recognizing that the EA is a “concise” document that “briefly” discusses the relevant issues (citing 40 C.F.R. §§ 1508.9, 1508.13 (1984))).

83. See McGarity, *supra* note 4, at 805-07. McGarity suggests that the informational value of the EIS should take precedence when an agency is confronted with the threshold issue. *Id.* at 805. “Regardless of whether an agency is influenced by the considerations and alternatives set forth in an impact statement, disclosure to the public has independent value.” *Id.* at 807.

84. See generally McGarity, *supra* note 4 discussing EIS’s informational value to the public.

85. See TAYLOR, *supra* note 9 (arguing that since the adequacy of an impact statement is a question of fact, agencies are unable to predict with any certainty how courts will address individual cases).

### A. *A Modest Proposal*

First, CEQ regulations should be amended to require the mandatory preparation of an EIS for all off-site mitigation proposals unless the agency satisfies the “Forty Questions” criteria.<sup>86</sup> This requirement is consistent with NEPA because section 102(C) states that an EIS is required for any federal action “significantly affecting the quality of the human environment.”<sup>87</sup> Although off-site mitigation proposals may replace significantly affected land, such measures do not reduce the impact at the project site itself to insignificant levels, thus, technically mandating the preparation of an EIS.<sup>88</sup> An agency can avoid this stringent interpretation of NEPA, however, if it satisfies the exceptions outlined in “Forty Questions.”<sup>89</sup>

In accordance with this proposal, if an agency relies upon off-site mitigation to support the issuance of a FONSI, then an EIS would not be required when a statutory or regulatory mandate imposes the off-site mitigation measures.<sup>90</sup> This exception assumes that the legislature engaged in a thorough consideration of the measure’s effectiveness or that the concern inherent in such a mandate is of such overriding importance that such analysis is preempted. If the legislature remains silent, then the agency may still forego preparation of an EIS when the off-site mitigation measures are “submitted by an applicant or agency as part of the original proposal.”<sup>91</sup> This requirement ensures that the agencies neither include such proposals late in the EA process nor neglect to sufficiently analyze their effectiveness.

When an agency suggests or permits the use of off-site mitigation techniques to justify a FONSI, the “original proposal” must also satisfy additional criteria. First, land purchased off-site must equal or sur-

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86. See *supra* notes 36-39 and accompanying text discussing the “Forty Questions” criteria.

87. National Environmental Policy Act of 1969, § 102(c), 42 U.S.C. § 4332(2)(C) (1988). See also *supra* note 3 and accompanying text discussing NEPA’s disclosure requirements.

88. See *supra* notes 12-18 and accompanying text for a discussion of mitigation measures’ use in preparing EA’s to circumvent the EIS requirement.

89. The “Forty Questions” lists two exceptions when mitigation can be relied on to make a finding of no significant impact and therefore not prepare an EIS. This is allowed only if the mitigation measures “are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal.” *Forty Questions, supra* note 36, at 18,038.

90. *Id.*

91. *Id.*

pass the area of land significantly affected at the project site.<sup>92</sup> Next, if the mitigating resource is not the same as the habitat being destroyed, then the proposal must include scientific data demonstrating that the new ecosystem can be successfully created and maintained.<sup>93</sup> Then, to further ensure that the off-site measures are implemented, the commitment must be legally enforceable.<sup>94</sup> If required, the purchase and cultivation of the off-site resource must be a condition precedent to the issuance of the applicable permits.<sup>95</sup> Moreover, money cannot be used as a mitigating resource. Finally, the public and agency comment and review period should be extended at the EA stage when an off-site plan is part of the original proposal.<sup>96</sup>

### B. *Judicial Review of a Modest Proposal*

When a party challenges an agency's decision to support a FONSI with off-site mitigation, the challenging party must have a lower burden of proof. Unless an EIS is prepared, there is no disclosure of essential information concerning the remaining impacts at the project site and potential effectiveness of the mitigation proposal. Parties challenging the agency's decision essentially would need to prepare an EIS-type document simply to obtain sufficient information to get into court. Alternatively, courts can impose a more stringent burden upon the challenger when the agency has prepared an EIS.

Once the challenging party meets its burden of proof the scope of judicial review for off-site mitigation should essentially remain the

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92. Thus, if the agency action resulted in the destruction of 10 acres of wetlands then the off-site mitigation plan must provide for the purchase of 10 acres or more of replacement.

