Boston College Environmental Affairs Law Review

Volume 10 | Issue 1 Article 4

8-1-1982

Judicial Review of Agency Decisions Under the National Environmental Policy Act of 1969 – *Strycker's Bay Neighborhood Council, Inc. v. Karlen*

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JUDICIAL REVIEW OF AGENCY DECISIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969—*STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC. v. KARLEN*

*Paula A. Kelly**

I. INTRODUCTION

The scope of a court's review of an agency's decision-making process is a matter of "crucial importance"[1] in the field of administrative law. Review may range from complete deference to the agency's decision to virtual substitution of the court's judgment for that of the agency.[2] Selection of a standard somewhere along this continuum must be carefully done. For upon this selection "hinges both the efficacy of the administrative process and the judicial ability to protect individuals against agency abuse of power."[3] Indeed, if the scope of review is too broad, agencies merely serve to conduct the cases to the courts for decision. Conversely, if the scope of review is too narrow, the legality of the agency's decision cannot be explored, and the right to review becomes meaningless.[4]

In environmental matters, courts have had a particularly difficult time determining the scope of their review of agency decisions. Environmental cases are often complex, involving highly scientific and technical issues. Courts have been wary of their ability to understand and correctly rule on these issues.[5] At the same time, however,

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* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

1. B. SCHWARTZ, ADMINISTRATIVE LAW § 204, at 579 (1976).

2. The Court itself selects a standard for the scope of review, after first determining that judicial review is indeed available. For criteria governing the availability of judicial review *see* SCHWARTZ, *supra* note 1, § 143, at 429-30.

3. SCHWARTZ, *supra* note 1, § 204, at 579.

4. *Id.*

5. *See* Bazelon, *Coping with Technology Through The Legal Process*, 62 CORNELL L. REV. 817 (1977).

courts are aware of the special emphasis Congress has placed on environmental concerns as is evidenced in the policy goals expressed in statutes such as the National Environmental Policy Act (NEPA).[6] In environmental cases, courts must not only determine whether Congress intended the courts to be vigilant enforcers of environmental legislation, but must also determine whether courts are qualified to conduct such strict review of environmental decisions. Courts are torn between adhering to traditional principles of administrative law[7] and creating a broader scope of review in environmental cases.

The enactment of NEPA[8] further complicated the selection of both a scope of review of agency decisions and a standard against which these decisions could be measured. NEPA expands the mandate of agencies to include consideration of environmental concerns.[9] Courts have been suspicious of the environmental decisions of agencies whose primary purpose, by its very nature, affects the environment and have therefore been tempted to broaden the scope of their review.[10] NEPA further confuses judicial review because it is unclear whether NEPA provides the standards that courts should use in conducting their review. Although it has been well established that section 102 of NEPA provides rather rigid mandates which the courts can enforce, the effect of section 101 is not so clear.[11] Whether courts should demand compliance with the policies and goals expressed in this section is a question both of statutory interpretation and of the abilities and competence of courts to carry out such review.

In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, the Supreme Court addressed the question of the scope of review of agency decisions on environmental issues. Although the holding of the case is limited to the question of whether NEPA requires the agencies to elevate environmental concerns over other legitimate concerns, the language used by the Court may have implications for both the scope and standard of judicial review. In reaching the conclusion that agencies need not consider environmental concerns over

6. 42 U.S.C. §§ 4321-4347 (1976).

7. *See infra* text at notes 16-20.

8. 42 U.S.C. §§ 4321-4347 (1976). *See infra* text at notes 70-75.

9. *See* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). In this case, the court observed that "[p]erhaps the greatest importance of NEPA is to require . . . agencies to *consider* environmental issues just as they consider other matters within their mandates." *Id.* at 1112.

10. *See* Trubek, *Allocating the Burden of Environmental Uncertainty: The NRC Interprets NEPA's Substantive Mandate*, 1977 WIS. L. REV. 747, 750-51.

11. *See infra* text at notes 70-75.

12. 444 U.S. 223 (1980).

all others, the Court observed 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."[13] In considering the standards to be used by the courts in evaluating agencies' decisions under NEPA, the Court noted that NEPA's mandates are "essentially procedural."[14] The effect of these Supreme Court pronouncements on the scope and standards of judicial review is the subject of this article.

II. Judicial Review of Agency Decisions

Scope of review and standard of review are terms often confused by courts and agencies alike. The terms themselves can be difficult to distinguish. Grant P. Thompson has observed that discussion of these terms is difficult because the courts' articulated doctrines and actions may not always mesh.[15] Moreover, because the terms are so closely related and must each be discussed by the court, courts have tended to discuss the scope and standard of review in the same sentence, saying something like "[t]he appropriate role for the court is to determine whether the agency has . . . ." In this simple sentence, the court indicates what it sees as the proper degree of scrutiny into an agency decision as well as the kinds of standards the court will use to evaluate the agency's decision.

For purposes of this article, the scope of review will refer to the degree of scrutiny a court will use in evaluating an agency decision. The broadening and subsequent narrowing of the scope of review will be discussed in part A.

The standard of review will be used to refer to the tests the courts apply to evaluate the agency decision. In NEPA cases, a discussion of the standard of review often involves the question whether the policy goals expressed in the first section of the Act can be used as standards for reviewing agency action. This will be discussed in part B.

A. Administrative Law and Environmental Decision Making

Traditionally, the scope of review of agency decision making has been a relatively narrow one.[16] Judges have been reluctant to step into areas in which agencies are the experts and have tended to defer

13. *Id.* at 227.

14. *Id.* (*citing* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978)).

15. *See* Thompson, *The Role of the Courts*, in Federal Environmental Law 206 (1974).

16. Schwartz, *supra* note 1, § 204, at 579.

to agencies' judgment on matters within the agencies' mandates.[17] This tendency had been due in part to judges' feelings of incompetence in the face of detailed, technical evidence[18] and in part to the fact that agencies are created to resolve the questions committed to their discretion without help from the courts.[19]

Professor Schwartz makes the observation that the traditional principles of administrative law are not rigid and inflexible. Rather, he notes that, although limited review is the norm where judges cannot penetrate the mass of cases before them, when a judge does penetrate a case, the scope of his review will depend on his estimate of the justice of the case.[20]

During the mid-1970's, commentators were observing an increased willingness on the part of courts to assume a more active role in the review process.[21] A number of reasons for this trend have been advanced. Professor Anderson suggests that judges were beginning to feel guilty for having too long neglected to delve into the quality of decision making.[22] He also observes that public interest law firms

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17. *Id.* at 579-80. *See also* Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 72 N.W. 713 (1897). The court there questioned its role in evaluating an agency decision on the rates set in the railroad industry. The court commented:

> It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

Id. at 716.

18. *See* Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201 (1970). Judge Kaufman contends that he can determine the kind of case he will be reviewing by observing the law clerk carry it in. "[I]f the briefs, records and appendices are so bulky that he has to haul them in relays, I know that once again the court is called upon to review a decision by an administrative agency." *Id.*

19. *Id.* at 203. Judge Kaufman has observed that an agency may demand special respect from the courts not only on technical matters, but on its view of the law.

20. SCHWARTZ, *supra* note 1, § 204 at 579-81. Professor Schwartz elaborates: "[N]o review theory will deter them from what they perceive to be the correct result." Schwartz quotes Justice Weintraub as saying: "I incline to believe that a Judge will do what he thinks he should, no matter how we try to corral him." *Id.*

21. *See id.* at 581; Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 278-83 (1974). *See also* Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

In *Greater Boston Television*, the court of appeals commented on its role in reviewing a decision of the FCC, saying that the court must

> intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

Id. at 851 (citation omitted).

22. Anderson, *supra* note 21, at 279.

had come into fashion and had begun bringing well-conceived suits against agency action.[23] For whatever the reason, judges had begun to take a closer look at agency decisions—a development which prompted Judge Bazelon to comment, "we stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts."[24]

With this broader scope of review of agency decisions came the question of what kind of review would be afforded decisions affecting the environment.[25] More specifically, should courts create an even broader, more strict review for environmental decision making? Highlighting this question was the plethora of statutes that had been recently enacted in response to the country's growing environmental problems.[26] Among these was the National Environmental Policy Act of 1969.[27] NEPA expanded the mandate of agencies to include environmental decisions;[28] yet, the courts' role in the review of these agency decisions under these statutes was still unclear. The question arose: should environmental matters be examined more closely in light of the general trend toward stricter review of agency decisions?

