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A Calll to Revitalize the Heart of NEPA: The Alternatives Analysis

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NOTE

A CALL TO REVITALIZE THE HEART OF NEPA:THE ALTERNATIVES ANALYSIS

*Kelly Wittorff**

> The call to care for the Earth . . . is a human impulse as well as a moral imperative. In so many modes — intuitive, aesthetic, spiritual, religious — humans know that by protecting the Earth, they find a sense of place and purpose and fulfill a moral obligation to the future.
>
> President's Council on Sustainable Development[1]

I. INTRODUCTION 361
II. NATIONAL ENVIRONMENTAL POLICY ACT 364
A. *Statutory Framework* 364
B. *Judicial Interpretation* 366
III. THE ALTERNATIVES REQUIREMENT 369
A. *Background* 369
B. *Case Analysis* 372

I. INTRODUCTION

Prior to the enactment of the National Environmental Policy Act (NEPA), the 1960's embodied an "environmental awakening" supported by a growing grassroots backdrop.[2] The awakening was brought to a climax when an estimated twenty million people gathered nationwide to express support for the environment at the first annual Earth Day celebration on April 22, 1970.[3] This rise in environmental consciousness and concern was also reflected in the legislation and court decisions of the period.[4] Congress passed a myriad of environmentally protective

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1. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1111 (2d. ed. 1996).

2. Harvey Bartlett, Comment, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1),* 13 TUL. ENVTL. L.J. 411, 415-16 (2000).

3. *See id.* at 416.

4. *Id.*

legislation including the Wilderness Act of 1964,[5] the National Historic Preservation Act of 1966,[6] and the Wild and Scenic Rivers Act of 1968.[7] However, the birth of NEPA in 1969 constituted the most far-reaching environmental legislation enacted by Congress and remains as such to date.[8]

At first glance, NEPA seems nothing more than an "innocuous, vague statement of idealistic vision."[9] However, it has the effect of completely revamping federal decision-making in a nonpareil manner.[10] NEPA first sets forth a broad national commitment to promoting and protecting the quality of the environment.[11] Rather than erecting an elaborate regulatory scheme applicable to the private sector, the act imposes environmental responsibility on all public officials through specific procedural mandates.[12] These statutory mandates serve two main purposes: 1) to ensure that agencies take a "hard look" at the environmental consequences of the proposed action, and 2) to inform other interested groups and individuals, providing a springboard for public comment.[13]

Since its enactment, NEPA has spawned continuous, massive litigation and debate over its original legislative intent and its effectiveness in the environmental arena. In particular, the alternatives requirement under NEPA is described in the regulations as being the very "heart of the EIS" and has been critical to sustaining NEPA's impact on proposed federal actions.[14] The alternatives requirement is intended to force agencies to

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5. 16 U.S.C. § 1131-1136 (1997).

6. 16 U.S.C. § 470-470(mm) (1997).

7. 16 U.S.C. § 1271-1287 (1997).

8. *See* Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99 (1994).

9. Jean M. Emery, Comment, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973 (1996).

10. *See id.* at 973.

11. 42 U.S.C. § 4331. The overall purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." *Id.*

12. In this section of NEPA, "Congress authorizes and directs that, to the fullest extent possible: 1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter." 42 U.S.C. § 4332. These requirements include that agencies have as an integral part in proposals for legislation and other "major federal actions significantly affecting the quality of the human environment, a detailed statement" foregoing requirements mentioned in the text. *Id.* § 4332(C).

13. Robertson v. Methow Valley Citizen Council, 490 U.S. 332, 356 (1989).

14. Under this provision, agencies "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear

consider carrying out a proposed goal in a less environmentally damaging way by mandating that agencies analyze a reasonable scope of alternatives to the proposed action.[15] Unfortunately, the requirement itself has weakened due to judicial interpretation and an ineffective standard of review.[16]

This note will include statutory and judicial background information regarding NEPA and a discussion of the alternatives requirement, from past to present. It is my hope that after this inquiry, practitioners will realize the deficiency and narrowness that has been imputed to this vital requirement under NEPA, as well as the possible environmental effect it could have if revitalized by agencies and the courts.

