NEPA in the Supreme Court: A history of defeat

By

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Submitted to the Graduate Faculty of
North Carolina State University
in partial fulfillment of the
requirements for the Degree of

Master of Environmental Assessment

Raleigh, North Carolina

2015

Approved by advisory committee:

Committee Chair – Gary Blank

Abstract

Green, Zachary C. Master of Environmental Assessment. NEPA in the Supreme Court: a history of defeat.

Since its enactment in 1970, the National Environmental Policy Act (NEPA) has been the focus of seventeen Supreme Court cases. Government and industry have defeated environmental organizations in each of those seventeen cases. This begs the question "what does it take to defeat government/industry in the Supreme Court" on issues applicable to the Act. An analysis of the seventeen cases shows that the Supreme Court, relying only on the procedural aspects of NEPA, has favored government and industry due to government and industry's success at following procedures. The focus on the procedural mandate of the Act has diminished the substantive mandate into an afterthought. The crux of NEPA litigation revolves around the preparation of an Environmental Impact Statement (EIS), yet the results of that statement are only meant to inform, not dictate, an agency's decision to pursue an action. This focus essentially leaves agencies unaccountable for upholding the substantive element of NEPA and could undermine the Act's intent, allowing negative environmental consequences and limiting NEPA's full potential. Over time, the focal point of each case involved more and more intricate procedural requirements. This highlights government and industry effectiveness in following the steps of NEPA and suggests environmental organizations must rely more heavily on litigation involving the most technical procedural requirements in an effort to defeat government and industry at the Supreme Court level.

Biography

Zachary Green received a Bachelor's Degree in Environmental Technology from North Carolina State University in 2010. Following graduation, he spent five months as an environmental/safety responder in the Gulf of Mexico during the Deepwater Horizon oil spill. Once clean-up efforts subsided, he returned to North Carolina and began working with Deeco, Inc. as an environmental technician. While working with Deeco, he sampled stack gas at industrial sites all over the country. His passion for understanding and protecting the environment led him to pursue a Master of Environmental Assessment Degree in 2012. In 2013, Zach accepted a position with the State of North Carolina where he was responsible for the enforcement and compliance of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) and the state's Asbestos Hazard Management Program. While completing his Master's Degree and working in state government, Zach was exposed to many aspects of law and policy, leading him to pursue law as a means of protecting the environment. He was recently accepted at the University of Oregon's School of Law where he will concentrate on Environmental and Natural Resources Law.

Acknowledgements

First and foremost, I would like to thank my fiancée for standing with me through the pursuit of this degree. I know it was difficult, especially during the last year as we have been preparing for our wedding, a cross-country move, and job relocations. You have kept me steady through turbulent times and I am grateful.

Thank you to my parents, who have always encouraged me to follow my passion and believed in my abilities. Your encouragement has given me strength and continues to provide inspiration.

Thank you to Linda Taylor, who gave me the freedom to pursue a project I was deeply interested in and provided help throughout both my undergraduate and graduate career.

Thank you to Dr. Gary Blank, who provided me with important guidance throughout this project. His insight and understanding of NEPA helped shape my project and give it direction.

Thank you to all the professors and lecturers in the Environmental Assessment program for providing expertise and enrichment in the vast field of environmental science.

Finally, thank you to Dr. Robert Bruck of Louisburg College, who helped me see that my passion for environmental stewardship could be enhanced through education and realized through action.

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Introduction

The National Environmental Policy Act (NEPA), signed into law January 1, 1970, established a national policy for environmental protection with the goals of maintaining and enriching the ecosystem[1]. Stated specifically, the Act seeks to carry out the environmental policy by requiring the Federal government to, using all practicable means necessary,

> "(1)fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2)assure for all Americans safe, healthful, productive, and aesthetically 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)**)

The Act also established the Council on Environmental Quality (CEQ) to assist in the implementation of NEPA and provide compliance guidance to agencies[1]. Not only has NEPA been referred to as the Magna Carta of environmental policy, but many other countries have adopted similar policies, attending to the need for effective environmental management worldwide[2]. Enforcement of the Act has largely been through litigation, as no single executive branch agency is charged with its enforcement like other environmental statutes (such as the Clean Air Act)[3]. Thus, in the majority of cases, litigation is the last line of defense to prevent significant environmental harm. Since NEPA's enactment, the Supreme Court has ruled on seventeen cases: in all seventeen

cases, the Court has sided with government/industry as opposed to the environmental groups[4]. One would think that, out of seventeen cases spanning almost forty years, at least some rulings would favor the environmental organizations. The abysmal record has likely disheartened environmentalists over the decades while painting the picture of a Supreme Court ignorant of environmental issues. This perfect record begs the question: "What does it take to defeat government/industry in the Supreme Court?"

NEPA's primary tool for achieving its lofty goals of environmental enrichment is the requirement of federal agencies to produce a detailed statement on the impacts of an agency's particular proposal for a project[5]. The environmental statement, referred to as the Environmental Impact Statement (EIS), was integrated into the Policy Act to compel Federal agencies to consider the consequences of their actions on the environment when making decisions on projects[6]. This part of the Act establishes procedural mechanisms as opposed to the substantive mechanisms established in the goals section of the Act[5]. Once an action significantly affecting the environment is proposed by an agency, certain steps must be taken before that action can occur. The procedures an agency must follow under NEPA prior to major Federal action can be seen in Figure 1:

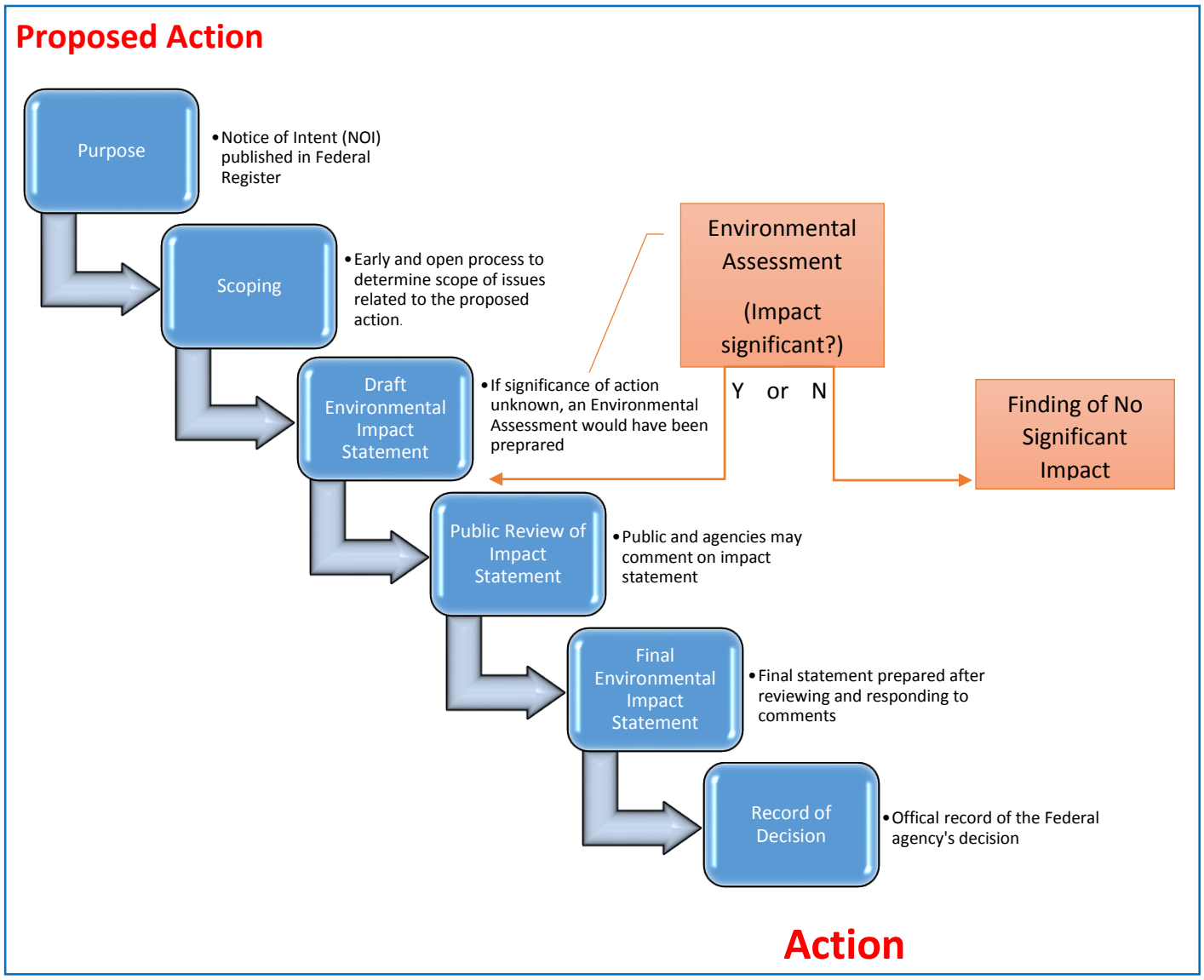


Figure 1: Steps an agency must take to satisfy NEPAs procedural requirements

The "action-forcing" procedures of NEPA, namely the EIS preparation, are responsible for almost all litigation involving the Act because the court system has, over time, eliminated the possibility of ruling on the substantive aspects of NEPA. This substantive dynamic includes concepts of environmental stewardship with goals of environmental enrichment. Though not quantifiable, NEPA's substance displays the intent of Congress to pass a policy that would protect the environment and maintain the ecosystem[5].