1. Should the Courts Exercise a Stronger Role in Environmental Decision Making—the Trend Toward Judicial Vigilance

There is no doubt that an environmental lawsuit is a unique breed of animal. There are four factors which make this kind of suit unlike any other. First, much of the evidence that is presented is highly scientific or technical—often there will be technical experts whose opinions are almost diametrically opposed.[29] Second, environmental litigation forces courts to balance quantities that cannot be measured —things like the value of scenery, or the probability of uncertain harm.[30] Third, the consequences of an environmental decision are

23. *Id.*

24. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971).

25. There is some debate among authorities as to whether the general tendency toward stricter review preceded the trend toward stricter environmental review. Anderson, *supra* note 21, indicates that general reform paved the way for special treatment for environmental decisions. On the other hand, it has been suggested that the "new era" in general administrative law was introduced by environmental cases. *See* Thompson, *supra* note 15, at 207.

26. *See, e.g.*, Environmental Education Act, 20 U.S.C. §§ 1531-1536 (1976); The Clean Air Act of 1967, 42 U.S.C. §§ 1857-1858a (1976); Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-4374 (1976).

27. 42 U.S.C. §§ 4321-4347 (1976).

28. *See* Anderson, *supra* note 21, at 286-97.

29. *See* Bazelon, *supra* note 5.

30. *See* Thompson, *supra* note 15, at 193.

likely to be irreversible where harm is done to the environment.[31] Fourth, environmental matters are now governed largely by laws which are national in scope, leaving judges to deal not with a "case or controversy" but, rather, with a question of national environmental policy.[32] Finally, many of the agencies whose decisions affect the environment have a distinctly antienvironmental bias. That is, their primary purpose, such as building roads or dams, by its nature adversely affects the environment.[33]

In the early 1970's, courts were grappling with the question whether the uniqueness of environmental lawsuits should afford them a stricter standard of review. In *Environmental Defense Fund, Inc. v. Ruckelshaus*,[34] the Circuit Court for the District of Columbia determined that a stricter standard was required. The court there reviewed an order of the Secretary of Agriculture refusing to suspend or commence procedures to suspend the registration of the pesticide DDT.[35] In remanding the matter for further proceedings, Judge Bazelon, writing for the majority, observed that matters which "touch on fundamental personal interests in life, health and liberty . . . have always had a special claim to judicial protection."[36] The court indicated its dedication to protecting these interests from "administrative arbitrariness" and observed that strict review of agency decisions was necessary.[37]

The District of Columbia Circuit Court's expression was reiterated in the Supreme Court's opinion in *Citizens to Preserve Overton Park v. Volpe*.[38] In that case, the Supreme Court considered the question of the scope of the authority of the Secretary of Transportation

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31. *See* Sive, *Environmental Decisionmaking: Judicial and Political Review*, 28 CASE W. RES. L. REV. 827, 828 (1978).

32. *See* Bazelon, *supra* note 5, at 831.

33. Trubek, *supra* note 10, at 750-51.

34. 439 F.2d 584 (D.C. Cir. 1971).

35. *Id.* at 588. This case was brought under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-135K (1964). FIFRA is now codified at 7 U.S.C. §§ 135-136y (1976). This statute provides that for certain purposes, pesticides must be registered with the Secretary of Agriculture. To be registered a product must conform to the statutory standards for product safety. 439 F.2d at 588.

36. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

37. *Id.* at 597-98. The court found no problem with the Secretary's findings of fact and noted that it was appropriate for the court to defer to the agency's findings of fact. The court did, however, take exception to the agency's explanation of its ultimate decision and stated that, in order to protect fundamental personal interests, "[c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Id.* at 598 (citation omitted).

38. 401 U.S. 402, 404 (1971). *See also* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PENN. L. REV. 509, 512 (1974).

under the Federal Aid Highway Act of 1966.[39] The Court observed that the Act was one of many recent pieces of legislation designed to "curb the accelerating destruction of our country's natural beauty."[40] The Court indicated that its review was to be "thorough, probing and in-depth"[41] and remanded the case to the district court for plenary review.[42] In both *Environmental Defense Fund* and *Overton Park*, the courts emphasized the special nature of environmental matters as reasons for expanding the scope of courts' review. The District of Columbia Circuit emphasized the "fundamental personal interests"[43] involved, while the Supreme Court indicated a desire to effectuate the statutes enacted to protect the country's natural beauty.[44] In analyzing *Overton Park*, the late Judge Leventhal has argued that the decision is premised on the court's recognition that environmental questions should be reviewed more strictly. He wrote, "[t]he 'paramount importance' attributed to environmental values serves to grab the court initially and causes the court to be especially attentive in its review, and where necessary, to delve into the decisional process—to see whether the Government has acted to give due protection to the environment."[45]

Other arguments have also been raised in favor of the expanded review suggested in *Overton Park*. Environmental lawyer David Sive listed three reasons favoring an expanded role for the judiciary during the "first explosion" of environmental law.[46] First, Sive argues that the intricate value judgments involved in environmental decision making are better suited to the talents of judges rather than administrators.[47] Second, the newly enacted statutes would raise

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39. 23 U.S.C. §§ 101-141 (Supp. V 1964). *See* specifically § 138. This act is now codified at 23 U.S.C. §§ 101-156 (1976). It provides that the Secretary of Transportation may not authorize the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" alternative exists. If no such alternative can be found, the Secretary may authorize construction only if all "possible planning to minimize harm" to the park has been undertaken. The petitioners contended that the Secretary had violated these statutes by authorizing the construction of a highway through a public park in Memphis. 401 U.S. at 404-06.

40. 401 U.S. at 404.

41. *Id.* at 415.

42. *Id.* at 420.

43. 439 F.2d at 598.

44. 401 U.S. at 404.

45. Leventhal, *supra* note 38, at 514. This is not to intimate that *Overton Park* is limited to this question. Other principles discussed in that case will be discussed in text at notes 113-15 *infra*.

46. Sive, *supra* note 31, at 827. *See also* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 629-30 (1970).

47. Sive, *supra* note 31, at 827.

problems of interpretation that should be reviewed by the courts.[48] Third, the irreversibility of decisions affecting the environment demands strict review.[49] For all of these reasons, therefore, many courts in the early 1970's, the early stages of environmental decision making, tended to treat environmental decisions more strictly than other decisions.[50]

2. Scope of Judicial Review in the Mid-to-Late 1970's—The Narrowing Trend

In the mid-to-late 1970s, the Supreme Court issued two opinions which indicated that the Court no longer intended to treat environmental decisions differently. In 1977, the Court decided *Kleppe v. Sierra Club*.[51] The Court there addressed the issue of the scope of review applied by the Court of Appeals for the District of Columbia. The question was whether NEPA requires the filing of a "comprehensive environmental impact statement" (EIS) for coal mining in the entire Northern Great Plains Region, or whether the various mining plans in the region are discrete enough to be considered local in nature. The Court found that the absence of any regional plan or proposal for mining in the area negated the need for an EIS.[52] The Court rejected the claim that an EIS was necessary because all coal-related activity in the area was environmentally related.[53] The Supreme Court found that the court of appeals had devised its own four part "balancing test" in reviewing the Department of Interior's decision not to file an EIS.[54] Relying heavily on its assessment of the department's "high level of technical expertise," the Court held that the department's determination must be upheld.[55]

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48. *Id.* at 827-28.

49. *Id.* at 828.

50. Some courts, however, explicitly refused to treat environmental decisions differently. *See, e.g.*, Scenic Hudson Preservation Conference v. Federal Power Comm'n, 453 F.2d 463 (2d Cir. 1971). In *Scenic Hudson*, the court rejected the idea that *Overton Park* created a stricter review for environmental decisions, saying, "[t]o read these cases as sanctioning a new standard of judicial review for findings on matters of environmental policy is to misconstrue both the holdings in the cases and the nature of our remand in *Scenic Hudson*." The court stressed that in *Overton Park* the agency had merely failed to give adequate consideration to environmental factors. *Id.* at 468.