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basis for choice among options by the decision-maker and the public." 40 C.F.R. § 1502.14 (1995). Specifically, the provision requires that certain alternatives be explored including, but not limited to, reasonable alternatives, alternatives eliminated from the study, alternatives not within the jurisdiction of the lead agency, the no action alternative, and mitigation measures. 40 C.F.R. § 1502.14. In addition, the agency should identify a preferred alternative or alternatives, as well as devote "substantial treatment" to all of the alternatives considered in the EIS. 40 C.F.R. § 1502.14. Whether an EIS is required is also a highly litigated issue that has generated considerable case law, especially with regard to exceptions to preparing an EIS. *See* Melaney Payne, *Critically Acclaimed but not Critically Followed—The Inapplicability of the National Environmental Policy Act to Federal Agency Actions:* Douglas County v. Babbit, 7 VILL. ENVTL. L.J. 339 (1996) (articulating circumstance under which courts have not required the EIS to be prepared by agencies).

15. Most agencies are not experts in the various environmental fields and therefore, careful analysis and studies should be composed in order to help agencies even determine what environmental impacts will result from proposed actions and what alternatives exist to minimize or avoid any detrimental environmental consequences. Without agencies self-imposing NEPA requirements or interested parties bringing suit for judicial review of agency decision-making, agencies may not balance environmental concerns in the cost-benefit analysis conducted before most major federal projects are implemented.

16. *See* Administrative Procedure Act, 5 U.S.C. § 702 (1994) (stating the right of review); *see also* Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(1994) (setting the standard of review as arbitrary and capricious). Section 706 states that a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." According to court interpretation, a reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . ." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The inquiry engaging this standard should be thorough, but the standard itself is still a narrow one. *See id.* In addition, courts should give agencies deference in relying on the reasonable opinions of their experts. *See id.* This standard of review grants the agencies a great deal of discretion in so far as meeting the procedural requirements under NEPA.

II. NATIONAL ENVIRONMENTAL POLICY ACT

A. *Statutory Framework*

NEPA has been hailed by some as the Magna Carta of environmental legislation, incorporating "action-forcing"[17] mechanisms for ensuring informed and reasoned decision-making that includes consideration of environmental impacts to the human environment.[18] Section 101 announces NEPA's basic policy "to use all practicable means and measures. . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."[19] While discretion and flexibility abound in these "sweeping policy goals,"[20] the section following sets forth the critical requirements for which NEPA is more commonly known.[21] Section 102 directs federal agencies to prepare an Environmental Impact Statement (EIS) for all "major federal actions significantly[22] affecting the quality of the human environment."[23]

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17. The term "action-forcing" was introduced during the Senate's consideration of NEPA. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 372 (1989). It refers to the idea that when an agency prepares an EIS, the agency ensures that environmental goals are "infused into the ongoing programs and actions of the Federal Government" as NEPA intended. *Id.* at 372. The regulations also enforce this notion in section 102(2) by containing "action-enforcing" provisions that capture the letter and spirit of the Act. 40 C.F.R. § 1500.1(a) (1987).

18. Weinberg, *supra* note 8, at 973.

19. 42 U.S.C. § 4331(a).

20. *Robertson*, 109 S. Ct. at 1845.

21. *See* Lori Hackleman Patterson, Comment, *NEPA's Stronghold: A Noose for the Endangered Species Act?*, COLUM. L. REV. 753, 755-56 (1996-97) (discussing the debate over whether a NEPA exemption exists with respect to the Secretary of the Interior when action is taken pursuant to the Endangered Species Act). It is interesting to note that the comment addresses this issue in such a way as to concede that NEPA has already been weakened considerably due to court interpretation. *See id.*

22. The term "significantly" requires consideration of

> context and intensity: a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. . .(b) Intensity. This refers to the severity of the impact . . . The following should be considered in evaluation of intensity: (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. (2) The degree to which the proposed action affects public health or safety. (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas. (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

23. 42 U.S.C. § 4332(C).