Methods

In order to assess the role of NEPA in the Supreme Court, each case was analyzed by identifying the specific statutes and regulations important in justifying the Court's arguments and rulings. Along with finding specific statutes and regulations supporting the decisions on NEPA compliance and interpretations of NEPA, the opinions of the Court were also discussed to accompany those statutes and regulations and further the understanding of each ruling. In some cases, the opinions of the lower courts (either the District Court, the Court of Appeals, or both) were also referenced to show how the regulations were interpreted at different stages of litigation. In addition to a discussion of each case, tables were created to highlight the most important statutes and regulations responsible for the decisions reached by the Court.

Results

The following tables summarize the specific NEPA statutes and CEQ regulations interpreted by the Supreme Court in rendering their decisions on NEPA compliance. Table 1 shows the exact location of each requirement in either the United States Codes (USC) or Code of Federal Regulations (CFR) referenced by the Court in each case, along with a summary of the holding in each case.

Table 1: Location of each statute and regulation as they relate to each case

Case	Decision	Held	Location**
U.S. v SCRAP - 1973	6 - 2	NEPA was not intended to repeal by any implication any other statute	42 U.S.C. § 4332(2)(C); 42 U.S.C. § 4335
Aberdeen & Rockfish RR v SCRAP - 1975	7 - 1	An EIS "shall accompany the proposal through the existing agency review process."	42 U.S.C. § 4332(2)(C)
Flint Ridge Development Co. v Scenic Rivers Association of OK - 1976	8 - 0	NEPA was not intended to repeal by any implication any other statute	42 U.S.C. § 4333; 42 U.S.C. § 4335
Kleppe v Sierra Club - 1976	7 - 2	An EIS is required "in every recommendation or report" on "proposals for legislation and other major Federal actions."	42 U.S.C. § 4332(2)(C)
Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council - 1978	7 - 0	The term "alternatives" is not self-defining	42 U.S.C. § 4332(2)(C)(iii); 42 U.S.C. § 4335; 40 C.F.R § 1502.16(e)
Andrus v Sierra Club - 1979	9 - 0	An EIS is required on "proposals for legislation and other major Federal actions."	42 U.S.C. § 4332(2)(C); 40 C.F.R § 1508.17
Strycker's Bay Neighborhood Council, Inc. v Karlen - 1980	8 - 1	NEPA does not require that environmental concerns be elevated over other considerations	42 U.S.C. § 4332(2)(E)
Weinberger v Catholic Action of Hawaii - 1981	9 - 0	A "Hypothetical EIS" is not required by NEPA	42 U.S.C. § 4332(2)(C)
Metropolitan Edison v People Against Nuclear Energy - 1983	9 - 0	NEPA does not require an agency to assess every impact, only environmental impacts	42 U.S.C. § 4332(2)(C)
Baltimore Gas & Electric Co. v Natural Resources Defense Council - 1983	8 - 0	NEPA does not require that environmental concerns be elevated over other considerations	42 U.S.C. § 4332(2)(C)
Robertson v Methow Valley Citizens Council - 1989	9 - 0	A complete mitigation plan is not required by NEPA	42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R § 1502.14(f), 40 C.F.R § 1502.16(h), 40 C.F.R § 1502.22
Marsh v Oregon Natural Resources Council - 1989	9 - 0	When specialists express conflicting views, an agency may rely on its own experts when determining whether a supplemental EIS is necessary	40 C.F.R. § 1502.9(c)(1)
Robertson v Seattle Audubon Society - 1992	9 - 0	In the lower courts, requiring a supplemental EIS for timber harvesting in spotted owl territory was at issue, but NEPA became irrelevant once the case reached the Supreme Court	40 C.F.R. § 1502.9(c)(1)
Department of Transportation v Public Citizen - 2004	9 - 0	The EA did not need to take in to account certain effects the agency could not control (the President lifting a moratorium)	40 C.F.R. § 1508.7, 40 C.F.R. § 1508.8
Norton v Southern Utah Wilderness Alliance - 2004	9 - 0	A supplemental EIS is not required if major Federal action is not ongoing	42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.9(c)(1)(ii)
Winter v Natural Resources Defense Council - 2008	5 - 4	An EIS is not required if an EA results in a FONSI	40 C.F.R. § 1506.11, 40 C.F.R. § 1508.9, 40 C.F.R. § 1508.13
Monsanto Co. v Geertson Seed Farms - 2010	7 - 1	An agency can take some action on a proposal before an EIS is preprared	40 C.F.R. § 1506.1

Statutes in United States Code
Regulations in Code of Federal Regulations

Table 2 shows which requirements were at issue in each case by identifying the general section of federal law where each statute exists.

Table 2: General location of each NEPA requirement related to each case

		U.S. v SCRAP	Aberdeen v SCRAP	Flint Ridge v Scenic Rivers	Kleppe v Sierra Club	Vermont Yankee v NRDC	Andrus v Sierra Club	Strycker's Bay v Karlen	Weinberger v Catholic Action	Metropolitan v PANE	Baltimore Gas v NRDC	Robertson v Methow Valley	Marsh v Oregon Nat. Res. Council	Robertson v Seattle Audubon	DOT v Public Citizen	Norton v SUWA	Winter v NRDC	Monsanto v Geertson
CEQ Regulations	40 C.F.R. § 1508																	
	40 C.F.R. § 1506																	
	40 C.F.R. § 1502																	
NEPA Statutes	42 U.S.C. § 4335																	
	42 U.S.C. § 4333																	
	42 U.S.C. § 4332																	
		1973	1975	1976	1976	1978	1979	1980	1981	1983	1983	1989	1989	1992	2004	2004	2008	2010

The following summaries detail the background of each case and the NEPA issue examined by the Supreme Court (and sometimes by the lower courts).

1. United States v. Students Challenging Regulatory Procedures (SCRAP) – 1973

The first case decided by the Supreme Court encompassing NEPA took place approximately three years after the Act was signed into law. Involving the Interstate Commerce Commission (ICC) and SCRAP (along with various environmental groups), the case addressed whether the ICC had to comply with NEPA in setting freight rates for railroads shipping various materials including recyclables[7]. The nation's railroads sought to impose a 2.5% surcharge on freight rates to increase revenues as an emergency measure before a permanent rate increase on certain materials was to go into effect[7]. Shippers and carriers requested a suspension on the surcharge pending a 7-month review (the timeframe written in the ICC's statutory language for rate increases), and SCRAP filed suit stating that failure to suspend the surcharge would cause their members harm economically, recreationally, and aesthetically[7]. Further, they stated that the rate increases would deter the use of recyclables, increasing the use of competing materials and, thus, harming the environment[7]. SCRAP's main argument was that the ICC failed to include the environmental impact statement required by NEPA when ordering carriers to collect the surcharge[7]. NEPA states that an EIS (a "detailed statement") is required for

> "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" (**42 U.S.C. § 4332(2)(C)**)

and SCRAP argued that the impact on the environment from the surcharge constituted a major federal action[7]. The Supreme Court ruled that, based on § 15(7) in the Interstate Commerce Act (ICA) and a favorable ruling *in Arrow Transportation Co. v Southern R. Co.*, the ICC was given sole authority by Congress to suspend rates based on their lawfulness[7]. The Court stated that "NEPA was not intended to repeal by implication any other statute" and referred to specific language in NEPA:

> "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." (**42 U.S.C. § 4335**) [7]

The policies of the ICA, specifically § 15(7), would be significantly undermined if courts were able suspend rates because of alleged non-compliance with NEPA, according to the Court[7].

2. Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Procedures (SCRAP) – (1975)

Following the first Supreme Court case involving NEPA, the second case again included SCRAP and the railroad companies. The ICC issued a report in 1972 stating it did not find the selective rate increases referenced in the first case unlawful after review and, after terminating the temporary 2.5% surcharge, ordered the new rate increases into effect[8]. Because of this finding, the ICC also did not prepare an EIS, but began an investigation into the ICC's entire rate structure to determine if it interfered with environmental policies[8]. After this, however, the ICC reopened its investigation into the lawfulness of the new rate increases as they pertained to environmental effects and in 1973 released a Final Environmental Impact State (FEIS) [8]. This impact statement corroborated their

earlier finding that the selective rate increases on recyclables would not create a significant environmental impact[8]. SCRAP filed suit, arguing that the ICC failed to comply with NEPA because it did not hold an oral hearing prior to adopting the FEIS, and that the 1972 order on rate increases was an existing agency review process[8]. SCRAP stated that the ICC should have started over on the process and prepare a new impact statement, hold hearings, and reconsider the lawful determination on recyclables[8]. The language in NEPA dictates that the EIS

> "shall accompany the proposal through the existing agency review processes" (**42 U.S.C. § 4332(2)(C)**),

but the Court held that the oral hearing before the 1972 order was not an existing agency review process[8]. They also stated that the time at which an EIS must be prepared is when a report or recommendation on a proposal for major federal action is made:

> "every recommendation or report on proposals for legislation and other major Federal actions" (**42 U.S.C. § 4332(2)(C)**) [8].

Prior to the order issued by the ICC in 1972, no "proposal" had been made; therefore, the Court held that the earliest time NEPA required an EIS was at the time of the order (which was *after* the oral hearing) [8]. The Supreme Court also held that the ICC did not have to start over because, from the outset, they consulted with other experts, discussed environmental issues during hearings, and issued Draft Environmental Impact Statements (DEIS) prior to those hearings[8]. Thus, the *procedures* required by NEPA were fully complied with[8]. Finally, the Court, addressing the FEIS and its analysis of the rate structure, found that the final statement was sufficient (rather than deficient as alleged by SCRAP) [8]. The 1972 order was issued after governmental and non-governmental agencies submitted comments on the DEIS and the ICC's report covered 92 pages that addressed, among other things, general and specific environmental consequences due to the rate increases[8]. The FEIS,

issued in 1973, covered 150 pages that included an expanded discussion on rate increases after receiving comments from multiple agencies and others, including those who filed suit[8].

3. Flint Ridge Development Co. v. Scenic Rivers Assn. of Okla. – 1976

The Department of Housing and Urban Development (HUD) requires a statement of record (SOR) that includes various data and information (some environmental) be filed by developers registering a subdivision[9]. The SOR, after 30 days from filing, becomes effective unless it is determined to be inaccurate or incomplete by the Secretary of HUD[9]. Flint Ridge Development filed a SOR for a subdivision and during the 30-day period, Scenic Rivers Association and others petitioned HUD to prepare an EIS on the subdivision development before the SOR could go into effect[9]. HUD denied the petition to prepare an EIS and the environmental organization filed suit, arguing that this was a major federal action significantly affecting the quality of the human environment and, accordingly, HUD must comply with NEPA by preparing an EIS[9]. The Supreme Court held that the EIS requirement in NEPA was inapplicable in this situation[9]. They found that there existed a "clear and fundamental conflict of statutory duty" due to the 30-day timeframe written into the Interstate Land Sales Full Disclosure Act (the act requiring a SOR be registered with HUD) [9]. The Court held that NEPA "must yield" where a conflict in statutory authority exists[9]. The Court *did* reject the first of two arguments by HUD and Flint Ridge, which declared that, because HUD had no powers to take environmental consequences into account in their decisions affecting a SOR, the actions were not "major.[9]" The Court cited NEPA's language, specifically "to the fullest extent possible", indicating the Act included all federal agencies, not just those that can deal with environmental impacts[9]. However, the Supreme Court referenced their previous position in *United States v. SCRAP* where they found that "NEPA was not intended to repeal by implication any other statute."

> "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." (**42 U.S.C. § 4335**) [7,9]

They highlighted the fact that an EIS could not feasibly be prepared in 30 days and the Interstate Land Sales Full Disclosure Act did not give the Secretary of HUD the ability to suspend the SOR process for preparation of an EIS[9]. The suspension of the 30-day time period could be applied in "virtually all cases" had this single case favored the environmental organizations[9]. Further, the Court understood that even though a conflict in statutory duty existed, the process under the Disclosure Act incorporated some environmental facets as well as the ability of the Secretary to require more information if deemed necessary[9]. In this respect, it seems the Court felt the following NEPA requirement was met:

> "All agencies of the Federal Government……shall determin[e] whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose…….such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act." (**42 U.S.C. 4333**)

The Supreme Court made clear that HUD still had the ability to review environmental aspects of development, facilitating the Act's intent[9].

4. Kleppe v. Sierra Club - 1976

In the fourth NEPA case to reach the Supreme Court, the Sierra Club, along with other environmental organizations, brought suit against federal agencies, including the Department of the Interior (DOI), the agency responsible for approving development of coal reserves on federally owned lands[10]. The Sierra Club and others alleged that, because the "Northern Great Plains region" of the United States (Wyoming, Montana, North and South Dakota) is rich in coal and likely to have

coal mined from its lands, a single EIS for the entire region ("Northern Great Plains region") was required by NEPA[10]. Without a regional EIS, environmental organizations argued that development of coal reserves in the area could not continue[10]. In 1972, the DOI, along with the aid of other agencies, formed a federal-state task force that conducted a study on the impacts (economic, social, and environmental) of resource extraction in the region comprising Montana, Nebraska, North Dakota, South Dakota, and Wyoming[10]. This study was known as the Northern Great Plains Resources Program (NGPRP) [10]. The final report on this study was released in 1975[10]. Environmental groups alleged that the study, which contained the "contemplation" of regional development of coal reserves, was justification that a "proposal" for major Federal action existed and, in turn, required a comprehensive regional EIS[10]. The Supreme Court held that no proposals for regional development existed, only proposals of local or national scale (both of which had proper EIS documentation) [10]. The Court said that, absent a plan on regional proposal, it is impossible to analyze environmental consequences, alternatives, and resource commitments, making the preparation of an EIS impractical[10]. They also said that the NGPRP did not contain any indication that a regional plan was being developed and, even if one were, until a recommendation or report on a proposal for major federal action is made, an EIS is not required[10]. Again, NEPA specifically says an EIS is required for:

> "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." (**42 U.S.C. § 4332(2)(C)**)

Third, the Supreme Court said that the theory about "contemplation" of regional action (a theory the Court of Appeals put forth in their decision favoring the environmental organizations) does not require an EIS because NEPA explicitly states that a final statement need only be ready at "the time

at which it makes a recommendation or report on a proposal for federal action" (SCRAP and SCRAP II) [10]. The Court found the DOI recommendations and reports for actions only encompassed local and national scope, and in those cases, impact statements had been prepared in accordance with NEPA requirements[10].

5. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. (NRDC) – 1978

In 1972, the Atomic Energy Commission (AEC) initiated proceedings to address the consideration of environmental effects related to the uranium fuel cycle[11]. The "fuel cycle rule" resulted from those rulemaking proceedings; however, prior to the rule's effective date (1974), the AEC did not include the environmental impacts associated with the uranium fuel cycle in their environmental statement addressing Vermont Yankee's nuclear plant because the impacts were shown to be insignificant[11]. The AEC approved a license to Vermont Yankee Nuclear Power Corp. to operate a nuclear power plant after hearings before the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board[11]. Also, the AEC granted a permit to construct two nuclear reactors to Consumers Power Co. after hearings before the Advisory Committee on Reactor Safeguards[11]. During this time, the CEQ amended regulations pertaining to EIS preparation, specifically adding consideration of energy conservation as an alternative to proposed projects[11]. After the AEC declined to readdress permit proceedings to consider energy conservation as an alternative, suit was filed to deny the permit for construction of the two nuclear reactors[11]. The NRDC and others argued that, regarding Vermont Yankee's power plant, the AEC must assess the impact on the environment from fuel reprocessing and disposal in licensing proceedings[11]. Regarding Consumer Power Company, they argued that the EIS was defective for failing to include energy conservation as an alternative[11]. The Supreme Court held that the AEC acted within its

authority in licensing Vermont Yankee Nuclear Power and that NEPA does not permit a court to require procedures exceeding those required by the Administrative Procedure Act (APA) [11]. They "search[ed] in vain for something in NEPA which would mandate such a result[11]." They cited previous rulings (*Aberdeen & Rockfish R. Co. v. SCRAP* and *United States v. SCRAP*) where they stated "NEPA does not repeal by any implication any other statute[8,9,11]."