51. 427 U.S. 390 (1976).

52. The local nature of these discrete projects removes them from the mandate of section 102(2)(e) of NEPA, which requires that an Environmental Impact Statement be filed for "every major Federal action significantly affecting the quality of the human environment." *Id.* at 399-401.

53. *Id.* at 414.

54. *Id.* at 404-05.

55. *Id.* at 412-14.

The second example of the Court's reluctance to treat environmental decisions differently can be seen in the Court's treatment of *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*[56] The Court of Appeals for the District of Columbia had determined that procedures followed by the Atomic Energy Commission with regard to the licensing of nuclear reactors were inadequate.[57] The Supreme Court cited *Kleppe* for the principle that the only procedures imposed by NEPA are those contained in the plain language of the Act and determined that the court of appeals "improperly intruded into the agency's decision-making process." The Court observed that there was nothing in "the nature of the issues being considered," which would warrant such an intrusion.[58] The Court intimated that the health issues involved in the licensing of nuclear reactors alone would not change the scope of review to be afforded.[59]

In both *Kleppe* and *Vermont Yankee*, the Court stressed that NEPA does not contemplate that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. In emphasizing traditional administrative law principles of judicial restraint, the Court may have been indicating that environmental decisions should no longer be treated differently. Much of the Court's reasoning seems to be based on the feeling that lower courts had let environmental decision making get out of hand—had forgotten the guidelines of administrative law and had let "judicial intervention run riot."[60]

Sive has noted three reasons for the narrowing of the distinction between judicial review in environmental cases and the review of other types of administrative decisions.[61] One is that many of the questions of statutory interpretation which arose after the passage of statutes like NEPA had already been settled by the late 1970's.[62] Another is that, with increased familiarity with new environmental statutes, agencies were developing their own environmental expertise and were learning to integrate environmental concerns with

56. 435 U.S. 519 (1978).

57. *Id.* The circuit court had found that the agency's environmental impact statement was defective in that it did not examine the alternative of energy conservation and did not address the disposal of nuclear waste. *See* Raymond, *A Vermont Yankee in King Burger's Court: Constraints on Judicial Review Under NEPA*, 7 B.C. ENV. AFF. L. REV. 629 (1979).

58. 435 U.S. at 525, 548.

59. The significance of *Vermont Yankee* is not limited to this observation. The case will be discussed further in text at notes 117-29 *infra*.

60. 435 U.S. at 556-57.

61. Sive, *supra* note 31.

62. *Id.* at 830. *See supra* text at notes 46-49.

their "primary" mandates.[63] Third is that while, initially, the environmentalists were the ones asking the courts to broaden their review for environmental concerns, as time wore on, the anti-environmental forces began "borrowing" this technique. Since both sides could make equally good use of broad judicial review, litigants soon became wary of arguing for an expanded scope of review.[64]

B. Judicial Review Under NEPA

After the court determines how closely it will look into an agency's decision, the next question is: what will the court look for—what standard must the agency meet?

1. The Substance-Procedure Problem—Is NEPA "Law to Apply?"

NEPA created special problems for courts trying to determine the appropriate scope and standard of their review. Nothing in the Act itself or in its legislative history specifically mentions judicial review.[65] The courts were left to determine whether NEPA itself conferred jurisdiction, or whether review was available only through the Administrative Procedure Act (APA).[66] In considering this question, courts are guided by the Supreme Court's interpretation of the APA and *Citizens to Preserve Overton Park v. Volpe*.[67] There the Court considered the language of the APA that permits judicial review of agency decisions except where prohibited by statute or where agency action is committed to agency discretion by law. The Court found these exceptions to be very limited ones and observed

63. Sive, *supra* note 31, at 833. *See also* Kleppe v. Sierra Club, 427 U.S. 390 (1976). There the Court placed particular emphasis on the expertise of the Department of the Interior in sustaining its determination that a regional Environmental Impact Statement was not required for a coal mining plan in the Northern Great Plains Region. *Id.* at 412.

64. Sive, *supra* note 31, at 832. To illustrate this phenomenon, Sive cites the brief submitted by respondents in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Sive observed that most of the cases cited by the NRDC were cases in which developmental interests were seeking to expand the scope of judicial review. Sive, *supra* note 31, at 831-32.

65. Anderson, *supra* note 21, at 278.

66. 5 U.S.C. §§ 701-706 (1976). The APA establishes the minimum procedural requirements applicable to agency rulemaking and adjudication of disputes. It also provides for judicial review of administrative decisions. Section 701 provides that every final agency action is subject to review "except to the extent that (1) statutes provide judicial review; or (2) agency action is committed to agency discretion by law." The APA also uses the criteria for reversing agency decisions. The Act provides, *inter alia*, that the agency's decision will be set aside if it is "arbitrary, capricious and abuse of discretion, or not otherwise in accordance with law," or "without observance of procedure required by law." *Id.* §§ 706(2)(A), (2)(D).

67. 401 U.S. 402 (1971).

that, where there is no "clear and convincing" evidence of a legislative intent to restrict judicial review, or, where there is any but the broadest statute, the courts can review agency decisions.[68] *Overton Park* reduces the question whether the APA applies in NEPA cases to whether NEPA is "law to apply."[69] To answer this, the content of NEPA must be examined.

Section 101 of NEPA[70] describes the goals and objectives of the Act—it contains the substance of the Act.[71] Section 102,[72] on the other hand, is the procedural provision of the Act—it requires, among other things, the preparation of an EIS for any "Federal action[s] significantly affecting the quality of the human environment."[73]

It has been well established that section 102 is "law to apply" and that, therefore, judicial review is available.[74] The question whether section 101 is "law to apply" is more complex. Considerable debate has arisen over whether section 101 is merely "fancy paper" in

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68. *Id.* at 410 (*citing* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)).

69. *Id.*

70. 42 U.S.C. § 4331 (1976).

71. The Act encourages all federal plans to:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety or other undesirable and unintended consequences;

(4) preserve important historic, cultural and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b)(1)-(b)(6) (1976).

72. *Id.* § 4332.

73. An environmental impact statement is required for legislation and other major federal actions which will affect the environment. The EIS must contain a discussion of the environmental impact of the proposed action, adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship of long-term effects and short-term uses of the environment, and any irreversible commitments of resources which the proposed project will require. *Id.* Other major provisions of this section mandate that agencies: (1) utilize natural and social services and environmental design arts in planning and choosing projects; and (2) develop procedures which will give appropriate consideration to environmental values. *Id.*

74. Courts have had little trouble enforcing the mandates of § 102. *See generally* RODGERS, ENVIRONMENTAL LAW §§ 7.3, 7.4 (1977). *See also*, Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). There the Court observed that § 102 of NEPA "sets a high standard for the agencies, a standard which must be rigorously enforced by reviewing courts." *Id.* at 1114.

which the procedural requirements of section 102 are wrapped, or whether section 101 contains standards or criteria against which agency decisions can be weighed. Much of this debate has centered around the peculiar characteristics of environmental litigation[75] and the ability of courts to handle these substantive questions. Before the question whether NEPA is "law to apply" can be answered, it is necessary to determine whether courts are competent to apply this law. It is helpful to examine here the views of two vocal participants in this debate, Judge Bazelon and the late Judge Leventhal, both of the District of Columbia Circuit Court.

3. The Substance-Procedure Debate—Can Courts Handle Substantive Review?

Judge Bazelon has taken the position that courts should not undertake substantive review in environmental cases.[76] He bases much of his argument on the fact that much of the evidence presented in environmental cases is mathematical or scientific.[77] Judge Bazelon contends that judges are "technically illiterate" and that their review of agency decisions would be "dangerously unreliable."[78] The appropriate role for the courts is to "scrutinize and monitor" the decision-making process—the agency's compliance with procedures—to make sure that it is complete.[79] The court's function is to insure that the agency generates a complete record in which factual issues are fully developed;[80] in other words, the court must insure that the agency has complied with NEPA's procedural provisions.