Interestingly, the agencies themselves determine initially whether an action rises to the level of requiring an EIS.[24]

To help ensure compliance with this section, Congress formed a central agency, the Council of Environmental Quality (CEQ), to implement NEPA through the development of specific guidelines binding on agencies.[25] In 1978, CEQ promulgated regulations that explain the NEPA process in some detail.[26] In particular, CEQ flushed out the concept of the EIS, introduced so briefly in section 102.

The EIS is often a massive undertaking for federal agencies and is central to most of the disputes and controversies involving NEPA implementation.[27] In fact, an entire procedure called the Environmental Assessment (EA) is dedicated merely to deciding if agencies must create an EIS.[28] Not surprisingly, agencies use their own procedures in creating the EA and based upon the results, an agency may make a Finding of No Significant Impact (FONSI).[29] If a FONSI is made, no EIS is required; but if the EA reveals a significant effect on the environment, then an EIS is required by NEPA.[30]

Once it is determined that an EIS is necessary, agencies must comply with further procedural requirements for ensuring that the EIS is adequate.[31] The five categorical requirements that must be discussed in an EIS are: 1) environmental impacts of the proffered action, 2) unavoidable adverse effects and alternatives, 3) the relationship between short-term uses and maintenance of long-term productivity, and 4) any irreversible commitment of resources.[32] Of these five requirements, the alternatives requirement is imperative to environmentalists. It, in effect, requires agencies to brainstorm other less environmentally harmful means to proceed with a project.

A question that has received considerable discussion and vigorous debate in regards to these five components has been whether review of

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24. 40 C.F.R. § 1501.14 (1995).

25. *See* Patterson, *supra* note 21, at 757.

26. 42 U.S.C. § 4321-4370(a).

27. *See* PERCIVAL, *supra* note 1, at 1111.

28. The Environmental Assessment must provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9 (1995). In addition, the EA should aid the agency in achieving compliance with NEPA, even when no EIS is necessary and should include a discussion of the purpose of the proposal and alternatives of the proposed action as required in the EIS. 40 C.F.R. § 1508.9 (1995). This provision basically reinforces the alternatives requirement by forcing agencies to generate alternatives regardless of whether an actual EIS is required under NEPA.

29. *See* Patterson, *supra* note 21, at 757.

30. *See id.*

31. 40 U.S.C. § 4332(C)(i)-(v).

32. *Id.*

agency action generating an EIS has a substantive aspect or whether it is wholly procedural.[33] The difference between these two interpretations is extremely significant. The former interpretation allows NEPA to mandate certain outcomes with respect to environmental concerns.[34] The latter allows agencies to balance results as they see fit, as long as the guidelines are followed to the extent that the decision was an informed one.[35] It is on this very issue that judicial interpretation becomes cardinal.

B. *Judicial Interpretation*

Compliance with NEPA is not discretionary and is subject to review by federal courts to enjoin federal actions failing to meet NEPA's procedural requirements.[36] While federal courts cannot reverse or modify a federal agency action, they may order an agency to prepare an initial EIS or prepare a new EIS if the prior EIS is found to be inadequate.[37] In general, the regulations under NEPA receive considerable deference from the courts. However, as the principal arbiters of NEPA, the courts have also given further meaning to these provisions through judicial interpretation and decisions. In the last few decades, treatment of NEPA has changed dramatically.[38]

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33. *See* Weinberg, *supra* note 8, at 99.

34. Substantive review would permit the courts to review the actual assessment and balancing of factors that agencies weighed in the decision-making process. If the courts believed that the agency improperly assigned too much weight to certain factors in light of environmental concerns, the courts could overturn the agency decision based on its substantive merit. The procedural aspect of NEPA, however, solely permits courts to review the agency process, and as long as the agency considered relevant environmental factors, no further inquiry by the court is allowed.

35. *See* Patterson, *supra* note 21, at 757.

36. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980).