> "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." (**42 U.S.C. § 4335**)

The Court relayed that NEPA cannot revise the procedures of the APA[11]. Regarding the EIS claimed to be defective for not considering energy conservation as an alternative, the Supreme Court stated that the term "alternatives" is not "self-defining", and, in this case, the environmental effects of the alternatives were "deemed only remote and speculative possibilities[11]." NEPA refers to alternatives in an EIS in the following language:

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement…..on – (iii) <u>alternatives</u> to the proposed action." (**42 U.S.C. § 4332(2)(C)(iii)**)[5]

Even though the CEQ promulgated regulations that would require energy conservation as an alternative in subsequent impact statements, those "guidelines were not made applicable to…..final statements filed with the Council before January 28, 1974" (a time after which the permit for construction had been granted) [11]. Those regulations state that part of the discussion of environmental consequences in an EIS must include:

> "e<u>nergy requirements and conservation potential</u> of various alternatives and mitigation measures." (**40 C.F.R. § 1502.16(e)**)

The Court admitted that the "concept of alternatives is an evolving one," and while future EIS documentation should include energy conservation as an alternative under CEQ requirements, procedures prior to the promulgated regulations did not require such information[11]. At the time the AEC promulgated the regulations at issue in this case, the Court held their decisions were not "arbitrary and capricious" and reiterated the fact that a court could not substitute its judgement for that of an agency's as long as the procedural requirements of NEPA were met[11].

6. Andrus v. Sierra Club - 1979

In Andrus v. Sierra Club, environmental organizations contended that an EIS should have been prepared when budget cuts to the National Wildlife Refuge System were proposed[12]. They claimed that these curtailments would "significantly affect the quality of the human environment[12]." The Supreme Court held that NEPA does not require agencies to prepare an EIS for appropriation requests because these requests are not "proposals for legislation" as stipulated in NEPA[12]. Further, the Court referenced the CEQ's own interpretation of legislation, which excludes appropriations entirely[12]. Appropriation requests are not "proposals for……major Federal actions" under NEPA[5]. Where an EIS is only required for

> "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" (**42 U.S.C. § 4332(2)(C)**),

appropriation requests are not applicable for the purposes of NEPA[12]. The CEQ's regulations issued in 1978 stated legislation:

> "includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but <u>does not include requests for appropriations</u>" (**40 C.F.R. § 1508.17**).

Prior to the 1978 regulations issued by the CEQ, their guidelines stipulated that NEPA was applicable to "recommendations or favorable reports relating to legislation including requests for appropriations," but then President Carter ordered the CEQ to create uniform regulations[12]. Because the CEQ guidelines were found to be "ill-suited" to the budgetary process, the resultant regulations were issued and applied to this case[12].

7. Strycker's Bay Neighborhood Council, Inc. v. Karlen – 1980

A housing project proposed for construction in Manhattan originally entailed 70% middle-income housing and 30% low-income housing, but was revised to include only low-income housing[13]. This project was approved by HUD in 1972, although suit was filed in 1971 by various groups including Trinity Episcopal School Corporation[13]. The groups alleged that HUD did not give environmental impacts associated with a 100% low-income housing plan determinative weight with the delay a relocation would cause (two years or more, according to HUD) [13]. Prior to the Supreme Court ruling, the Court of Appeals held that HUD's consideration of alternatives to the low-income site were "limited or nonexistent" and cited language in NEPA that said an agency must:

> "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." (**42 U.S.C. § 4332(2)(E)**) [13]

The Supreme Court held that HUD followed all procedures required by NEPA and 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 environmental consequences[13]." The Court ruled that HUD did consider the environmental impacts in its decision[13]. Just as the Court stated in *Vermont Yankee Nuclear Corp. v. Natural Resources Defense Council*, NEPA insures an informed and well-considered decision, but not one that a court would necessarily reach were they members of that

agency[11,13]. In a lone dissenting opinion, Justice Marshall stated "whether NEPA, which sets forth 'significant substantive goals,'……permits a projected 2-year time difference to be controlling over environmental superiority is by no means clear. Resolution……is certainly within the normal scope of review," suggesting a court *could* rule on the substance of NEPA to an extent[13].

8. Weinberger v. Catholic Action of Haw./Peace Ed. Project – 1981

In Hawaii, the Navy constructed ammunition storage facilities that were capable of storing nuclear weapons[14]. The Navy, however, is not at liberty to confirm or deny when nuclear weapons are being stored at certain facilities[14]. Therefore, the Environmental Assessment (EA) they prepared for those facilities did not state nuclear weapons would be stored at those facilities and the impacts of such storage were not discussed[14]. The EA determined that no significant impact on the environment would result from the construction of those facilities[14]. Respondent groups filed suit against the Navy, arguing that an EIS must be prepared for those facilities and must include nuclear weapon storage as an impact[14]. The District Court sided with the Navy, but the Court of Appeals held that the Navy must prepare a "hypothetical" EIS for a facility considered "nuclear-capable[14]." The Supreme Court held that no language in NEPA dictates a "hypothetical" EIS be prepared and that public disclosure of an EIS is subject to the Freedom of Information Act (FOIA) [14]. Further, they held that no "proposal" to store nuclear weapons had been made, only that the facilities were capable of storing nuclear weapons[14]. NEPA states that:

> "to the fullest extent possible……all agencies of the Federal Government shall……(C)include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" (**42 U.S.C. § 4332(2)(C)**).

The Supreme Court stated that determining whether NEPA was complied with to the fullest extent possible was "beyond judicial scrutiny" in this case[14]. The provisions of NEPA do not override exemption from public disclosure on classified materials protected by the FOIA[14]. The Court acknowledged "it [was] clear Congress intended that the public's interest in ensuring…..federal agencies comply with NEPA must give way to the Government's need to preserve military secrets[14]." They cited *Kleppe v. Sierra Club*, where they held that an EIS does not need to be prepared for a project that is "contemplated," only for a project that is "proposed[10,14]."

9. Metropolitan Edison Co. v. People Against Nuclear Energy (PANE) – 1983

Metropolitan Edison owned two nuclear power plants at Three Mile Island and one of those plants, TMI-2, incurred an accident that damaged the nuclear reactor[15]. Because of the incident, the other plant's (TMI-1) reactor was shut down by order of the Nuclear Regulatory Commission (NRC) while it could be determined if restarting that reactor was safe[15]. The NRC held a hearing to invite parties to submit reports on whether "psychological harm" or other effects of the Three Mile Island partial meltdown should be considered in the safety determination[15]. Although PANE contended that restarting the plant would cause psychological harm, the NRC decided not to consider this contention[15]. PANE filed suit, arguing that NEPA required the NRC to consider this harm in their determination of whether to restart the reactor at TMI-1, as new fears had arisen since the original EIS was prepared for the reactors[15]. The Supreme Court held that NEPA, although containing language that dictates the protection of "human health and welfare," meets the goals of human health protection "by means of protecting the physical environment[15]." Specifically, NEPA addresses:

> "actions significantly affecting the quality of the human environment……(i)the environmental impact of the proposed action…..(ii)any adverse environmental effects which cannot be avoided" (**42 U.S.C. § 4332(2)(C)**),

where the use of the term environment[al] indicates "that Congress ha[d] chosen to pursue [NEPA's goals] by means of protecting the *physical environment*," not by protecting the psychological health of humans unrelated to the "world around us[15]." NEPA does not require that agencies assess every impact associated with an action, only those impacts affecting the physical environment.

10. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc. (NRDC) – 1983

In evaluating the environmental impacts of the fuel cycle for nuclear power plants, the NRC decided licensing boards should assume that the storage of nuclear wastes would not significantly impact the environment when making decisions for licensing plants under the procedures required by NEPA[16]. The NRDC and others argued that the NRC did not take into consideration "uncertainties" in the "zero-release" assumption (the generic rules stating long-term storage of wastes did not create a significant environmental impact) and that individual licensing proposals contained uncertainties that would need to be addressed individually[16]. The Court of Appeals found the generic rulemaking "arbitrary and capricious" (the standard against which rulemaking, under the APA, is measured); however, the Supreme Court overturned that finding, holding that the rules were not "arbitrary and capricious[16]." These generic rules, deemed the Court, fully complied with NEPA procedures and provided a "hard look" at environmental consequences[16]. Under NEPA, agencies must follow action-forcing procedures that ensure this "hard look" is taken, which allows agencies to make informed decisions[16]. The action-forcing provisions in NEPA state that in

> "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment……a detailed statement [must be included]" (**42 U.S.C. § 4332(2)(C)**),

and the Supreme Court stated again (as in *Vermont Yankee Nuclear Power Corp. v. NRDC*) that NEPA "has twin aims:" to consider the environmental impacts in proposed actions and to inform the public of those proposals[11,16]. Based on proceedings before the NRC and the evidence compiled by the NRC in its rulemaking decision, the Court found "it…clear that the Commission, in making this determination, ha[d] made the careful consideration and disclosure required by NEPA[16]." Just as the Court stated in *Strycker's Bay Neighborhood Council v. Karlen*, agencies are not required to "elevate environmental concerns over other appropriate considerations[13,16]." Also, just as the Court said in *Strycker's Bay* and *Vermont Yankee*, agencies are free to make decisions the Supreme Court may not necessarily make in that particular agency's position[11,13,16]. The only role for the courts is to determine whether environmental consequences are considered in the decision-making process[16].

11. Robertson v. Methow Valley Citizens Council – 1989

The Forest Service conducted a study that found a particular site in a national forest in Washington had the potential to be developed as a downhill ski resort[17]. In 1978, Methow Recreation Inc. sought a special use permit from the Service to develop a ski resort at that site (Sandy Butte) [17]. The Service's decision to grant a recreational special use permit in a national forest is subject to NEPA's mandates, as it is a "major Federal action" within the meaning of the Act[17]. The Forest Service prepared an EIS that included consideration of effects on the environment (including those on wildlife and air quality) both on- and off-site[17]. The EIS included steps for mitigation; however, those steps were said to be "conceptual" and would become "more specific [during]….the planning process[17]." In 1984, the Service decided to issue the permit, finding that "no major adverse effects

would result" from the resort development, other than secondary effects that could be mitigated by state and local agencies[17]. Methow Valley Citizens Council brought suit alleging that the EIS was inadequate for its failure to include a complete mitigation plan, or, where lacking information existed, to postulate a "worst-case scenario" in the EIS[17]. Before revising its guidelines, the CEQ had a "worst-case analysis" requirement when information on proposed projects was either too costly to gather or unavailable[17]. This requirement was revised in 1986, guiding agencies to produce "a summary of existing credible scientific evidence which is relevant to evaluating…..impacts[17]." The amendment only requires that consequences be addressed in the context of "scientific opinion," not in the context of a worst-case scenario[17]. Specifically, the CEQ guidelines state:

> "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking. (a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement. (b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts

based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, 'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation." (**40 C.F.R. § 1502.22**)

"Reasonably foreseeable" does not mean a "worst-case" scenario under NEPA, but does include impacts that may have a low probability of occurrence. The Supreme Court held that a worst-case scenario did not need to be generated for that EIS and that a complete mitigation plan was not required by NEPA[17]. The Court stated that "reasonably foreseeable" means information that "will generate……consequences of greatest concern to the public and of greatest relevance to the agency's decision[17]." Further, they said that a worst-case analysis, in some instances, could distort "the decision-making process by overemphasizing highly speculative" impacts[17].

Finally, regarding the question of whether a complete mitigation plan was necessary, they held that NEPA requires "mitigation be discussed in sufficient detail," not that a complete mitigation plan be developed, as new information and uncertainties can alter mitigation measures[17]. NEPA itself implies mitigation is part of the EIS process in the language requiring a statement to include:

> "any adverse environmental effects which cannot be avoided should the proposal be implemented," (**42 U.S.C. § 4332(2)(C)(ii)**)

where there lies "an understanding that the EIS will discuss the extent to which adverse effects can be avoided," according to the Supreme Court[17]. The CEQ regulations state an EIS must include:

> "appropriate mitigation measures not already included in the proposed action or alternatives" (**40 C.F.R. 1502.14(f)**) and "means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." (**40 C.F.R. 1502.16(h)**)

The "action-forcing" procedures in NEPA, according to the Court, "are almost certain to affect the agency's substantive decision" and "NEPA itself does not mandate particular results, but simply prescribes the necessary process[17]." NEPA disallows "uninformed" action as opposed to "unwise" action[17]. To sum up this basic premise supported by the Supreme Court regarding NEPA compliance, Figure 2 shows the steps the Court went through in making part of their ruling:

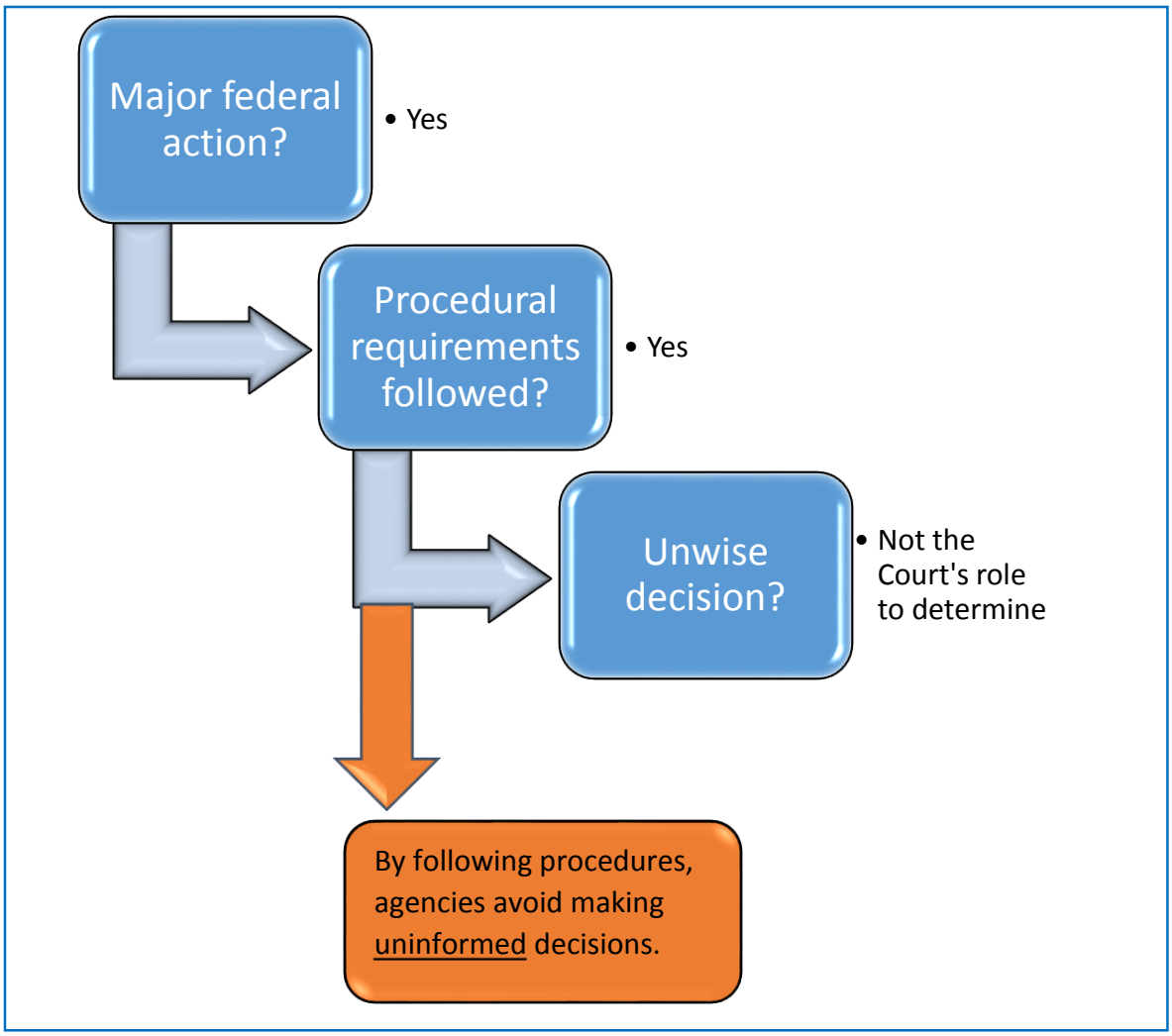


Figure 2: Steps taken by the Supreme Court in reaching its decision in *Robertson v. Methow Valley Citizens*