Judge Leventhal, on the other hand, believed that courts are competent, or can become competent, to deal with the issues that would arise in substantive review.[81] Leventhal indicated that Congress left review of environmental decisions under NEPA to the courts (rather than to itself or to a superagency) because of the courts' special characteristics. Courts, he argued, are uniquely able to combine a supervisory role with an attitude of restraint. They are familiar with principles of equity and statutory interpretation, and are divorced from the tribulations of politics.[82] Judge Leventhal noted that the

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75. *See supra* text at notes 29-33.

76. Bazelon, *supra* note 5. *See also* Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 66-68 (D.C. Cir. 1976) (Bazelon, J., concurring), *cert. denied*, 426 U.S. 941 (1976).

77. 541 F.2d at 67. (Bazelon, J., concurring).

78. *Id.*

79. Bazelon, *supra* note 5, at 823.

80. *Id.*

81. Leventhal, *supra* note 38.

82. *Id.* at 515-17.

complex nature of the evidence should not hinder judicial review. He believed that courts have always had a special interest in the knowledge of "how matters are proven" and that very little else is needed to deal with environmental matters.[83] He urged that, through "diligence and attentiveness," courts will be able to master the scientific data that is presented.[84]

4. Status of the Substance-Procedure Problem in the Late 1970's

With valid arguments on either side of the substance-procedure debate, courts began lining up on either side of the issue. By 1979, most courts had recognized NEPA as "law to apply" under the APA and used NEPA to determine the rationality or arbitrariness of the agency decision.[85] Two circuits initially ruled that NEPA created no "law to apply," but later realized that the APA gives courts the authority to review while section 101 of NEPA provides standards for that review.[86] The Tenth Circuit Court has remained steadfast in its contention that NEPA is purely procedural.[87]

Substantive review has been afforded under NEPA in a number of circumstances to allow courts to reverse agency decisions found to be offensive to the principles of NEPA. Generally, the more factual the question before the court, the more likely the court is to conduct a strict substantive review.[88] Conversely, the more the question in-

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83. *Id.* at 533.

84. *Id.* It should also be noted that the debate over the courts' abilities to handle scientific matters has encouraged commentators to propose alternative solutions to this problem. Judge Leventhal addresses the question of whether there should be "Scientific Courts" appointed to take jurisdiction of such matters, or whether special masters should sit with the judge to explain the complicated material. *Id.* at 541-54.

85. *See* Natural Resources Defense Council, Inc. v. Securities and Exchange Comm'n, 606 F.2d 1031 (D.C. Cir. 1979); Conservation Council of North Carolina v. Froehlke, 591 F.2d 1339, 9 ENVTL L. REP. 20,105 (4th Cir. 1979); Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978), *rev'd sub nom.* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980); Jackson County, Missouri v. Jones, 571 F.2d 1004 (8th Cir. 1978); Environmental Defense Fund v. Tennessee Valley Authority, 492 F.2d 466 (6th Cir. 1974), *aff'd per curiam*, 371 F. Supp. 1004, 4 ENVTL L. REP. 20,120 (E.D. Tenn. 1973); Sierra Club v. Froehlke, 486 F.2d 946 (7th Cir. 1973); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973).

86. *Compare* Lathan v. Brinegar, 506 F.2d 677 (9th Cir. 1974) *and* Pizitz v. Volpe, 467 F.2d 208 (5th Cir. 1972) *with* Warm Springs Dam Task Force v. Gribble, 565 F.2d 549 (9th Cir. 1977) *and* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974) (Tennessee-Tombigbee Waterway).

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

88. Leed, *The National Environmental Policy Act of 1969: Is the Fact of Compliance a Procedural or Substantive Question?*, 15 SANTA CLARA L. REV. 303, 311-19 (1975).

An example of this is the careful scrutiny given to an agency decision that an EIS is not required. *See* Save Our Ten Acres v. Kreger, 472 F.2d 463 (5th Cir. 1973). There the court in-

volves the agency's substantive decision to carry out a project, the more confused the courts become about the proper standard of their review.[89]

Courts reviewing questions concerning the agency's scrutiny of the factors involved in environmental decision making have come up with standards of review much stricter than the traditional "arbitrary and capricious" standard. Two of these standards are the "reasoned decision-making" test and the "substantial inquiry" test.[90]

An example of the "reasoned decision-making" test can be found in *International Harvester Company v. Ruckelshaus*.[91] In *International Harvester*, the Circuit Court for the District of Columbia considered automobile manufacturers' claims that the EPA had wrongly refused to grant a one-year suspension of the emission control standards of the Clean Air Act. The agency had determined that the automotive industry had failed to show that the technology needed for compliance was not available.[92] Judge Leventhal, writing for the court, waded through extensive, complicated evidence[93] and concluded that granting an extension would be the only outcome of a "reasoned decision-making process."[94] The court explained "reasoned decision making" as a process whereby the court undertakes a perceptive study of the record "to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate or

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dicated that, in the wake of *Overton Park*, strict review was required for an EIS threshold decision, saying, "[t]he spirit of the Act would die aborning if a facile, ex parte decision that the project was minor . . . were too well shielded from impartial review . . . . The primary decision . . . must be subject to inspection under a more searching standard." *Id.* at 466.

89. Leed, *supra* note 88 at 314-15. *Compare* Environmental Defense Fund v. Armstrong, 487 F.2d 814 (9th Cir. 1973) (the court questioned its authority to revise an agency's decision where all NEPA's procedures had been fulfilled and finally determined that it did not have the authority to apply the standards of section 101); *with* Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974) (where the court determined that the agency's decision to proceed with the environmentally controversial Tennessee-Tombigbee Waterway project should be reviewed under the standards of § 101).

90. Thompson, *supra* note 15, at 211.

91. 478 F.2d 615 (D.C. Cir. 1973).

92. *Id.* at 622.

93. Judge Bazelon in his concurring opinion balked at the court's scrutiny of substantive matters, arguing instead that the court should scrutinize any procedures used by the agency to see if they provide a "framework for principled decision-making," *Id.* at 650-53. Judge Bazelon does, however, agree that principled, or reasoned, decision-making is the goal of judicial review: "My Brethren and I are reaching for the same end . . . a 'reasoned decision' through different means." *Id.* at 652.

94. *Id.* at 650. The court did not issue an order for the suspension because certain preliminary determinations had not been made by the Administrator. The court, instead, remanded the case to the agency for further proceedings. *Id.*

ignore the ascertainable legislative intent."[95] The decision made by the Administrator was characterized by the court as leaving a "residue of uncertainty that beclouds."[96] The court was skeptical of the reliability of the administrator's methodology; the court cited instances in which the Administrator failed to state assumptions and support calculations.[97] A court applying the "reasoned decision-making" test could not uphold such a decision, not because it found the decision to be "arbitrary," but because the information considered by the agency was not reliable or certain enough to be reasonable. Phrased more succinctly, in reasoned decision making, "[w]hat one senses is a willingness of the court to sift finely through the fabric of the decision at hand to ensure that at every possible point of dispute the factors are openly considered and fairly weighed."[98] As applied by Judge Leventhal in *International Harvester*, the reasoned decision-making test allows the court to delve into the substance of the agency decision in order to improve the quality of the decision itself.[99]

In a NEPA case, the procedural requirements of section 102 serve as guidelines for the court in assessing the kinds of relevant environmental factors that must be weighed.[100] The court looks to see whether the environmental impact assessment (EIA) contains the type of reasoned elaboration required to support an administrative determination. This may seem to be a merely procedural review to insure compliance with section 102 of NEPA, but it is, in fact, substantive review because it looks at the reasoning of the agency to determine the propriety of the results. In *City of Rochester v. United States Postal Service*,[101] the court evaluated the EIA prepared by the Postal Service for construction of a new facility. The Postal Service had concluded that the facility would not "significantly affect the quality of the human environment" under section 102 of NEPA. The court disagreed with the Postal Service, finding not that section 102 had not been complied with, but that

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95. *Id.* at 648 (*citing* Greater Boston Television Corp. v. Federal Communications Comm'n. 444 F.2d 841, 850 (D.C. Cir. 1970)).

