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Revisiting the Tense Relationship Between the U.S. Supreme Court, Administrative Procedure, and the National Environmental Policy Act

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Revisiting the Tense Relationship Between
the U.S. Supreme Court, Administrative
Procedure, and the National
Environmental Policy Act

Jason J. Czarnezki*

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I. INTRODUCTION

The National Environmental Policy Act of 1969¹ (NEPA) requires agencies to consider the environmental consequences of major federal actions that significantly affect the quality of the human environment.² While scholars and courts have debated whether NEPA should be understood as having primarily substantive or primarily procedural force, neither group has explored the relationship between NEPA and the Administrative Procedure Act (APA) in great depth. More specifically, neither group has focused on what role—if any—the APA might play in fortifying NEPA's mandate.

Scholarship exploring this relationship has done so only by dissecting Supreme Court precedent. In contrast, this Article supplements scholarly discussion of Court precedent by proposing an analytical framework for reviewing the processes required by NEPA in light of the APA. The framework provides for a more searching review of agency action, and suggests criteria for evaluating an agency's procedures to determine whether it has actually considered environmental factors in the decision-making process. Viewed in this light, the APA potentially endows NEPA with a substantive force that courts have not acknowledged in NEPA itself. This framework acknowledges that courts cannot overrule reasoned agency decisions,³ but asserts that judges must do more than sign off on every decision for which the requisite paperwork is prepared. Instead, courts should review the merits of the *process* that influences the policy choice—a perspective that implicates the APA's central concerns.

This Article addresses the possibility, under the prevailing understanding of NEPA, that an agency might draft a comprehensive report containing information about potential environmental effects and alternate approaches to a proposed plan—and then wholly disregard all of this information in making its final decision. Although an agency may contend that it has “considered” the environmental consequences of alternative courses of action, what if these factors have no actual impact on its final decision? Hypothetically, an agency could simply “steamroll”⁴

1. 42 U.S.C. §§ 4321-47 (2005).

2. *Id.* § 4332(2)(C).

3. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

4. *See Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (“The difficulty of

toward its preferred decision, hurdling NEPA's procedural obstacles without genuinely considering potential environmental harms or the means to avoid them.

This Article questions whether formally including environmental factors in decision-making documents, but paying them no real heed, violates the "arbitrary and capricious" standard of the APA.⁵ If so, courts should engage in a more searching review, allowing their analysis to be informed by the APA's mandates.

Part II of this Article provides historical background and explains how lower courts, the Council on Environmental Quality (CEQ), and scholars have interpreted NEPA to have substantive power. Part III explains how the Supreme Court, unlike other institutions, has interpreted NEPA to be a strictly procedural statute that lacks much substantive force, mandates certain *processes*, but requires no substantive changes in decision-making. Part IV discusses the history of the APA, a statute, like NEPA, designed to ensure fully informed and explicated decision-making by administrative agencies. Part V examines the tension between the APA and the Supreme Court's NEPA jurisprudence, and concludes that despite the Supreme Court's restrictive interpretation of NEPA, an agency's failure to give any weight to environmental considerations in the decision-making process would be insufficient under the APA. This Part then suggests indicators for determining whether agencies have given appropriate weight to requisite NEPA concerns. Finally, Part VI provides an example of how these indicators might be applied. By considering this framework, and taking the APA into account, courts can prevent agencies from going through the NEPA process without substantively engaging environmental concerns.

II. DOES NEPA HAVE SUBSTANTIVE FORCE?

Enacted in 1970, NEPA "mandated major changes in the decisionmaking processes of federal agencies."⁶ The Act's goals include protecting the environment for future generations,

stopping a bureaucratic steamroller, once started, still seems to us . . . a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction.").

5. 5 U.S.C. § 706(2) (A) (2005).