93. See Arnold van der Valk, *Effective Wetlands Policy: Sticks or Carrots?*, ENVTL. FORUM, Jan.-Feb. 1989, at 21, 26 ("Studies are also needed to discover the best methods for restoring wetlands, and how effectively restored wetlands function as environmental filters.").

94. See *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986).

95. See *supra* note 70 and accompanying text explaining this conditional permit issuance approach. See also *Sierra Club v. Marsh*, 769 F.2d 868, 877 (1st Cir. 1985) (recognizing that mere promises to mitigate environmental impacts is not enough to render these impacts insignificant); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982) (holding that commitments to mitigate must be "more than mere vague statements of good intentions").

96. See *supra* notes 42-48 and accompanying text explaining reasons for the absence of in-depth analyses of off-site mitigation plans, and the consequences of this omission.

same.<sup>97</sup> In cases where an agency discusses off-site mitigation in an EIS the “hard look” standard is sufficient.<sup>98</sup> The additional safeguards courts adopted ensure that the agency provides an adequate discussion of off-site measures in its EIS and does not merely list the measures to be taken.<sup>99</sup>

Courts reviewing an off-site mitigation proposal supporting a FONSI should apply the “hard look” analysis with the further requirement that the court ensure that the agencies abide by the criteria listed above. The fact that the agency followed these procedures is enough to ensure that the agency engaged in a thorough analysis of the off-site mitigation proposal’s potential effectiveness. Consequently, courts would not need to substantively review scientific documentation of the mitigation proposal’s potential effectiveness.<sup>100</sup>

### C. *Critical Review of the Modest Proposal*

Critics may argue that the above proposal essentially transforms the EA into an EIS. This criticism, however, is unwarranted. If the proposed action is relatively minor in scale, and habitat conversion studies become more readily available (if they are even required), then the content of the proposal and the analysis required would be consistent with an EA.<sup>101</sup> Indeed, if the project is massive and large parts of the environment will be destroyed and replaced elsewhere, then an EIS should probably be prepared.<sup>102</sup>

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97. See *supra* notes 62-68 and accompanying text discussing the applicable standard of judicial review for agency decisions concerning the necessity for an EIS.

98. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989) (discussing actions which guarantee that the agency has undertaken the required “hard look” analysis); see also *supra* notes 66-68 and accompanying text.

99. See *supra* notes 69-71 and accompanying text recognizing additional safeguards for evaluating off-site mitigation plans supporting a FONSI.

100. *But cf.* Note, *The Least Adverse Alternative Approach to Substantive Review Under NEPA*, 88 HARV. L. REV. 735, 756-58 (1975) (arguing for an intermediate substantive judicial review theory).

101. See J. Michael Luzier, *Putting States in the Driver’s Seat*, ENVTL. FORUM, Jan.-Feb. 1989, at 20, 24. Luzier, commenting specifically on off-site mitigation and wetlands, states that the “EPA should continue to develop the technical standards for mitigation.” *Id.* Further, a statutory protection plan should identify “procedures for mitigation ‘banking,’ or creating or restoring degraded wetlands as compensation for altering other wetlands sites.” *Id.*

102. See *Sierra Club v. Marsh*, 769 F.2d 868, 874 (1st Cir. 1985) (“In most cases . . . a lengthy EA indicates that an EIS is needed” (quoting *Forty Questions*, *supra* note 36, at 18,037)).



Another argument may emphasize the cost involved in requiring the preparation of an EIS under such broad circumstances. This argument fails for three reasons. First, as a purely legal response, under NEPA an EIS must be prepared whenever substantial questions are raised that a project may cause significant degradation of the environment regardless of cost.<sup>103</sup> Technically, an off-site mitigation plan does not minimize the environmental impacts at the project site, it simply replaces the lost resource.<sup>104</sup>

Second, on an environmental level, the circumstances surrounding the implementation of off-site mitigation and the uncertainty surrounding the success of converting a substitute resource may often outweigh the expense of preparing an EIS. Third, on an economic level, if a private party is involved, agencies can require the applicant to pay all or part of the costs resulting from the EIS preparation.<sup>105</sup>

#### D. *Benefits of the Modest Proposal*

Agencies and courts have taken all of the easy steps in satisfying NEPA and now must make some hard choices. This proposal is a novel approach to analyzing the different problems posed by off-site mitigation. The proposal recognizes the need for in-depth review of off-site mitigation proposals while also recognizing that, if the contemplated program is relatively small in scale, the purpose of the EA and

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103. See Garver, *supra* note 25, at 212.