12. Marsh v. Oregon Natural Resources Council – 1989

In 1980, the Army Corps of Engineers (Corps) produced a Final Environmental Impact Statement Supplement (FEISS) for a dam project proposed in Oregon's Rogue River Basin[18]. The original EIS had been completed in 1971 and the supplement paid close attention to water quality and fish production, as the basin was popular as a fishing ground[18]. The Corps moved forward with dam construction after reviewing the FEISS and, in 1985, Congress allocated funds for the project[18]. The Oregon Natural Resources Council and other groups filed suit against the Corps, alleging that, like in the previous case of *Robertson v. Methow Valley Citizens*, environmental impacts were not properly

described and a "worst-case analysis" should have been included in the FEISS[17,18]. Also, they challenged that a second supplemental EIS should have been prepared when two documents were produced after 1980 that contained new information related to the impacts of dam construction at that particular site[18]. One of the documents was a memorandum produced by the Oregon Department of Fish and Wildlife indicating that downstream fishing would be harmed by the project[18]. The other document was a soil survey produced by the United States Soil Conservation Service indicating that turbidity would be greater than the FEISS claimed[18]. The Supreme Court, referring to this case as a companion to *Robertson v. Methow Valley Citizens*, held that, because of the reasons in *Robertson v. Methow Valley Citizens*, the first two claims were "erroneous[18]." Regarding the supplemental EIS, the Court held that the Army Corps' decision not to supplement the FEISS was not arbitrary and capricious[18]. The Justices reached this conclusion based partly on CEQ regulations related to supplements, specifically:

> "(c) Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." (**40 C.F.R. § 1502.9(c)(1)**) [18]

The Army Corps did not accept that the information contained in the two documents was accurate or relevant enough to prepare a supplemental statement[18]. The Court held "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts" and in this case, their own experts did not think preparing a supplemental EIS was sensible[18]. Therefore, the two documents did not contain "significant new….information" as

required by CEQ's regulations. The Court felt that the two documents were scrutinized adequately by the Corps of Engineers and that their experts deserved to have final say in the matter[18].

13. Robertson v. Seattle Audubon Soc. – 1992

In the lower courts, Robertson v. Seattle Audubon Society had significance as a NEPA-related case, but the NEPA aspect of the case in the Supreme Court became irrelevant[4, 19]. Ultimately, the Supreme Court ruled that the United State Forest Service and the Bureau of Land Management (BLM) did not violate the Constitution in issuing a provision under the Northwest Timber Compromise (enacted by Congress) that influenced results in pending cases involving timber harvesting in forests managed by those agencies[19]. The issue in the lower courts focused on the supplemental EIS aspect of NEPA. Specifically, Portland Audubon Society alleged that the BLM was required to prepare a supplemental EIS in the face of new information on the northern spotted owl in the region of Oregon where timber harvesting was being proposed[20]. Ultimately, the Northwest Timber Compromise allowed for both timber harvesting and expanding harvesting restrictions, which made NEPA irrelevant by the time the case reached the Court[4,19].

14. Department of Transportation v. Public Citizen – 2004

In 1982, Congress issued a moratorium that prohibited Mexican motor carriers from operating within the United States[21]. In 2001, the President intended to lift that moratorium once certain regulations were readied to allow Mexican carriers operating authority[21]. The Federal Motor Carrier Safety Administration (FMCSA) prepared an EA, leading to a Finding of No Significant Impact (FONSI) along with their proposed rules for the lifting of the moratorium[21]. The assessment did not consider impacts associated with increased Mexican truck operations in the United States because the FMCSA could not control the lifting or the continued enforcement of the moratorium enacted by Congress[21]. Public Citizen and other groups filed suit, arguing that the EA prepared by

the FMCSA violated NEPA for not taking into account the foreseeable lifting of the moratorium by the President[21]. The Court of Appeals agreed with the respondents and directed the FMCSA to prepare an EIS to comply with NEPA[21]. The Supreme Court held, however, that the FMCSA did not violate NEPA because they "lack[ed] discretion to prevent cross-border operations of Mexican motor carriers[21]." The Justices focused on the issue of whether an increase in cross-border operations was an "effect" of the FMCSA's own rules[21]. Because they found that the operations were not an "effect" of the FMCSA's own rules, they held that the FMCSA fully complied with NEPA in preparing an EA and FONSI with respect to the potential cross-border operations that would soon occur[21]. Public Citizen also alleged that the moratorium lifting was "reasonably foreseeable," referencing language in the CEQ's regulations that state:

> "Effects include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." (**40 C.F.R. § 1508.8**) [21]

According to those CEQ requirements, indirect effects must be included in an impact statement. However, the Court found that the indirect effects in NEPA did not include the lifting of the moratorium in this case and that the "argument overlooks FMCSA's inability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican trucks from operating in the United States[21]." The FMCSA would not have had the ability to act on information in an EIS discussing the President's lifting of the moratorium and increasing cross-border operations, and they also would not have had the ability to act on public input received during the EIS process[21]. For these reasons, the FMCSA was not required to include such operations in assessing the environmental impacts, nor any cumulative impacts as required by CEQ regulations, where a:

> "cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." (**40 C.F.R. § 1508.7**) [21]

Even though cumulative impacts are to be considered "regardless of what agency….or person undertakes such actions," the FMCSA found the crossing of Mexican carriers into the United States was not an "effect" of its regulations and NEPA requires "a reasonably close causal relationship" between environmental impacts and the cause of those impacts[21]. The Court ended its argument stating that "it would not…..satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform[21]."

15. Norton v. Southern Utah Wilderness Alliance (SUWA) – 2004

The land at issue in this case (located in Utah) is managed by the BLM[22]. These lands were classified as Wilderness Study Areas (WSA's) by the BLM and receive special protection under this classification[22]. Off-road vehicle (ORV) use on the lands was degrading habitat; therefore, SUWA, along with others, brought suit, alleging that the BLM did not take the "hard look" required by NEPA as to whether a supplemental EIS was required for the lands being degraded by ORV operation[22]. They considered the ORV action "new circumstances" as stated in CEQ's regulations, where a supplemental EIS is required for

> "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." (**40 C.F.R. § 1502.9(c)(1)(ii)**) [22]

The Supreme Court held that a supplemental EIS was not required in this instance, because the regulations are only applicable where "major Federal action" remains[22]. They state that "the BLM's approval of a land use plan is the 'action' that requires an EIS" and once that plan was approved,

"there [was] no ongoing 'major Federal action' requir[ing] supplementation[22]." The Court stated in *Marsh v. Oregon Natural Resources Council*, and again here, that NEPA's language suggests there must remain "major Federal action" when considering supplementation of an EIS[18,22]. Particularly in:

> "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment," (**42 U.S.C. § 4332(2)(C)**)

the Court's interpretation supports that a major action must be in progress for NEPA to apply[22]. The proposed action of a land use plan for the WSA was no longer in progress and, thus, the BLM was in compliance with NEPA.

16. Winter v. Natural Resources Defense Council, Inc. (NRDC) – 2008

One of the tools used by the Navy to identify diesel-electric submarines is active sonar[23]. In this case, the active sonar of concern is "mid-frequency active" (MFA) sonar, which the Navy uses in exercises off the coast of California[23]. Waters in southern California, the area involved in this particular case, contain numerous species of marine mammals and the Navy stated that training in these waters using MFA sonar had never resulted in any documented injury to marine mammals[23]. The Navy prepared an EA in 2007 for fourteen training exercises scheduled through 2009, finding that such exercises would not have a significant impact on the marine environment[23]. The EA resulted in a FONSI and the NRDC, along with others, filed suit, arguing that an EIS should have been prepared because of evidence indicating sonar harmed marine mammals more than the Navy acknowledged and evidence that mass strandings outside of California waters were associated with active sonar[23]. The Navy contended that any court injunction (like the one imposed by the District Court) and the additional preparation of an EIS would hamper their ability to conduct important training exercises and, thus, harm their preparedness for a military emergency[23]. They believed no

evidence suggested active sonar use would result in significant environmental consequences and therefore did not need to prepare an EIS[23]. The CEQ regulations regarding a FONSI state:

> "Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5))." (**40 C.F.R. § 1508.13**)

The CEQ granted the Navy permission to pursue "alternative arrangements" for NEPA compliance due to "emergency circumstances" (the protection of the Nation) [23]. This regulation states:

> "Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements." (**40 C.F.R. § 1506.11**)

This language suggests a significant impact *will* occur, yet the Navy found otherwise. The Court of Appeals held that "a serious question regarding [the legality of] the CEQ's interpretation of the 'emergency circumstances' regulation'" existed and that the EA was "unsupported by cited evidence[23]." The Supreme Court disagreed and vacated the injunction issued by the District Court. They held that "the balance of equities and the public interest" strongly favored the Navy[23]. They felt those equities were hardly addressed by the lower courts and highlighted that "the Navy's need to conduct realistic training with active sonar to respond to the threat posed by enemy submarines plainly outweighs the interests advanced by the plaintiffs[23]." They also referred to language in

Robertson v. Methow Valley which stated "NEPA itself does not mandate particular results," only procedural requirements that produce an informed decision[17,23].