6. Jason J. Czarnezki, *Defining the Project Purpose under NEPA: Promoting Consideration of Viable EIS Alternatives*, 70 U. CHI. L. REV. 599, 599 (2003).

assuring safe and healthy surroundings for all Americans, preserving natural resources, and promoting recycling and the use of renewable resources.⁷ Section 101 of NEPA requires agencies to "use all practicable means" to fulfill NEPA's goals.⁸ Specifically, NEPA mandates comprehensive scientific and systematic analysis of environmental problems, and imposes procedural requirements to generate information for agency and public benefit.⁹ Under the statute, agencies must produce a publicly available environmental impact statement (EIS) that discusses the potential environmental consequences of each proposed project, mitigation measures, and alternatives to the proposed action, and lists any irretrievable commitments of resources involved.¹⁰

Some appellate courts have suggested that pursuant to NEPA, decision-making agencies must give substantial weight to environmental considerations. For example, Judge Skelly Wright's famous decision in *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission* indicated that agencies must take environmental considerations seriously, weighing economic and technical benefits of a planned action against potential environmental costs.¹¹ Under this interpretation, an EIS may not merely "accompany" an application through the review process while receiving no actual consideration.¹² Instead, agencies must engage in case-by-case balancing, taking all alternatives into account so that "each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance."¹³ Some courts have gone further, suggesting that under NEPA, environmental factors must be given "determinative weight"¹⁴ and

7. 42 U.S.C. § 4331(b) (2005).

8. *Id.*

9. Czarnecki, *supra* note 6, at 599.

10. 42 U.S.C. § 4332(2)(C).

11. *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) ("In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values.").

12. *Id.* at 1117 (calling the mere accompaniment of environmental data a "mockery of the Act").

13. *Id.* at 1114.

14. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (quoting *Karlen v. Harris*, 590 F.2d 39, 44 (2d Cir. 1978)) (stating that the court below

must “tip the balance” in agency decision-making.¹⁵ Procedurally, this might involve monetizing environmental factors and employing cost-benefit analysis,¹⁶ or requiring discussion of maximum mitigation measures.¹⁷

In *Sierra Club v. Marsh*, Judge (now Justice) Breyer announced that NEPA is concerned with a lack of ex ante consideration that could lead to real harm to America’s natural resources.¹⁸ The harm is not to the procedural requirements of NEPA but to the environment—that is, substantive harm. According to Breyer, NEPA is meant to ensure a decision-making process built on informed awareness of a plan’s likely effect on the environment.¹⁹ The idea behind NEPA is to “present[] governmental decision-makers with relevant environmental data *before* they commit themselves to a course of action.”²⁰ After all, “[i]t is far easier to influence an initial choice than to change a mind already made up.”²¹ Thus, courts have suggested that NEPA’s procedures should promote substantive changes in decision-making.²²

NEPA is also viewed in a substantive light by the Council on

required that “environmental factors . . . be given determinative weight”).

15. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 100 (1983) (noting that the D.C. Circuit required environmental uncertainties to “tip the balance”). For other expansive views of NEPA, see *Environmental Def. Fund v. Army Corps of Eng’rs*, 470 F.2d 289, 297 (8th Cir. 1972) (stating that NEPA is “more than an environmental full-disclosure law” and “was intended to effect substantive changes in decision-making”); *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973) (agreeing with the Eighth Circuit).

16. WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 9.4, 860 *et seq.* (2d ed. 2000) (citing Daniel Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993)).

17. *Id.* at 862. (“Where the issue is one of the extent of the damage expected, it calls for best efforts to avoid it and maximum efforts to mitigate it.”).

18. See *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (“But the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation.”).

19. *Id.* at 500.

20. *Id.* (quoting *Massachusetts v. Watt*, 716 F.2d 946, 952 (1983)).

21. *Id.*

22. Lower courts, for example, have given NEPA substantive force by finding discussions of mitigation measures procedurally defective. See, e.g., *Stein v. Barton*, 740 F.Supp. 743, 754 (D. Alaska 1990) (“[W]here an agency’s decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as ‘arbitrary and capricious’”); *Friends of the Earth v. Hall*, 693 F.Supp. 904, 939 (W.D. Wash. 1988) (“Where an EIS fails to contain a detailed mitigation plan, the agency fails to meet its touchstone obligation of fostering informed decisionmaking *and* informed public participation.”) (emphasis in original).