Examination of the extent to which an EA balances factors is crucial in evaluating the validity of a FONSI. While an agency is free to recognize social and economic factors that favor an action, those factors can never justify the decision to forgo an EIS. Only after preparation of an EIS can an agency determine that economic and social factors outweigh significant environmental impacts and thereby justify a decision to proceed with an action.

*Id.*

104. See *supra* notes 16-18 and accompanying text for a discussion of off-site mitigation measures and their effectiveness.

105. See Weiss, *supra* note 9, at 786 nn.34-37 (citing TAYLOR, *supra* note 9, at 164 n.2, 399 n.13 & app. E). The author quotes some significant findings from Taylor's study. *Id.* "Taylor questioned the veracity of the conventional complaint by agencies that the EIS process significantly reduces efficiency and increases costs." *Id.* at 786 n.35. Taylor also found that "the evidence of costs added to federal projects by NEPA EIS requirements inconclusive." *Id.* at 786 n.37. Finally, Taylor's study reported Forest Service personnel believed that "they would have been - or 'should' be - gathering virtually the same kind of [environmental] information whether or not the EIS process required it." *Id.* at 786 n.34 (citing TAYLOR, *supra* note 9, at 399 n.13).

FONSI alternative is still viable and may be observed.<sup>106</sup> More importantly, agencies are provided with a clear standard that allows environmental groups to challenge concrete areas in off-site proposals that agencies have ignored, while also providing agencies and courts with more certainty of their NEPA responsibilities.<sup>107</sup>

The advent of off-site mitigation into NEPA's procedural process significantly minimizes its substantive effect by assuring that agencies consider environmental impacts in their decision-making. NEPA is a self-enforcing statute and requires agencies to follow NEPA's procedures in good faith. The public and the courts are the watchdogs. The public becomes informed of potential environmental impacts through the EIS disclosure process. If the information is not disclosed through the EIS process or as a result of the suggested amendments to the EA requirements, then the public cannot challenge these decisions and judicial review is impossible.<sup>108</sup>

#### IV. CASE STUDY OF OFF-SITE MITIGATION - A CALL FOR STRINGENT REVIEW

The cases examined in this section are particularly useful in analyzing the deficiencies inherent in NEPA's existing procedural framework.<sup>109</sup> Comments on each case and the mitigation plans are merely intended to highlight the insufficiency of agency and judicial review of off-site mitigation plans justifying a FONSI. Most importantly, the cases help emphasize the significant potential for environmental harm as use of these plans proliferates. Hopefully, the case study also illustrates the potential for improvement in both agency decision-making and judicial review of off-site mitigation plans if the above mentioned plan was implemented.

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106. See *supra* note 49 and accompanying text discussing using on-site mitigation proposals to reduce the need for a full-scale EIS.

107. See *supra* notes 75-76 and accompanying text for a discussion of the limited scope of review and the absence of agency procedures regarding off-site mitigation proposals. The proposed procedural framework may actually save litigation costs because challengers may bring fewer frivolous suits.

108. See *supra* notes 2-11 and accompanying text for an overview of NEPA's disclosure requirements and the functions these requirements serve.

109. See *supra* notes 28-76 and accompanying text discussing NEPA's existing procedural framework and its failure to explicitly address mitigation.

### A. *Friends of the Earth*

Any case study of off-site mitigation as support for a FONSI must begin with *Friends of the Earth v. Hintz*.<sup>110</sup> In *Hintz*, the Ninth Circuit Court of Appeals first coined the term “off-site” mitigation and acknowledged its unique concerns.<sup>111</sup> The *Hintz* court held that the purchase of substitute wetlands, as outlined in a mitigation agreement,<sup>112</sup> could be used to support the Army Corps of Engineers’ decision not to issue an EIS.<sup>113</sup> The private party in *Hintz* applied to the Corps for a section 404 permit authorizing his logging company to discharge toxic fill material into a seventeen acre wetlands area.<sup>114</sup> The Corps, relying upon the mitigation agreement, issued the permit after

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110. 800 F.2d 822 (9th Cir. 1986).

111. *Id.* at 837-38.