37. *See* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989) The Court addressed the situation of how NEPA applies after a project receives initial approval or has already begun implementation. *See id.* at 371. The agency argued that NEPA should not apply past a certain point in the life of the project because the opportunity to weigh costs to the environment against the benefits of the project disappears at some point. *See id.* The Court responded by reviewing the agency's decision not to prepare a supplemental EIS under NEPA's overall objectives to provide the public with assurances that the agency made a reasoned decision considering environmental impacts. *See id.* at 377. Although the Court ultimately concluded that a supplement was not necessary, it did reiterate the importance of keeping an EIS updated with current and accurate information regardless of what stage a project is in. *See id.* The CEQ regulations require that agencies "shall prepare supplements to either draft or final environmental impact statements if..." the agency makes substantial changes involving environmental concerns or new circumstances or relevant information bearing on the environmental impacts of the proposed project. 40 C.F.R. § 1502.9(c) (1987).

38. *See* Percival, *supra* note 1, at 1111.

When first introduced, federal courts recognized a substantive dimension to NEPA.[39] NEPA common law began with Judge Skelly Wright's opinion in *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n* in 1971.[40] Wright found that judicial review was essential to ensuring that the legislative intent of protecting environmental quality was not lost in the "vast hallways of the federal bureaucracy."[41] In parsing the language in NEPA, Wright found both substantive and procedural standards for federal agencies to follow. He concluded that section 101's "substantive mandate" recognized in section 102(1) required agencies to substantively review environmental factors in the decision-making process.[42] Therefore, if a reviewing court found that the "actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values," it could reverse a substantive decision of the agency.[43] In justifying this interpretation, Wright insisted that Congress had not intended NEPA to merely be a "paper tiger,"[44] a term that may more properly describe NEPA today.

For nearly a decade after Wright's decision, almost all of the federal circuit courts interpreted a substantive mandate in NEPA to conform to its environmental protection policy and allow for judicial review on the merits.[45] However, four Supreme Court decisions followed and completely eroded substantive review under NEPA entirely by dicta.[46] The first case came in 1976, *Kleppe v. Sierra Club,*[47] and involved the question of whether the agency needed to formulate an EIS for the entire region prior to issuing mining leases.[48] The issue in no way involved the availability of substantive review under NEPA.[49] In a footnote,[50] the Court declared that it could only ensure that agencies take a "hard look" at environmental impacts and that the Court could not substitute its judgment for that of the agency or interject into an area of agency discretion.[51]

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39. *See* Weinberg, *supra* note 8, at 100.

40. Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

41. *Id.* at 1111.

42. *Id.* at 1112 n.5.

43. *Id.* at 1115.

44. *Id.* at 1114.

45. *See* Bartlett, *supra* note 2, at 422.

46. *See id.* at 427.

47. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

48. *See id.* at 394.

49. *See* Bartlett, *supra* note 2, at n.105.

50. The footnote was surprising because the federal case law leading up to *Kleppe* not only recognized a substantive component to NEPA, but had also determined the scope and availability of substantive review under NEPA. As a result of this federal case law, Justice Marshall dissented from the opinion. *See Kleppe*, 427 U.S. at 421 (Marshall, J. dissenting).

51. *See id.* at 410 n.21.

The second renowned case, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*,[52] involved review of rulemaking procedures that led to the issuance of two construction permits for nuclear facilities.[53] The Court of Appeals found that the rulemaking procedures were insufficient to meet the requirements of NEPA section 102(2)(C). The Court reversed and relied in dicta on the "hard look" doctrine formulated from a footnote in *Kleppe*.[54] Expanding on *Kleppe*, the Court went further to find that the "role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review."[55]

The effect of *Vermont Yankee* is that courts cannot impose new procedures on agencies not required by NEPA's plain language.[56] However, this does not preclude courts from expounding on existing procedures through mere interpretation, thereby sidestepping the *Vermont Yankee* issue of additional procedures. In addition, the *Vermont Yankee* court found that although "NEPA does set forth significant substantive goals for the Nation . . . its mandate to the agencies is essentially procedural."[57] The blow struck by *Vermont Yankee* not only reaffirmed the substantive decline of NEPA, but also restrained the role of the courts of providing a meaningful check on agency action.