96. *Id.* at 644.

97. *Id.* at 645-46.

98. Thompson, *supra* note 15, at 215.

99. *Id.* at 214-15.

100. *See, e.g.*, City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976) discussed in text at notes 101-02 *infra*.

101. City of Rochester v. United States Postal Serv., 541 F.2d 967 (2d Cir. 1976).

> [t]here are a multiplicity of factors, some of which were mentioned in the EIA and several of which were not, which indicate that substantial environmental degradation may result from the challenged project. The EIA . . . falls short of the type of reasoned elaboration which must be required to support an administrative determination of non-substantiality under the EPA.[102]

The "substantial inquiry" test is well illustrated by the Fifth Circuit Court's decision in *Save Our Ten Acres v. Kreger*.[103] In this case, the General Services Administration (GSA) had decided that the construction of a federal office building would not significantly affect the quality of the human environment.[104] The GSA argued that its decision could not be disturbed unless it was found to be arbitrary and capricious. The court disagreed and applied a more searching standard,[105] stating that the decision must be made in a two-step process. First, the court must see if the factors which plaintiffs have charged would degrade the environment. Second, the court must review the evidence to see if the agency conclusion was "reasonable."[106]

Both the "reasonableness" test and the "substantial inquiry" test are stricter applications of the "arbitrary and capricious" test of *Overton Park*. The next question is whether the stricter review of the reasonableness test and the ability of courts to conduct substantial review under section 102 affects the willingness of courts to use section 101 as a standard of review.

The question whether section 101 of NEPA can be used as standards against which to measure the arbitrariness of an agency decision has been a difficult one for courts to decide.[107] In *Environmental Defense Fund v. Corps of Engineers*,[108] the Eighth Circuit con-

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102. *Id.* at 973.

103. 472 F.2d 463 (5th Cir. 1973).

104. *Id.* at 465.

105. *Id.* at 466.

106. *Id.* at 466-67.

107. *See* Leed, *supra* note 88. *See also* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971); Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

In *Calvert Cliffs'*, the Court observed that "the substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances." 449 F.2d at 1112. The court indicated that § 101 of the NEPA provides flexible duties for agencies.

The court in *Hanley v. Mitchell* gave a literal interpretation to the goals in § 101, to find that noise, traffic and crime all affect the urban environment within the meaning of NEPA. 460 F.2d 640 (2d Cir. 1972).

108. 470 F.2d 289 (8th Cir. 1972).

sidered whether the administrative decision that a dam should be constructed was reviewable by the court on the merits.[109] The court observed that section 101 of NEPA imposes upon agencies an obligation to preserve and enhance the environment.[110] The court stated "[t]he unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives."[111] The court concluded that since agencies are required to comply with section 101 of NEPA courts must have an obligation to review agency decisions on these grounds.[112] To find the appropriate standard of review, the court looked to the Supreme Court's holding in *Citizens to Preserve Overton Park v. Volpe*.[113] As applied to NEPA cases, the *Overton Park* test requires the court to determine first, whether the agency reached its decision after a full, good faith consideration and balancing of environmental factors, and second, whether according to the standards in section 101 the "actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[114] The court was also careful to note that "[t]he court is not empowered to substitute its judgment for that of the agency."[115] After this careful analysis of the scope and standard of the court's review, however, the court found that the decision of the Corps of Engineers was not arbitrary.

In 1978, the Supreme Court issued *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*,[117] an opinion which contained a threatening message for the future of substantive review. By stating that NEPA's provisions are "essentially procedural," the Court cast doubt on the notion that section 101 of NEPA could be enforced in the courts.[118] *Vermont Yankee* involved the adequacy of procedures for the licensing of nuclear reac-

109. *Id.* at 293.
110. *Id.* at 297.
111. *Id.* at 298.
112. *Id.*
113. 401 U.S. 402 (1971). *See supra* text at notes 67-69.
114. Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972) (*citing* Calvert Cliffs' Coordinating Comm. v. United States Energy Comm'n, 449 F.2d 1009, 1115 (D.C. Cir. 1971)). However, in *National Helium Corp. v. Morton,* the court determined that *Overton Park* does not govern the scope and standard of review when the procedural requirements of § 102 of NEPA have been complied with. 486 F.2d 995 (10th Cir. 1973).
115. 470 F.2d at 300 (*citing* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).
116. *Id.* at 300-01.
117. 435 U.S. 519 (1978).
118. *Id.* at 558.

tors. The Court of Appeals for the District of Columbia had found that the procedures used by the Atomic Energy Commission were not sufficient to "ventilate the issues" and remanded the question for further proceedings.[119] The Supreme Court questioned whether the lower court had merely determined that the record presented by the agency was inadequate, or whether the court of appeals had found that the procedures followed by the agency were inadequate. The Court decided that the lower court had found the proceedings to be inadequate[120] and indicated that this was a "serious departure" from the basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.[121] The Court chastised the circuit court for "engrafting their own notions of proper procedures upon agencies entrusted with substantial functions by Congress."[122] The Court observed that, if courts were continually to review agency procedures to determine whether the procedures employed were designed to reach the "correct" result, judicial review would be totally unpredictable and agencies would be forced to conduct full adjudicatory procedures in every instance.[123]

The Court also considered the question whether NEPA would allow courts to require agencies "to develop new procedures to accomplish the innovative task of implementing NEPA through rule making."[124] The Court observed that the only procedural requirements imposed by NEPA are the ones stated in the Act.[125] The Court then made a "further observation of some relevance to this case."[126] Pointing out that policy decisions, such as the decision to try nuclear power, are matters for the legislature and should not be reexamined by the courts, the Court stated:

> NEPA does set forth significant substantial goals for the Nation, but its mandate to agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or this court would have reached had they been members of the decisionmaking unit of the agency.[127]

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119. Aeschilman v. United States Nuclear Regulatory Comm'n, 547 F.2d 622 (D.C. Cir. 1976), *cert. granted,* 429 U.S. 1090 (1977); Natural Resources Defense Council v. United States Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *cert. granted,* 429 U.S. 1090 (1977).

120. 435 U.S. at 540-42.

121. *Id.* at 543.

122. *Id.* at 525.

123. *Id.* at 546-47.

124. *Id.* at 548.

125. *Id.*

126. *Id.* at 557.

127. *Id.* at 558 (citations omitted).

In this manner, the Supreme Court appears to have been chastising the lower court for effectuating its own policy judgments on the value of nuclear energy for those of Congress and the agency.

The *Vermont Yankee* Court did not consider whether the "substantive goals" of NEPA provide standards against which to judge agency action, as the question before it was a procedural one. However, the statement that NEPA's mandate is "essentially procedural" could raise doubts in the minds of courts that had used NEPA to modify or nullify agency action found to be offensive to the substantive goals of the Act.[128] At least one observer found this concern with *Vermont Yankee* easy to dismiss. Professor Rodgers observed:

> The decision is out of step, nonetheless, with the dominant strains of the close scrutiny doctrine that has become synonymous with contemporary judicial review of technological decision making by the agencies. For this reason, *Vermont Yankee* is likely to be isolated and confined; the banishment of the decision should not be greatly mourned.[129]

III. *Stryker's Bay Neighborhood Council, Inc. v. Karlen*

By the late 1970's, environmental concerns were being afforded a broader scope of review than other agency decisions, although the scope was less broad than it had been. Also, although many circuit courts had begun using the substantive provisions of NEPA as guidelines in evaluating agency decisions, recent rumblings in the Supreme Court had cast doubt on this approach. It was within this framework that the Second Circuit Court of Appeals considered the litigation which culminated with the Supreme Court's decision in *Strycker's Bay Neighborhood Council, Inc. v. Karlen.*[130]

A. The Lower Court Decisions

The litigation in *Strycker's Bay* involved an urban development project on the West Side of New York City.[131] In 1962, the City Planning Commission (the Commission) and the United States Department of Housing and Urban Development (HUD) began forming a plan for the renewal of twenty square blocks of the city which became known as the West Side Urban Renewal Area.[132] The funds

128. *See supra* notes 85-86.