Environmental Quality (CEQ),²³ an organization created under NEPA to report on the quality of America's environment.²⁴ CEQ has issued regulations and guidance interpreting NEPA to require decision-makers to "emphasize real environmental issues and alternatives."²⁵ CEQ's NEPA regulations require agencies to balance environmental considerations in the decision-making process²⁶ and to use all means to avoid and minimize environmental harm.²⁷ This is consistent with the language of NEPA, which creates "action forcing" devices designed to "insure" that environmental concerns are "infused into the ongoing programs and actions of the Federal Government."²⁸ CEQ has not eliminated the possibility that courts examine the provisions of NEPA and give them substantive weight.²⁹ The CEQ regulations are entitled to substantial deference by the courts,³⁰ and require agencies to avoid adverse environmental effects and to restore or enhance the environment.³¹

23. Despite CEQ's NEPA regulations, courts must still engage in hard look review of NEPA decision-making processes because these regulations are not entitled to *Chevron* deference. Czarnecki, *supra* note 6, at 610 n.87 (citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 893-95 (2001) (implicitly stating that the CEQ regulations are not entitled to *Chevron* deference because the CEQ lacks substantive rulemaking authority and no single agency is charged with the enforcement of NEPA).

24. 42 U.S.C. §§ 4341-47 (2005).

25. 40 C.F.R. § 1500.2(b) (2005).

26. 1980 CEQ ENVTL. QUALITY ANN. REP. 11, at 376 (stating that courts must determine whether the actual balance of costs and benefits was arbitrary or clearly gave insufficient weight to environmental values).

27. See 40 C.F.R. § 1505.2(b)-(c) (2005) ("An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision. . . . [and] [s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.").

28. 40 C.F.R. § 1502.1 (2005) ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.").

29. 1980 CEQ ENVTL. QUALITY ANN. REP. 11, at 376 (endorsing the view that agency action be set aside when there are substantive reasons mandated by statute).

30. Jennifer R. Bartlit, *An Adequate EIS Under NEPA: Deference to CEQ; Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 NAT. RESOURCES J. 653, 658 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference.")); Merrill & Hickman, *supra* note 23, at 895 n.5 (noting that the CEQ regulations are entitled to *Skidmore* deference).

31. *Envtl. Def. Fund v. Army Corps of Eng'rs*, 470 F. 2d 289, 298 (8th Cir. 1972) (citing CEQ guidelines in 36 Fed. Reg. 7724 (Apr. 23, 1971)) (agreeing with CEQ that

In addition to the CEQ, many scholars agree that NEPA was intended to have both substantive and procedural requirements³² and that enforcing both would make the statute a more effective tool for environmental justice.³³ Some have maintained that NEPA refocuses agency decision-making on rights to environmental quality.³⁴ Still others have argued that Congress should bolster and clarify NEPA's language in order to ensure the intended substantive, not merely procedural, enforcement in the courts.³⁵

These scholarly, judicial, and CEQ interpretations of NEPA are, moreover, in accord with sound environmental policy, as substantive interpretation of NEPA places a beneficial check on mission-oriented agencies. Yet, neither NEPA itself, nor any other environmental or administrative statute, provides for an independent individual or administrative body to take a hard look at an agency's decision-making process;³⁶ there is no NEPA "supervisor." Instead, that role falls to the courts.³⁷ At the same

NEPA is a substantive statute).