The third case was *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,[58] which involved a decision by the Department of Housing and Urban Development to build low-income housing.[59] In holding that the decision to build was not arbitrary, the Court framed the analysis in terms of meeting NEPA's procedural requirements.[60] Again, the Court referred to past dicta and cited *Vermont Yankee* for the conclusion that once agencies have followed NEPA's procedural requirements to reach a decision, the role of the Court is limited to simply assuring that environmental consequences were considered. In other words, agencies need not elevate environmental concerns over other considerations that are deemed appropriate.

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52. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

53. *See id.* at 527, 552-55.

54. *See id.* at 555 (quoting *Kleppe*, 427 U.S. at 410 n.21).

55. *Id.*

56. *See* Bartlett, *supra* note 2, at 429.

57. *See Vermont Yankee*, 435 U.S. at 555.

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

59. *See id.*

60. *See id.* at 223-27.

The final case in the Court's progression toward dismantling substantive review was *Robertson v. Methow Valley Citizens Council*.[61] In *Robertson*, the Court approved the position taken in *Strycker's Bay*.[62] The Forest Service had issued a permit for a ski resort.[63] The EIS for the ski resort was challenged for failing to have adequately fulfilled NEPA's procedural requirements of examining worst-case scenarios and developing mitigation measures.[64] Following what may be characterized as a trend in supporting land development, the Court held that section 102(2)(C)'s requirements did not call for any actual mitigation or worst-case scenarios at all.[65]

Once again, the Court diverged from the issue in the case and declared in dicta that "although [NEPA's] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[66] In what has become a coin phrase for NEPA, the Court summed up NEPA's effect by asserting that "NEPA merely prohibits uninformed—rather than unwise—agency action."[67]

Consequently, these cases set the course for diminishing NEPA's strength to its sole ability to force agencies to follow the prescribed procedural requirements.[68] Although the EIS remains an essential mechanism for environmentalists, its potential for re-shaping agency actions and elevating environmental concerns has been halted, if not entirely lost.

III. THE ALTERNATIVES REQUIREMENT

A. *Background*

In turning now to the main focus of this Article, it is necessary to first confront the specific provisions in NEPA making up the alternatives requirement. First, NEPA requires that an EIS prepared by a petitioning agency include a discussion of alternatives to the federal action being considered when the proposal involves "unresolved conflicts concerning alternative uses of available resources."[69] While the CEQ regulations

61. *Robertson*, 490 U.S. 332 (1989).
62. *See* Bartlett, *supra* note 2, at 431.
63. *See Robertson*, 490 U.S. at 332.
64. *See id.* at 337, 345-46.
65. *See id.* at 353.
66. *See id.* at 350.
67. *See id.* at 351.
68. *See* Patterson, *supra* note 21, at 758.
69. This provision mainly deals with the requirements for agency jurisdiction. 42 U.S.C. § 4332(D).

describe the alternatives requirement as being the very "heart of the EIS,"[70] courts have similarly referred to it as the "linchpin of the entire impact statement."[71]

The alternatives provision directs agencies to "rigorously explore and objectively evaluate all reasonable alternatives,"[72] as well as to discuss the reasons for rejecting alternatives from the detailed study.[73] This provision charges agencies with the task of considering whether a proposed action can be carried out in a less environmentally damaging manner or whether alternatives exist making the action unnecessary altogether. The regulations require at least three types of alternatives to be considered before a reasoned choice can be made: 1) the no-action alternative,[74] 2) other reasonable courses of action,[75] and 3) mitigation measures not already included in the proposed action.[76] Once alternatives are identified, agencies must "devote substantial treatment" to each alternative considered so that the analysis for each alternative is substantially similar to the degree of analysis devoted to the proposed action itself.[77]

As the Court noted in *City of Alexandria v. Slater*,[78] NEPA's provision requiring "reasonable alternatives" to be discussed does not offer much guidance for reviewing courts.[79] Therefore, courts begin an alternatives analysis by first looking at the objectives of the proposal itself.[80] These stated objectives necessarily define the range of alternatives an agency must consider.[81] For this reason, agencies are precluded from defining the proposal's objectives too narrowly, so as to avoid assessing a wider range of alternatives to the proposed action.[82] For example, an agency cannot define its objective in such a way that the objective can only be

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70. 42 C.F.R. § 1502.14 (1995).