112. The mitigation agreement stated:

1. ITT Rayonier, Inc., (ITT) and a resource agency committee (representatives of the US Environmental Protection Agency; US Department of the Interior, Fish and Wildlife Service; US Army Corps of Engineers; and the Washington Department of Game (WDG)), representing the State of Washington, have agreed that land mitigation for ITT’s unauthorized fill in Bowerman Basin, Grays Harbor, should involve purchase of a portion of a 66-acre property located at the Elk River in South Bay, Grays Harbor. This Elk River site is predominately high salt-marsh that was converted to pastureland by placement of a dike and tide gates. The terms of the mitigation agreement are described below. Issuance of a Department of the Army permit shall initiate the timing of the agreement terms.

2. ITT will pursue the purchase of 17.0 acres of Elk River site and will transfer the title of this land to WDG.

3. If the land purchase has not been accomplished within 6 months of the date of the Department of the Army permit, ITT agrees to make available to the WDG (within 30 days written notice) the total sum of \$25,500 for the purpose of purchasing 17.0 acres of the Elk River site. These funds will be held by ITT and will be available to WDG for up to an additional 3 years. ITT agrees to increase the total sum by 8 percent per year (compounded annually) as long as the funds are in their possession. Funds not required for purchase of the 17.0 acres at the Elk River site will be retained by ITT. WDG may request and use the funds for purchase of mitigation land in Grays Harbor other than the Elk River site subject to approval by ITT.

4. If the mitigation lands have not been purchased after 3.5 years (6 months plus 3 years per above terms), ITT agrees to transfer a total sum of \$32,122.66 to WDG. WDG agrees to use these funds for purchase and preservation of coastal wetlands in Grays Harbor.

*Id.* at 825 n.3.

113. *Id.* at 838. The court stated that “we see no reason why off-site mitigation cannot be considered in determining whether to prepare an EIS.” *Id.*

114. 800 F.2d at 826-27.

engaging in an EA.<sup>115</sup> The Corps concluded that the off-site mitigation reduced the impact on the environment to insignificant levels, thereby precluding the need for an EIS.<sup>116</sup>

The mitigation agreement required Hintz to purchase a seventeen acre site that would be converted into wetlands to replace those being destroyed by the toxic fill material. The agreement contemplated that the Washington Department of Game (WDG) would receive the site after its conversion. If Hintz failed to purchase the site within a six month period, the agreement required Hintz to pay the WDG \$25,500.<sup>117</sup> An additional provision permitted Hintz to forego the purchase of the site altogether and simply pay \$32,122.66 to the State Game Department after a three and one-half year period.<sup>118</sup>

Several disturbing elements exist concerning the off-site mitigation plan and the acquiescence of the agency and the court in permitting its implementation. First, the agency did not engage in, and the court did not require, any analysis of the effectiveness of the mitigation plan.<sup>119</sup> Such an analysis is especially important where the proposal contemplates the creation of a new resource. Second, the purchase and conversion of the site was not a prerequisite to Hintz receiving the Corps permit.<sup>120</sup> Although the appellants challenged this deficiency, the court found it unnecessary to rule on the matter since the applicant mooted the issue when he purchased the off-site resource.<sup>121</sup>

A third problem involved the Corps' reliance upon a third party to implement the plan. Reliance on a third party does not ensure that implementation is done in a careful and sound manner. The court did not address this issue. Fourth, and perhaps most significantly, the plan contemplated the use of money as mitigating the effects at the project site. There was no guarantee that the WDG would use the money to purchase substitute wetlands nor were they legally obligated to do

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115. *Id.* at 827.

116. *Id.*

117. *Id.* at 826. *See supra* note 112 for the terms of the mitigation agreement.

118. 800 F.2d at 826 n.3. *See supra* note 112 for the terms of the mitigation agreement.

119. The court concluded that because the appellants, Friends of the Earth, did not challenge the adequacy of the off-site mitigation plan "the Corps' decision not to prepare an EIS was reasonable." 800 F.2d at 838.

120. *Id.* at 826. The EPA and other agencies that reviewed the project expressed concern that the mitigation agreement did not contain a provision to assure the purchase of the site. *Id.* at 826 n.4.