129. Rodgers, *A Hard Look at Vermont Yankee; Environmental Law Under Close Scrunity,* 67 GEO. L. J. 699, 727 (1979). The decision in *Strycker's Bay* calls this reasoning into question. *See infra* text at notes 174-76.

130. 444 U.S. 223 (1980).

131. Greenhouse, *Top Court Backs Housing Project on the West Side,* New York Times, Jan. 8, 1980, at B1, col. 1.

132. 444 U.S. at 224.

for this project would come both from private parties and from federal programs.[133] The original plan called for a mix of 70 percent middle-income housing and 30 percent low-income housing.[134] In 1969, after much progress had been made on the project, local agencies in New York determined that the proposed number of low-income units would not satisfy an increased need for such units.[135] Accordingly, the Commission modified the plan and designated one site, Site 30, as the location of a high-rise building containing 160 units of low-income housing.[136]

The plaintiffs in this action were corporations and individuals who had invested in the neighborhood, as well as a community group named CONTINUE (Committee of Neighbors to Insure a Normal Urban Environment) whose membership was composed primarily of middle-income housing owners.[137] The plaintiffs feared the conversion of Site 30 to low-income housing would cause the entire neighborhood to deteriorate.[138] They alleged, *inter alia*, that the decision to fund public housing at Site 30 was illegal in that the agency charged with the administration of this project did not comply with NEPA.[139] The defendants, the United States Government, the State of New York, the City of New York, and the Community Group called Strycker's Bay Neighborhood Association, claimed that the changes were necessary to provide adequate low-income housing and that no violation of NEPA existed.[140]

In the first round of litigation, the district court found that section 102(2)(E) of NEPA[141] did not require any agency to study alternatives to projects which did not present "significant environmental ef-

133. *Id.* It was the decision to use federal funds for this project which was the 'major federal action' that triggered NEPA's procedural requirements.

134. *Id.*

135. *Id.*

136. *Id.*

137. Trinity Episcopal School Corp. v. Romney, 387 F. Supp. 1044, 1053 n.10 (S.D.N.Y. 1974). The names of the parties changed a number of times during the nine-year course of this litigation. The original plaintiffs were Trinity Episcopal School Corporation and Trinity Housing Company, Inc., occupants of site 24 of the area. They instituted this action on October 4, 1971, against George Romney, as Secretary of the Department of Housing and Urban Development, the City of New York, and the State of New York. On April 13, 1972, Strycker's Bay Neighborhood Council, an organization favoring the construction of low-income housing, joined as intervenor-defendants. On July 18, 1973, Ronald N. Karlen and Alvin C. Hudgins, middle-income housing owners and the Committee of Neighbors to Insure a Normal Urban Environment (CONTINUE) moved to join as intervenor-plaintiffs; their motion was granted on April 22, 1974, during trial in the District Court. *Id.* at 1047 n.2.

138. *Id.*

139. *Id.* at 1048.

140. *Id.* at 1047.

141. 42 U.S.C. § 4332(2)(e) (1976).

fects" and would, therefore, not require an Environmental Impact Statement. The Second Circuit reversed the district court, stressing that NEPA requires alternatives be considered with respect to "any proposal" involving unresolved conflicts over the use of available resources. The circuit court concluded that the failure to discuss alternatives required a remand[142] and proceeded to list factors which could have been considered by HUD in analyzing alternatives.[143]

On remand, the district court considered the Special Environmental Clearance and Study, a 200-page study of alternatives prepared by HUD in response to the circuit court's opinion. The study evaluated nine alternatives to Site 30 and rejected them all. The leading contender, Site 9, was found to be environmentally "superior."[144] Construction on Site 9, however, would result in a delay of at least two years in the construction project and HUD concluded that, "measured against the environmental costs associated with the minimum two-year delay, the benefits seem insufficient to justify a mandated substitution of sites."[145] The district court, having extensively reviewed the report, was satisfied that alternatives had been examined, that factors suggested by the Second Circuit had been considered, and that the mandate of the circuit court had been complied with.[146] It, therefore, upheld HUD's decision to build on Site 30.[147]

The circuit court, however, was not satisfied. Before analyzing the decision of the district court, the circuit court referred to the scope of its reviewing powers and concluded that it was to use the substantive standards of NEPA to review the merits of the agency decision under the "arbitrary and capricious" standard of the APA.[148] The court then turned to the decision reached by HUD and evaluated it against NEPA section 101(1) which mandates that "the responsibilities of each generation as trustee of the environment for suc-

142. Trinity Episcopal School Corp v. Romney, 523 F. 2d 88, 95 (2d Cir. 1975).

143. *Id.* at 94. The list read:

> Alternative locations or sites; alternative of not building; alternative designs both in use of site and in size of individual units and number of total units; dispersal of the low income units on more sites in the project area; alternative measures for compensating or mitigating environmental impacts; and alternatives requiring action of a significantly different nature which would provide similar benefits with different impacts such as rehabilitation of existing buildings in the Area as public housing projects.

See, e.g., 40 C.F.R. § 1500 (1980).

144. Karlen v. Harris, 590 F.2d 39, 42 (2d Cir. 1978).

145. Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204, 216 (S.D.N.Y. 1978).

146. *Id.* at 218.

147. *Id.*

148. 590 F.2d at 43.

ceeding generations" be fulfilled.[149] The court concluded that HUD had violated this mandate by choosing an alternative that would concentrate the area's low-income residents "at least for the life of the structure."[150] The court also observed that the factor of project delay outranked all other considerations in HUD's decisions, and concluded that "delay is not to be regarded as an overriding factor and that environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight."[151] In its remand instructions, the court stated "what is not to be done . . . [is] the construction of a high-rise apartment building exclusively for low-income families on Site 30."[152] The court then instructed HUD to reach a solution that would avoid such concentration.[153]

Despite the strong language used by the court, its actual holding is somewhat ambiguous. It is difficult to determine from the language in the decision whether the court actually found that HUD's decision was arbitrary and capricious. The only time the court specifically mentioned the arbitrary and capricious standard is when it defined its role as being that of determining whether the agency decision was arbitrary and capricious in light of the substantive standards of NEPA.[154] The court never stated directly that the decision was arbitrary and capricious. There are two possible interpretations of the circuit court's decision to remand. The first is that, by saying that delay cannot be an overriding factor, the court meant that the agency failed to consider other legitimate factors. A decision based on an inadequate consideration of all the factors involved would indeed be arbitrary and capricious. This is basic to the holding in *Overton Park*[155] that a determination of arbitrary and capricious involves "consideration of the relevant factors and whether there has been a clear error of judgment."[156] Support for this analysis is found not only in the fact that the circuit court recognized the standard of review as being the arbitrary and capricious test, but also in the court's detailed description of HUD's report which may indicate that the court felt HUD had ignored segments of the evidence.[157]

149. *Id.* at 44.
150. *Id.*
151. *Id.*
152. *Id.* at 45.
153. *Id.*
154. *Id.* at 43.
155. *See supra* text at notes 113-15.
156. 401 U.S. 402, 416 (1971).
157. *See* Karlen v. Harris, 590 F.2d 39, 42 (2d Cir. 1978). Justice Marshall found this interpretation to be convincing. Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 229-30 (1980) (Marshall, J., dissenting). An example of the court's criticism of the

A better interpretation of the circuit court's holding, however, is that the court was dissatisfied with the weight that the agency had assigned to the factors it considered. A literal reading of the court's statement, "we hold that delay is not to be regarded as an overriding factor and that environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight,"[158] supports this interpretation. The court does not indicate that legitimate factors such as social environmental impact were not considered, but rather that HUD had allowed these factors to be overridden by the factor of delay. This holding goes beyond the method of review which combines the substantive standards of NEPA with the arbitrary and capricious standard of the APA.[159] In mandating compliance with section 101 of NEPA without finding that the consideration of factors was arbitrary and capricious, the circuit court was giving section 101 of NEPA more impact than most courts had been willing to apply.[160] When the Eighth Circuit Court of Appeals stated that section 101 of NEPA sets forth the standards for judicial review of agency action in *Environmental Defense Fund v. Corps of Engineers*, it was careful to hinge its review on the arbitrary and capricious standard found in the APA.[161] In *Karlen v. Harris*, the Second Circuit was not so careful; the holding raised questions as to whether the arbitrary and capricious standard had been applied at all.[162] Even if it were argued that the *Karlen* court was attempting to use a stricter standard of review, as the Fifth Circuit did in *Save Our Ten Acres v. Kreger*,[163] the analogy would fail. In *Save Our Ten Acres*, the court conducted substantive review, while rejecting the arbitrary and capricious standard in favor of one that would more strictly enforce the goals of NEPA.[164] The Fifth Circuit, however, was careful to emphasize the limits of its authority and stated, "[t]his decision has not the slightest intent of indicating what ruling should eventuate from the retest we require."[165] Again, the Second Circuit was not so careful, as it stated quite forcefully that it

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agency's evaluation is the court's observation that the conclusion of the City's analysis was at variance with the facts stated by the parties in their briefs. 590 F.2d at 43.