71. *See* Monroe County Conservation Soc'y, Inc. v. Volpe, 472 F.2d 697, 698 (1978).

72. It is important to stop and note the language that Congress used to impose these procedural requirements. Surely Congress meant strict application of these provisions based on their use of words such as "rigorously" and "objectively evaluate *all* reasonable alternatives." Unfortunately, these requirements seem to lack the muster that Congress originally intended.

73. 40 C.F.R. §§ 1502.13-.14 (1995).

74. The no-action alternative refers to the current status quo, what the circumstances are, or would be if the agency took no action at all.

75. This subsection basically refers to all other reasonable alternatives that the agency must consider, not withstanding the no-action alternative.

76. 40 C.F.R. § 1502.14 (1995).

77. 40 C.F.R. § 1502.14(b) (1995).

78. City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999).

79. *Id.*

80. *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D. Cir. 1991).

81. *Id.* at 196.

82. *Id.* at 196; *see also* Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1175 (10th Cir. 1999).

accomplished in one way, the applicant's proposed project.[83] In addition, agencies must consider alternatives that only partially meet the proposed objectives.[84]

If the agency's objectives are deemed reasonable, an agency's alternatives analysis is then examined under a "rule of reason" approach. The "rule of reason" confers upon agencies a duty to affirmatively generate and consider a range of alternatives[85] sufficient to allow for a reasoned choice.[86] In conducting this analysis, courts give substantial deference to the agency's policy-making role and expertise.[87] In addition, agencies still retain discretion in making the ultimate choice of action, as long as the agency can demonstrate that the choice was a reasoned one.[88] This approach to agency decision-making under NEPA is a direct result of court interpretation limiting NEPA to a procedural dimension.[89]

Although an agency must consider alternatives that partially or completely meet the stated objectives of the proposed action,[90] the concept of alternatives must necessarily be restricted by some notion of feasibility.[91] Courts have found that agencies need not consider alternatives requiring remote and speculative implementation or whose effect cannot be reasonably ascertained.[92] In addition, alternatives that can be implemented only after significant changes in government policy or legislation need not be considered by agencies, according to court interpretation.[93] Nonetheless, the agency should go "beyond mere assertions" and provide sufficient information and reasoning to enable interested parties to comment on the EIS.[94]

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83. *See Colorado*, 185 F.3d at 1175.

84. *Callaway*, 524 F.2d 79, 91 (2nd Cir. 1975). The challengers in this case argued that the final EIS was inadequate and that a complete EIS should accompany all stages of the decision-making process. *See id.* The Court agreed that an EIS and all its accompanying supplements must be circulated and considered prior to any decision being reached or the purposes of NEPA become a mere mockery of legislation. *See id.* at 91-92.

85. *See* Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 835 (D. Cir. 1972) (stating that when the federal action being proposed is part of a coordinated plan to deal with a larger problem, the range of alternatives that an agency must consider is broadened as well).

86. California v. Block, 690 F.2d 753 (9th Cir. 1982).

87. *See id.*

88. *See* Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 499 F.2d 1109 (D. Cir. 1971); *see also* State of N.C. v. FAA, 957 F.2d 1125, 1134-35 (4th Cir. 1992).

89. *See* Envtl. Def. Fund v. Massey, 986 F.2d 528, 532 (Dist. Ct. Cir. 1993) (stating NEPA "does not dictate agency policy or determine the fate of contemplated action").

90. *See Callaway*, 524 F.2d at 93.

91. *See Vermont Yankee*, 435 U.S. at 551.

92. *See* Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist., 914 F.2d 1174, 1180 (9th Cir. 1990).

93. *See Callaway*, 524 F.2d at 93.

94. *See id.*

The "rule of reason" approach, coupled with the fact that the agency itself is conducting the analysis, creates a situation heavily laden with bias.[95] For this reason, NEPA may regain its strength simply by having the EIS prepared by independent agencies lacking any vested interest in the results. At least one court has recognized the possibility of agencies halfheartedly meeting NEPA's alternative requirement and held that agencies must consider a range of alternatives proportional to the significance of the environmental impact that will result from the proposed action.[96] However, until Congress seriously addresses this possibility, the courts will remain the sole arbiters and means of independent agency decision-making review.