17. Monsanto Co. v. Geertson Seed Farms – 2010

The Animal and Plant Health Inspection Service (APHIS), part of the Department of Agriculture (DA), has the authority to deregulate genetically engineered plant varieties while complying with NEPA[24]. APHIS approved the deregulation of Roundup Ready Alfalfa (RRA), a genetically engineered product owned by Monsanto, after preparing an EA and fielding public comments[24]. They determined that RRA would not significantly impact the environment and "decided to deregulate RRA unconditionally, without preparing an EIS[24]." Geertson Seed Farms and other environmental organizations filed suit, alleging that the deregulation of RRA violated NEPA[24]. Both the District Court and Court of Appeals held that APHIS, by not preparing an EIS, did, in fact, violate NEPA and APHIS was enjoined from RRA deregulation, "pending completion of the EIS[24]." The lower courts also issued an "injunction prohibiting almost all future planting of RRA during the pendency of the EIS process[24]." The District Court found that the EA "failed to answer substantial questions concerning…….the transmission of the gene [responsible for Roundup herbicide tolerance] to organic and conventional alfalfa; and… [how much] RRA would contribute to the development of Roundup-resistant weeds[24]." Monsanto and APHIS challenged the scope of the injunction, but not the finding that they violated NEPA[24]. In the lower court, they proposed mitigation measures that they would implement while preparing the EIS[24]. The Supreme Court held that Monsanto would be "injured by their inability to sell or license RRA" while APHIS completed an EIS[24]. The Court found that the District Court "abused its discretion" when it refused to allow APHIS to partially deregulated RRA while completing the environmental statement[24]. Even if NEPA was violated, injunctive relief does not have to be granted in every case because "an

injunction is a drastic and extraordinary remedy[24]." The Court found that, if a "less drastic remedy" than injunctive relief existed and "was sufficient to redress…injury," an injunction would not be necessary[24]. In this case, APHIS's proposed mitigation measures, though allowing for continued RRA planting, were subject to restrictions that the Court felt were adequate in remedying the situation for all involved[24]. Finally, the Supreme Court referred to specific language in NEPA allowing some action to occur before an EIS is fully prepared:

> "Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable alternatives. (b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved. (c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment." (**40 C.F.R. § 1506.1**) [24]

As long as an action does not significantly affect the environment, some measures may be taken before a completed EIS is prepared.

NEPA in the lower courts

While government and industry hold a perfect 17-0 record in the Supreme Court on issues involving NEPA compliance, Table 3 paints a different picture of decisions in lower courts:

Table 3: Decisions reached at various levels of federal courts

Case	District Court	Court of Appeals	Supreme Court
U.S. v SCRAP - 1973	Environmental Organization	[Direct appeal to the Supreme Court]	Government/Industry
Aberdeen v SCRAP - 1975	Environmental Organization	[Direct appeal to the Supreme Court]	Government/Industry
Flint Ridge v Scenic Rivers - 1976	Environmental Organization	Environmental Organization	Government/Industry
Kleppe v Sierra Club - 1976	Government/Industry	Environmental Organization	Government/Industry
Vermont Yankee v NRDC - 1978	Government/Industry[1]	Environmental Organization	Government/Industry
Andrus v Sierra Club - 1979	Environmental Organization	Environmental Organization	Government/Industry
Strycker's Bay v Karlen - 1980	Government/Industry	Environmental Organization	Government/Industry
Weinberger v Catholic Action - 1981	Government/Industry	Environmental Organization	Government/Industry
Metropolitan Edison v PANE - 1983	Government/Industry[2]	Environmental Organization	Government/Industry
Baltimore Gas v NRDC - 1983	Government/Industry[2]	Environmental Organization	Government/Industry
Robertson v Methow Valley - 1989	Government/Industry	Environmental Organization	Government/Industry
Marsh v Oregon NRC - 1989	Government/Industry	Environmental Organization	Government/Industry
Robertson v Seattle Audubon Society - 1992	Government/Industry	Environmental Organization	Government/Industry
DOT v Public Citizen - 2004	Government/Industry[3]	Environmental Organization	Government/Industry
Norton v SUWA - 2004	Government/Industry	Environmental Organization	Government/Industry
Winter v NRDC - 2008	Environmental Organization	Environmental Organization	Government/Industry
Monsanto v Geertson - 2010	Environmental Organization	Environmental Organization	Government/Industry

1. Atomic Safety and Licensing Board, Atomic Safety and Licensing Appeal Board
2. Nuclear Regulatory Commission
3. Federal Motor Carrier Safety Administration

District courts held mixed rulings for government/industry and environmental organizations, while agency rulemaking bodies always ruled for that agency. The overall record before cases reached the Court of Appeals was 11-6 in favor of government/industry. The Court of Appeals always ruled for

environmental organizations, and were then always overturned by the Supreme Court in favor of government/industry.

Discussion

The majority of cases that reached the Supreme Court involved the procedural application of NEPA[7-19,21-24]. Four cases did not directly involve the procedural aspects of NEPA: *United States v. SCRAP*, *Flint Ridge v. Scenic River*, *Kleppe v. Sierra Club*, and *Andrus v. Sierra Club*[7,9,10,12]. Of these four, both *US v. SCRAP* and *Flint Ridge* were not bound by the requirements of NEPA because of existing agency rules that superseded NEPA's rules:

> "The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies." (**42 U.S.C. § 4335**) [7,9].

In *Kleppe v. Sierra Club* and *Andrus v. Sierra Club*, a detailed statement was not required because the statutes of NEPA were determined inapplicable in each situation[10,12]. The remaining thirteen cases all involved procedures related to the preparation of EIS or EA documents1[8,11,13-19,21-24]. After the CEQ promulgated its regulations in 1978, nine of the remaining thirteen cases included those regulations[11,12,17-19,21-24]. Further, since 1989, every case to reach the Supreme Court has involved the CEQ regulations[17-19,21-24]. Table 4 duplicates Table 2, where the bold line between *Kleppe* and *Vermont Yankee* indicates when the CEQ implemented its regulations (1978) per the President in an effort to further the goals of NEPA and give uniform guidance to agencies[25]:

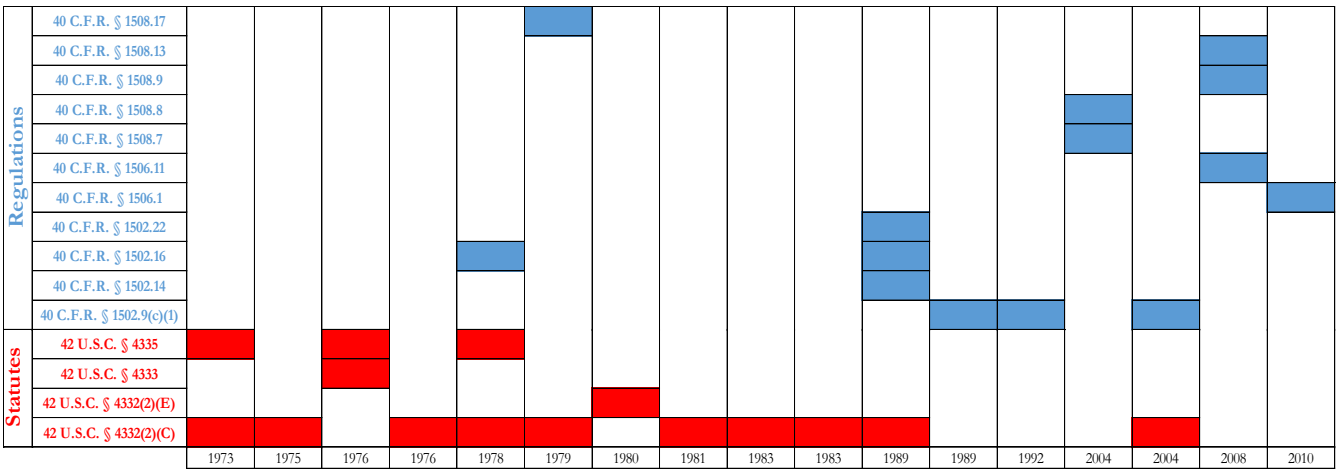
Table 4: General location of each requirement before and after CEQ promulgated regulations in 1978