121. *Id.* at 837.

so.<sup>122</sup> By refusing to address this issue, the court stated that because the site was in fact purchased, the issue was moot.<sup>123</sup> Finally, the appellants relied upon CEQ's "Forty Questions" for their contention that off-site mitigation could not preclude the need for an EIS.<sup>124</sup> The court disagreed and refused to entitle "Forty Questions" to substantial deference.<sup>125</sup>

This case illustrates the inconsistent and cursory treatment that off-site mitigation proposals receive under the present NEPA framework. Under this Article's suggested proposal, an EIS would have to be prepared unless the mitigation agreement was either included in the original agency proposal or the subject of a procedural or statutory mandate. Assuming that the mitigation agreement was included as part of the original agency proposal, the agency could forego preparation of an EIS if it complied with the additional procedures.

### B. *Missouri Coalition for the Environment*

*Missouri Coalition for the Environment v. United States Corps of Engineers*<sup>126</sup> stressed the importance of relaxing the plaintiff's burden of proof when challenging off-site mitigation used to support a FONSI. In *Missouri Coalition*, the district court found the off-site mitigation measures adequate to support the agency's decision to issue a FONSI.<sup>127</sup> The proposed mitigation plan provided for the purchase of ten acres of land and the creation of "new, higher quality wetlands there."<sup>128</sup> The court concluded that the plaintiffs did not meet their burden of proof in "raising a substantial environmental issue."<sup>129</sup> As a

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122. 800 F.2d at 837.

123. *Id.*

124. *Id.* at 837 n.15.

125. *Id.* In addition, the court addressed whether off-site mitigation could support an agency's decision not to prepare an EIS and concluded that under CEQ and Corps' regulations, off-site mitigation could effectively, consistent with NEPA, obviate the need for an EIS. *Id.* at 837-38. Furthermore, the court found that because the CEQ's definition of "mitigation" includes off-site measures, an agency could consider such measures when deciding whether to issue an EIS. *Id.* at 838.

126. 678 F. Supp. 790 (E.D. Mo. 1988), *aff'd*, 866 F.2d 1025 (8th Cir.), *cert. denied*, 490 U.S. 820 (1989).

127. *Id.* at 802.

128. *Id.* at 794.

129. *Id.* at 801. The court stated that before it addresses whether the agency reasonably concluded that no EIS was required, the plaintiff must "make a threshold showing that the agency failed to consider facts which, if true, would constitute a substantial

result, the court refused to engage in any independent analysis of the off-site mitigation plan to ensure that the agency discussed its estimated effectiveness.<sup>130</sup>

The plaintiffs also argued that the agency erroneously denied a public hearing at the EA stage.<sup>131</sup> The court dismissed this challenge on the ground that it was within the Corps' discretion to refuse a public comment period.<sup>132</sup> The significance of denying the public hearing is twofold. First, the public is denied the opportunity to evaluate the plan and suggest possible alternatives. Second, the potential impacts and effectiveness of the plan are not disclosed. If the public is denied this basic information, the public may later fail to meet its burden of proof and the courts will not have an opportunity to review the proposal.<sup>133</sup>

## V. CONCLUSION

Only a comprehensive EIS will ensure that agencies adopt the safest and most effective off-site mitigation measures. The CEQ regulations support this view and discourage FONSIIs justified by off-site mitigation except in limited circumstances. To encourage full disclosure and public participation in the NEPA process the CEQ, in "Forty Questions," mandates the preparation of an EIS whenever an action may have significant impacts on the environment regardless of mitigation unless such measures are imposed by law or included in the original proposal. Hopefully, the CEQ regulations will be amended so that the courts can regard this proposal as binding on the agencies.

The present NEPA procedural framework allows and even encourages both agencies and courts to engage in cursory and inadequate review of off-site mitigation. A legal distinction between on-site and off-site mitigation must be acknowledged in order to improve the decision-making process. While it is undeniable that mitigation should remain an agency option to be utilized to avoid preparing a FONSI, the cir-

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impact on the environment." *Id.* See also *supra* notes 58-60 and accompanying text discussing the challenging party's initial burden of proof.

130. 678 F. Supp. at 801-02. The court did note that the agency must independently evaluate information concerning mitigation measures and cannot rely on the analysis of third parties. *Id.* at 802.

131. *Id.* at 797.

132. *Id.*

133. See *supra* note 3 and accompanying text describing NEPA's disclosure requirements.

**cumstances under which this can be done need to be clearly outlined. Only then will judicial review of these proposals assure that NEPA's substantive mandate is satisfied.**

## **NOTES**