B. *Case Analysis*

As far back as 1972, shortly after NEPA's enactment, at least one justice recognized the importance of strictly enforcing the alternatives requirement. Justice Douglas wrote a dissenting opinion in *Scenic Hudson Preservation Conference v. Fed. Power Comm'n*[97] arguing that petition should be granted to decide whether the Federal Power Commission complied with NEPA's obligations in granting a license for construction of a pumped storage power project.[98] In listing NEPA's overall goals, Douglas noted that section 102 is meant to ensure that an environmentally acceptable alternative will be chosen, if and when a project is approved.[99]

Conceding that agency decisions should be given some deference, Justice Douglas still argued that the substantial evidence test was not the proper reviewing standard for decisions from agencies lacking environmental expertise.[100] In addition, Douglas also believed that the procedural obligations under section 102 of NEPA were not met.[101] Instead, it seemed that environmental considerations were only brought to light after private citizens brought them to the agency's attention.[102]

The agency limited its alternatives analysis to those alternatives that had been submitted by the environmentalists opposing the project.[103] According to Douglas, this clearly failed the procedural requirements of NEPA directing agencies to consider the environmental impacts of its

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95. *See City of Alexandria*, 198 F.3d at 865.

96. *See* City of New Haven v. Chandler, 446 F.Supp 925 (Dist. Conn. 1978).

97. Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 407 U.S. 926 (1972) (J. Douglas, dissenting).

98. *See id.*

99. *Id.* at 929.

100. *See id.* at 931.

101. *Id.*

102. *See id.* at 932.

103. *See id.*

actions.[104] Rather, the agency should have used its expertise to generate alternatives having less of an environmental impact, without regard to whether or not opposing groups proposed alternatives.[105] Completely overlooked by the agency, no information at all was provided with respect to not building the project at all.[106]

The ramifications of the agency's failures fall on Congress and the public since neither can decipher the value judgments made by the agency from a record so lacking in analysis.[107] Whether or not NEPA allows for substantive review of agency decisions, Congress and the public are still entitled to understand the judgments made by the agency.[108] With more insight than he realized, Douglas acknowledged that if such an EIS is allowed, NEPA "becomes only a ritual and like the peppercorn a mere symbol that has no vital meaning."[109]

Unfortunately, hindsight has proven Douglas's prediction to be a reality today and lax interpretation of NEPA's requirements are to blame. Recent cases continue to reflect the reluctance of the courts to strictly enforce NEPA's procedural requirements, especially the alternatives requirement.[110] In *City of Alexandria v. Slater*, the Federal Highway Administration's approval of a proposal to replace the Woodrow Wilson Memorial Bridge was challenged.[111] In the agency's final EIS, eight alternative proposals were discussed.[112] However, each of the alternatives, except the no-build alternative, consisted of a twelve-lane design and the only difference in these alternatives was the kind of river crossing proposed (tunnel or bridge).[113]

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104. *See id.*

105. *See id.*

106. In other words, the agency failed to consider the no-action alternative specifically mandated for consideration in the regulations. *See id.*

107. *See id.* at 933. The function of the EIS is to inform the public and Congress as to how an agency reached a decision. *See id.* As a result of the inadequacy of the EIS, Douglas noted that there is no way to calculate how much money was gained at the expense of the environmental destruction that will result from the project. *See id.* The purpose of the EIS is not served when the public is told that the project alternative is cheap and reliable, although causes destruction to the surrounding ecology. *See id.* Douglas focused on the informative purposes of NEPA and how this function cannot be carried out when the agency record does not disclose reasons for choosing the preferred alternative over other alternatives that may be less environmentally damaging. *See id.*

108. *See id.*

109. *Id.* Douglas went on to state that the decision below would be the "beginning of the demise of the mandate of NEPA."

110. *See City of Alexandria*, 198 F.3d; *see also* City of St. Louis v. Slater, 212 F. 3d 448 (D. Cir. 1999).