		U.S. v SCRAP	Aberdeen v SCRAP	Flint Ridge v Scenic Rivers	Kleppe v Sierra Club	Vermont Yankee v NRDC	Andrus v Sierra Club	Strycker's Bay v Karlen	Weinberger v Catholic Action	Metropolitan v PANE	Baltimore Gas v NRDC	Robertson v Methow Valley	Marsh v Oregon Nat. Res. Council	Robertson v Seattle Audubon	DOT v Public Citizen	Norton v SUWA	Winter v NRDC	Monsanto v Geertson
CEQ Regulations	40 C.F.R. § 1508																	
	40 C.F.R. § 1506																	
	40 C.F.R. § 1502																	
NEPA Statutes	42 U.S.C. § 4335																	
	42 U.S.C. § 4333																	
	42 U.S.C. § 4332																	
		1973	1975	1976	1976	1978	1979	1980	1981	1983	1983	1989	1989	1992	2004	2004	2008	2010

CEQ promulgated regulations in 1978

It is easy to see that after the implementation of the CEQ regulations, the majority of cases to reach the Supreme Court included these regulations (found in the Code of Federal Regulations). Looking back, Table 1 shows that cases reaching the Supreme Court have essentially run the gamut of procedural requirements under NEPA. These include regulations related to mitigation, alternatives, EAs, EISs, FONSIs, cumulative impacts, effects, incomplete/unavailable information, and legislation. As time has progressed, the issues reaching the Supreme Court centering on NEPA have become more complex. The focus on more detailed procedural requirements is evident when viewing the specific regulations and statutes in Table 1. Table 5 goes one step further than Table 2 in highlighting the exact statutes and regulations in a similar format that shows how entangled with procedural dynamics the cases have become:

Table 5: Statutes and regulations referred to by the Court in each decision



The predominating issue in the Supreme Court with regards to NEPA has been the action-forcing statute 42 U.S.C. §4332(2)(C). Ten of the seventeen cases have seen this statute as one of the major issues being ruled on[7,8,10-12,14-17,22]. Note that prior to 1989, every case involved NEPA statutes (the bottom four statutes highlighted in red). Since 1989, only one case has involved a NEPA statute in great detail, and only as a means of supporting the CEQ regulations dealing with supplemental statements[22]. This suggests that agencies as a whole have become more familiar with the basic EIS procedural requirements of the Act. This familiarity could potentially cross over to the more detailed procedural requirements of the CEQ, resulting in less litigation involving these regulations and mimicking the statutes of NEPA in the Court. Three of the last six cases have touched on supplemental impact statements, found in 40 C.F.R. §1502.9(c)(1), suggesting a possible need for more clarification from the CEQ on this issue[18,19,22]. The longer NEPA has been around, the more fine-tuned its regulations have become, and the more familiar with the process agencies have become.

Having a perfect 17-0 record in the Supreme Court, agencies appear to have the upper hand in the court system. This lopsided record begs the question first asked in this analysis: "What does it take to defeat government/industry in the Supreme Court?" There is no simple answer to this question

but there are some key takeaways from the information. The results show procedures required by the Act were followed closely enough to satisfy the Court in each case. Had an agency deviated from the procedural requirements, it is almost certain the Court would have favored the environmental organizations in that case. As the Court stated a number of times in various ways, NEPA does not mandate particular results, but champions the process that must be followed in decision-making[11,13,17]. The victories in the Supreme Court have rested on the adequacy of government and industry in completing the proper paperwork, holding hearings, and including outside stakeholders and experts in their decision-making process (following the steps in Table 1). Studies on NEPA's effectiveness have suggested agencies view the procedures of NEPA not as a way to improve decision-making, but merely as a process that must be done before a project can start[26]. In court, the environmental organizations are at the mercy of the agency's effectiveness in following procedures. They can only stop a potentially consequential project from occurring if lapses in the procedural actions exist. Though they may wish to stop a project for reasons related to the substantive policy of the Act, they must rely on the procedural inadequacies of the agency if they wish to be successful in challenging that project in court. NEPA's purpose is

> "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to 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." (**42 U.S.C. §4321**)

If meeting the procedural requirements of NEPA becomes too monotonous, agencies will drift further from this purpose than the creators of the Act intended.

As long as government and industry continue their effective compliance with NEPA procedures, their perfect record will remain untarnished. Moreover, as the gamut of procedural requirements under NEPA have been ruled on to some extent, agencies stand a better chance at avoiding future losses in litigation by utilizing court interpretations of NEPA. The CEQ used the term "litigation proof" when referring to agencies producing documents simply to comply with NEPA, not to improve their decisions[26]. Procedural compliance does not force agencies to make equitable decisions, even though the Court stated in *Robertson v. Methow Valley* that the "action-forcing" procedures in NEPA "are almost certain to affect the agency's substantive decision[17]." Eventually, agencies may reach a point where the paper-pushing mentality of the procedural process results in the mindless completion of impact statements, significantly, if not entirely, diminishing the intent of that paperwork and the Act itself.

If such a point is ever reached, where the substantive goals of NEPA are completely ignored, a change will be necessary to revive the lost substance. The court system did not initially eliminate the substantive element of NEPA. In fact, in an early landmark decision on NEPA in the 1971 *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission* case, Judge Wright stated "the general substantive policy of the Act is a flexible one[27]." This interpretation, though not exactly strengthening the substantive mandate in NEPA, did leave open the possibility that the substantive goals could require certain decisions be made in certain circumstances. Through 1979, only a small minority of courts held that NEPA was only procedural[28]. Over time, however, the Supreme Court easily closed this door by evolving NEPA duties from "essentially procedural" (in *Vermont Yankee v NRDC*) to "only procedural (in *DOT v Public Citizen*)[4,11,21]."

One of the things that makes NEPA unique is that the Act encompasses the environment *as a whole*. Other acts, such as the Endangered Species Act, Clean Water Act, and Clean Air Act, involve the

protection of a single entity or a focused area as opposed to the multifaceted environment. Moreover, "improving the environment" is not a quantifiable substantive element, making consistent rulings on such an element impossible (at least until quantification is possible). Regulating the amount of discharge into a stream or the amount of emissions into the atmosphere is quantifiable, but the science involved in the field of impact prediction does not yet allow for regulating the significance of impact. If there were a way to quantify the substantive policy (particularly, the amount of impact) and incorporate this quantity into an amended statute, court rulings could head in a new direction, allowing substance into the litigation arena. Agencies would be liable for making both informed and wise decisions. Had there been substantive "teeth" to NEPA in the seventeen cases reaching the Supreme Court, the perfect record would arguably be tarnished.

Conclusion

Until substance is given the strength of procedure in the Act, it remains likely that government/industry will remain undefeated in the Supreme Court. Generating the proper paperwork and complying with all procedural requirements listed under NEPA and the CEQ regulations will allow agencies to continue making decisions in an informed, but not necessarily thoughtful, way. The court system is not equipped to deal with the science involved in assessing environmental impacts and must rule on decision-making issues using the "arbitrary and capricious" standard[28]. This doesn't prevent significant impacts from harming the environment; it only ensures informed decisions are made. Environmental protection should not necessarily trump economic security or social progress, but it should be given balanced weight as NEPA intended[5]. As science discovers more about the complexities of the environment, 'balanced weight" may take on new meaning, demonstrating the need for better substantive decision-making. If this Nation is able to

find a way to quantify the substantive provisions of the Act, it is likely NEPA can reach its full potential and

> "create and maintain conditions under which man and nature can exist in productive harmony." (**42 U.S.C. § 4331(a)**)

NEPA has undeniably benefited the state of the environment since its creation, but there remains much to be desired for those hoping the substantive element persists with the Act[6]. Long-term monitoring of agency impacts, an important duty presently absent in many projects, could improve the science of impact prediction and assist the EIS process[26]. A better understanding of our impacts on the environment may be the key to strengthening what has become an afterthought: NEPA's substance.

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