158. 590 F.2d at 44.

159. *See supra* text at notes 85-87.

160. *Id.*

161. 470 F.2d 289 (8th Cir. 1972). The court stated that "[t]he court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck' was arbitrary ." *Id.* at 300. The court ultimately determined that the agency action under review was not arbitrary.

162. 590 F.2d 39 (2d Cir. 1978). *See supra* text at notes 154-60.

163. 472 F.2d 463 (5th Cir. 1973).

164. *See supra* text at notes 90-106.

165. 472 F.2d at 467.

would not allow construction of a low-income apartment building on Site 30 and instructed HUD to find a solution that would avoid a concentration of low-income families in the area.[166] The circuit court's decision takes substantive review far beyond the arbitrary and capricious test and has been characterized as the "high-water mark among the 'substantive NEPA cases.' "[167]

B. The Supreme Court Opinion

The case was brought before the Supreme Court on a Writ of Certiorari. The Court declined to entertain oral argument and, on January 7, 1980, the Court issued a brief per curiam opinion.[168] The heart of the Court's decision is contained in one paragraph. The Court considered only the question whether courts could require agencies to give "determinative weight" to environmental considerations in agency decision making.[169]

The Supreme Court initially commended the court of appeals for recognizing that its role was defined by the arbitrary and capricious standard of the APA.[170] The Court, however, did not interpret the circuit court as holding that HUD's decision was "arbitrary and capricious."[171] Instead the Court found that the circuit court had ordered HUD to reorder its priorities, a mandate that finds no support in either NEPA or the APA.[172] Accordingly, the Court reversed the judgment of the court of appeals.[173]

In reaching this conclusion, the Court relied on its decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[174] where the Court had stated that, while NEPA establishes "significant substantive goals for the nation," the duties it imposes are "essentially procedural."[175] The Court reiterated that the goal of NEPA was to "insure a fully-informed and well-considered decision" and concluded that, pursuant to *Vermont Yankee*, a court is not required to elevate environ-

166. 590 F.2d at 45.

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

168. 444 U.S. 223 (1980).

169. *Id.* at 227. The Supreme Court's view of the lower court's holding was that "the appellate court held that such delay could not be 'an overriding factor' in HUD's decision to proceed with the development."

170. *Id.* at 226.

171. *Id.* at 228 n.2. The Court here observed that if the court of appeals had found HUD's decision to be "arbitrary and capricious," plenary review might be warranted. *Id.*

172. *Id.*

173. *Id.* at 228.

174. 435 U.S. 519, 558 (1978); *see also supra* text at notes 56-59.

175. *Id.* at 558.

mental concerns over other appropriate considerations.[176] Moreover, the Court stated that, once an agency has complied with NEPA's procedural requirements, "the only role for a court is to insure that the agency has considered the environmental consequences."[177] The Court cited *Kleppe v. Sierra Club*[178] for the principle that courts cannot interject themselves within the area left to agency discretion.[179]

Justice Marshall in dissent disagreed with the Court's interpretation of the court of appeal's holding. He believed the Second Circuit had found HUD's decision to be "arbitrary and capricious."[180] He argued that oral argument was necessary for a proper understanding of the issues involved in the case.[181] Marshall pointed to HUD's own admission that adverse environmental consequences would result from the proposed action and concluded that the circuit court had found the decision to be arbitrary and capricious and, therefore, had not "substitute[d] its judgment for that of the agency as to the environmental consequences of the action."[182]

Marshall also indicated that the Court's reliance on *Vermont Yankee* was tenuous. His concerns with *Vermont Yankee* were twofold. First, he expressed doubt over whether *Vermont Yankee* could really be considered precedent. The relevant passage quoted by the Court in *Strycker's Bay* was characterized by the Court in *Vermont Yankee* as a "further observation of some relevance to this case."[183] This "observation," Marshall noted, was the Court's response to the court of appeals' attempt to assert its own views on nuclear energy under the guise of judicial review,[184] and, therefore, *Vermont Yankee* should be limited to its facts.

Marshall's second concern was that the majority had used *Vermont Yankee* to limit judicial review "solely to the factual issue of whether the agency 'considered' environmental consequences."[185] Not only was this not the test that *Vermont Yankee* calls for, Marshall contended, but it was an "essentially mindless" test that could

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176. 444 U.S. at 227.
177. *Id.*
178. 427 U.S. 390, 410 n.21 (1976). *See supra* text at notes 51-60.
179. 444 U.S. at 227-28. The Court also cited FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976).
180. 444 U.S. at 228-29 (1980) (Marshall, J., dissenting). *See also supra* text at note 157.
181. *Id.* at 231.
182. *Id.* at 229.
183. *Id.*
184. *Id.*
185. *Id.*

allow an agency decision to stand "even if that agency may have effectively decided to ignore [environmental] factors in reaching its conclusion."[186]

IV. ANALYSIS OF *STRYCKER'S BAY*

A. *A Narrow Interpretation of Strycker's Bay*

Strycker's Bay should be interpreted narrowly. It is unlikely that the Supreme Court was attempting to use this case to make broad pronouncements on the role of the judiciary in environmental decision making. There are a number of factors favoring a narrow interpretation of *Strycker's Bay*.

First, the decision was per curiam. The Court did not entertain oral argument, presumably because the case was considered a simple one.[187] Indeed, the issue addressed by the Court was a narrow one—whether NEPA requires that environmental factors be given determinative weight.[188] The Court answered that question in the negative, relying heavily on the reasoning in previous cases. There is nothing "new" in the Court's analysis, except for its pronouncement that the court felt that it was blazing new trails in environmental decision making. Rather, the Court appeared to be reiterating old principles of administrative law solely for the purpose of restraining a wayward circuit court. The lower court had specifically directed HUD to reach a solution which would avoid having a high concentration of low income familes in one area. The Court's desire to emphasize the error of this holding is evidenced by the Court's reference to *FPC v. Transcontinental Gas Pipe Line Corp.*[189] The *Transcontinental Gas* case did not deal specifically with NEPA, but rather with the courts' reviewing authority under the Natural Gas Act.[190] Much of this decision focused on the role of courts in remanding matters to agencies for further consideration. The lower court had remanded a decision to an agency and had requested that the agency reach a particular result. The Supreme Court overturned this decision, saying that courts must refrain from "essentially administrative" functions.[191] Although courts may remand to agencies to ob-

186. *Id.* at 231.
187. *Id.* at 228.
188. *Id.* at 227.
189. 423 U.S. 326 (1976).
190. 15 U.S.C. §§ 717-717w, specifically § 717r(b).
191. 423 U.S. at 333-34.

tain more evidence, it is the agency alone that determines how the evidence should be developed and what effect this evidence should have on its prior decision.[192] By emphasizing that a court cannot enter the area of discretion of an agency and by citing *Transcontinental Gas*, the Court seems to have been chastising the lower court for failing to adhere to traditional administrative law principles by requiring an agency to reach a particular result.