111. *See City of Alexandria*, 198 F.3d at 862.

112. *See id.*

113. *See id.*

The Court began its alternatives analysis by noting that NEPA does not substantively restrict the agency's choice of objectives.[114] The Court then engaged in an inquiry that analyzed the reasonableness of the objectives and the subsequent reasonableness of the alternatives fulfilling those objectives.[115] The main contention from appellees concerned the agency's failure to consider a ten-lane bridge as a reasonable alternative.[116] In rejecting the argument of the appellees, the Court concluded that the agency need not consider a ten-lane bridge because it did not offer a "complete solution to the problem."[117] This contention completely ignores prior precedent requiring agencies to consider alternatives that either partially or completely achieve the proposed objectives.[118]

In another recent case, challengers brought an action to contest the approval of an airport expansion project.[119] The Court majority held that the FAA had met NEPA's procedural obligations, including assessing all reasonable alternatives to the proposed project.[120] However, a dissenting opinion stated that the FAA and the Court had "misconceived the nature and purpose of the NEPA process."[121] Stating that the alternatives requirement is a key part of the evaluation, the dissenting opinion concluded that the FAA had excluded reasonable alternatives from the

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114. *See id.* at 865. The Court also noted that the district court impermissibly interpreted NEPA as a substantive statute instead of a procedural one by suggesting the agency's failure to prioritize environmental goals violated NEPA.

115. *See id.* The agency focused primarily on transportation and safety issues in articulating the objectives of the proposed bridge reconstruction.

116. *See id.* at 866. The agency conducted a study showing that a ten-lane bridge could accommodate almost as much traffic as what was projected for daily traffic flow on the bridge in 2020.

117. *Id.* The Court seemed very concerned with the fact that the agency had the sole responsibility for solving the congestion problem resulting from the existing bridge and that no other agency would probably step in and alleviate the congestion that might result from building only a ten-lane bridge.

118. *See Callaway,* 524 F.2d at 93.

119. *See City of St. Louis,* 212 F.3d at 448.

120. *See id.* The FAA utilized a three tier system where in the first tier each alternative had to fulfill operational goals of the project to continue on to the second tier analysis. *See id.* at 456. Only two alternatives plus the no-action alternative survived the first two tiers of analysis for various reasons, none environmental considerations. *See id.* Petitioners believed that several of the alternatives rejected in the first two tiers of the analysis were reasonable and therefore, should have been included in the detailed EIS.

121. *See id.* at 464. (J. Arnold, dissenting). While recognizing that no substantive review under NEPA is possible for FAA's decision, Judge Arnold concluded that NEPA consists of more than the majority conceded. *See id.* Although NEPA is procedural, agencies must still go through the thorough process prescribed in the statute, exposing the agency's decision-making to the scrutiny of Congress as well as the public.

analysis.[122] These cases represent the current trend of allowing NEPA procedural requirements, especially the alternatives requirement, to fall to the wayside of relaxed judicial interpretation.

In conclusion, Congress's enactment of NEPA gave environmentalists high hopes for serious changes to be made and enforced in the agency decision-making process with respect to environmental concerns. The decline and eventual end to substantive review of agency decisions under NEPA severely hinders the ability of environmental groups to ensure that agencies are seriously considering the environmental impacts of their decisions. However, strict procedural enforcement of NEPA's requirements can and should be an effective tool for reviewing agency processes.

Although the administrative state is a necessary aspect of modern government, it lacks the types of checks and balances afforded to the traditional branches of government. For this reason, the public should be given the opportunity to challenge the validity of agency processes, and courts should give NEPA the force Congress intended. Of the procedural mandates enforced under NEPA, the alternatives requirement has the most promise for ensuring environmental consciousness in agency decision-making. Without strict court enforcement, however, the requirement will lie with the rest of the act as a mere "paper tiger."

122. *See id.* The dissenting opinion noted that the three tier system allowed for what might have been reasonable alternatives. In addition, alternatives that only partially meet the agency's objectives can lead the decision-maker to conclude that accomplishing part of the objectives with less environmental impacts is preferred. *See id.* at 465.