It is also unlikely that the Supreme Court would have chosen *Strycker's Bay* as an opportunity to develop new principles in environmental decision making, as the case did not contain many of the qualities that set environmental decisions apart from other decisions. There were no scientific or technical questions involved and the agency involved was not by its nature antienvironmental. Moreover, the issue before the Supreme Court was so narrow that there was no problem of balancing values and no threat of irreparable harm to the environment. If the Supreme Court had wanted to cut back on the ability of courts to conduct a substantive review of agency decision making, it would have done so in a case where factors weighing against judicial review were present.[193] Accordingly, the only general principle which should be taken from *Strycker's Bay* is that, under NEPA, agencies need not elevate environmental concerns above other legitimate concerns.[194]

B. Implications of Strycker's Bay

1. Scope of Review

Strycker's Bay should have no effect on the scope of review of agency decisions. The trend towards treating environmental decisions with a broader scope of review has largely passed, and the current trend is towards treating environmental decisions less "differently."[195] *Strycker's Bay* will not encourage courts to expand the scope of their review because the decision stresses judicial restraint.[196] Neither, however, will the decision encourage courts to narrow the scope of their review, for the Court merely reiterates the long-standing principle that a court may not interject itself within the area of discretion of the agencies.[197]

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192. *Id.* at 333.
193. *See supra* text at notes 29-33.
194. 444 U.S. at 227.
195. *See supra* text at notes 51-64.
196. 444 U.S. at 227-28.
197. *Id.*

2. Standard of Review

Although *Strycker's Bay* merely reinforces the current trend in scope of review, the decision should have significant impacts for the standards of a court's review. The Court has not, as Justice Marshall feared, created a new "consideration" standard to replace the arbitrary and capricious test. What the Court has done, however, is limit judicial review to the arbitrary and capricious standard, foresaking the stricter standards that had evolved.

In his dissent, Justice Marshall expressed the fear that the Court's opinion limited judicial review solely to the factual question whether the agency had "considered" environmental consequences.[198] He stressed the fact that an agency decision must still be set aside if it is arbitrary and capricious under the APA.[199] Justice Marshall's concerns, however, seem largely unjustified. It is unlikely that by saying "the only role for a court is to ensure that the agency has considered the environmental consequences" the Court has set up a new standard of review.

The Court's role under NEPA—policing the agency's consideration of environmental consequences—is not new. In *Environmental Defense Fund, Inc. v. Corps of Engineers*,[200] the court observed that, since NEPA forces agencies to consider the environmental consequences of their actions, courts have the corresponding power to review the agencies' consideration of these consequences.[201] Rather than introducing a new consideration standard of review, the Court in *Strycker's Bay* is describing a natural consequence of the expanded mandate afforded agencies under NEPA.

By saying that courts must insure that agencies have considered the environmental consequences of their decisions, the Court is not setting up a new consideration standard, but merely rephrasing the old arbitrary and capricious standard. There is little practical difference between evaluating an agency's decision under the arbitrary and capricous standard and under a consideration standard. As defined in *Overton Park*, the arbitrary and capricious standard demands that the decision be based on a consideration of all relevant factors and that there has been no clear error of judgment.[202] In *Strycker's Bay*, the Court does not specifically mention the second

198. *Id.* at 229.
199. *Id.*
200. 470 F.2d 289 (8th Cir. 1972).
201. *Id.* at 298.
202. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

part of the *Overton Park* test—that the court must ensure that there has been no clear error of judgment. However, by saying that the court cannot interject itself within the area of discretion of an agency, the Court really implies this part of the test, for a clear error of judgment is not within the discretion of an agency.

The main effect of *Strycker's Bay* should be on the stricter standards of review that have evolved primarily in cases where agencies' factual determinations were suspect.[203] Although the decision leaves the arbitrary and capricious standard intact, it is likely that in the wake of *Strycker's Bay*, these stricter standards of review may be more difficult to apply. A reviewing court would have to be very careful to conduct its review without appearing to enter into the discretion of the agency or to dictate a result.

3. The Future of Substantive Review

Some courts have determined that *Strycker's Bay* limits the agencies' mandate essentially to procedural matters and narrows the court's role accordingly.[204] This, however, is not an appropriate interpretation in view of the Court's reliance on *Vermont Yankee*. In *Vermont Yankee*, the Court stated, "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."[205] The Court, however, went on to state: "[a]dministrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute."[206]

Even courts which have interpreted *Strycker's Bay* broadly have concluded that some form of substantive review, albeit a very limited one, is still necessary to enforce the goals of NEPA. In *Grazing Fields Farm v. Goldschmidt*,[207] the First Circuit Court of Appeals observed that there are two steps to a court's review of an agency decision under NEPA. The first step is to conduct a substantive review of the agency's action to determine whether it is arbitrary and capricious.[208] This substantive review is quite narrow, however, and allows the court only to assure itself that environmental conse-

203. *See supra* text at notes 90-106.

204. *See, e.g.*, South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980). *But see* note 212 *infra*.

205. 435 U.S. at 558.

206. *Id.* (citation omitted).

207. 626 F.2d 1068 (1st Cir. 1980).

208. *Id.* at 1072.

quences have been considered.[209] The second step is to assure compliance with NEPA's procedural provisions.[210] The *Grazing Fields Farm* court applied this test to an EIS prepared for the construction of a highway through a privately owned farm and concluded that NEPA's procedures had not been followed.[211] The court had nevertheless conducted a limited substantive review of the agency's action.[212]

The necessity of conducting a limited substantive review to effectuate the arbitrary and capricious test is supported by the Council on Environmental Quality (CEQ). In considering the impact of *Strycker's Bay*, the CEQ concluded that the decision would not force reviewing courts to sit idly by as environmental harms were perpetrated. Rather,

> if the agency selects an alternative causing unusually significant environmental damage to obtain a particularly insignificant short-term gain, without substantial evidence in the record of legitimate countervailing considerations, such action may be modified or set aside by the reviewing court as constituting an abuse of discretion or arbitrary and capricious action within the meaning of the APA and tested against the substantive goals and policies set forth in NEPA's § 101(b).[213]

Although it appears that courts can no longer invalidate agency decisions merely because the court finds they violate the spirit of NEPA, it also appears that Justice Marshall's fears that an agency could proclaim "consideration" of environmental consequences while ultimately ignoring these factors in reaching its decision are largely unjustified.

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209. *Id.*

210. *Id.*

211. *Id.*

212. *See also* South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980). There the court also indicated that review of NEPA decisions was limited to the "arbitrary and capricious" standard, but implied that limited substantive review was still available. The question before the court involved the assessment of economic costs and benefits tangential to environmental consequences. The court observed that, even though the question fell within the area of agency discretion, substantive review of the underlying assumptions was still necessary. The court admitted that the review was to be narrowly focused and indirect, but indicated that it was necessary to determine whether the "actual balance of costs and benefits struck by the agency according to the standards of § 101 and § 102 of NEPA was arbitrary." *Id.* at 1012.

213. Letter from Nicholas C. Yost, General Counsel, Council on Environmental Quality, to Phillip T. Cummings, United States Senate, Committee on Environment and Public Works, Feb. 4, 1980, at 6, appended to Brief for Environmental Committee of the Boston Bar Association as Amicus Curiae, Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068 (1st Cir. 1980).

In evaluating the impact of *Strycker's Bay* on substantive review, it should not be forgotten that the issue addressed by the Court was a narrow one, and the brevity of its opinion indicates the Court's desire to keep its decision narrow in scope. All that should be interpreted from the decision is the holding that courts are not allowed to elevate environmental concerns over other legitimate concerns.

V. Conclusion

Strycker's Bay Neighborhood Council, Inc. v. Karlen raises questions as to the role of the courts in environmental decision making. It seems that the "new era" of judicial review heralded by Judge Bazelon is over. The courts, however, are not left as mere "rubber stamps" for agency action. Although the scope of judicial review is no longer broader for environmental concerns than it is for other matters, the standard of review remains the two-pronged "arbitrary and capricious" test advanced by the Court in *Overton Park*. By requiring that courts police agencies' consideration of environmental consequences and not altering the principle that agencies can be reversed for clear errors of judgment, the Court has left room for limited substantive review.

Strycker's Bay should be interpreted narrowly because of the narrowness of the issue addressed by the Court. The Court's per curiam opinion and the particular facts of the case indicate that the Court was more interested in restraining a wayward Circuit Court than in establishing new rules for environmental law.