32. See, e.g., Bernard S. Cohen & Jacqueline M. Warren, *Judicial Recognition of the Substantive Requirements of NEPA*, 13 B.C. INDUS. & COM. L. REV. 685, 702 (1972) ("[T]he failure to require compliance with [NEPA's substantive policies] will lead ultimately to frustration of the legislative purpose of NEPA."); see also Harvey Bartlett, *Is NEPA Substantive Review Extinct, or Merely Hibernating? Resurrecting NEPA Section 102(1)*, 13 TUL. ENVTL. L.J. 411, 415 (2000) (interpreting NEPA as continuing to supply substantive law despite Supreme Court precedent); Bradley C. Karkkainen, *Whither NEPA?* 12 N.Y.U. ENVTL. L.J. 333, 342 (2004) (stating that the "legalist critic" view of NEPA is that the statute's application is "too anemic," since NEPA was intended to have both substantive and procedural requirements).

33. Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 596 (1997) (arguing that CEQ should use NEPA's procedural and substantive requirements to help aid social justice).

34. See William Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L. J. 205, 260-61 (1989) (promoting administrative modifications so that agencies will make decisions that more faithfully adhere to NEPA).

35. Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99, 116 (1994) (asserting that NEPA must be amended to make its substantive mandate clear); Philip M. Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 230 (1992) (arguing that the substantive portions of NEPA should be revitalized).

36. Unlike, for example, Australia, which requires (at the Commonwealth level) that an environmental minister approve assessed projects. See Australian Government, Department of the Environment and Heritage, *Assessments and Approvals* (2005), <http://www.deh.gov.au/epbc/assessmentsapprovals> (last visited Nov. 15, 2005) (on file with author). There is some question as to the effectiveness of such supervisors—an issue which will not be addressed here.

37. This concern is a justification for the APA, a statute designed to stop agencies from ignoring relevant considerations without a rational basis. See Part IV *infra*.

time, "NEPA's legislative history indicates that Congress was concerned with the potentially self-serving missions of individual agencies, and therefore sought to limit agency discretion."³⁸

It is a simple fact of life that policies of agencies of the Federal Government may and do conflict: it is equally true that there are occasions where, without the benefit of conflicting policies, these Government agencies may and do adopt courses that appear to conflict with the general public interest.³⁹

Yet, it is not altogether clear that this concern of Congress translates into an empowerment of courts to watch over agencies. A standard criticism of this guardian role is that the courts lack the relevant expertise to question an agency decision. This argument might have merit if NEPA required courts to sign off on each agency action, but courts are in a good position to evaluate decision-making *processes*, since this evaluation involves no technical expertise.⁴⁰ Perhaps rigorous review of agency process also holds the potential to lead to substantive decision-making change.⁴¹

III. IS NEPA PURELY PROCEDURAL?

Despite lower courts' historical willingness to engage in substantive review of the weight granted to environmental factors under NEPA—and despite the views of CEQ and legal scholars—the goals of NEPA have had difficulty gaining substantive enforcement by the United States Supreme Court. The Court has "refused to engage in any substantive review of the weight to be given to the environmental factors enumerated in section 101 of NEPA."⁴² Indeed, NEPA has an 0-15 record before the Court; it has "never decided a case, or for that matter a single issue in a case, in favor of a NEPA plaintiff."⁴³

38. Czarnecki, *supra* note 6, at 612.

39. National Environmental Policy Act of 1969, H.R. Rep. No. 91-378 (1969), reprinted in 1969 U.S.C.C.A.N. 2751, 2753-54.

40. These circumstances are discussed in Part V *infra*.

41. See Part V *infra*.

42. Charmian Barton, *Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-Making*, 13 GEO. INT'L ENVTL. L. REV. 837, 886 (2001).

43. David C. Shilton, *Is the Supreme Court Hostile to NEPA? Some Possible Explanations for a 12-0 Record*, 20 ENVTL. L. 551, 553 & n.6 (1990). Since publication of Shilton's article, the Court has ruled against NEPA in at least three more cases, bringing the record to 0 wins, 15 losses. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

Moreover, the Court has played a major role in limiting the scope of NEPA. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*⁴⁴ is typically cited for the proposition that NEPA is strictly a "procedural" statute.⁴⁵ In its per curiam opinion, the Court held that an agency's decision withstood challenge under NEPA simply because the agency complied with NEPA's procedures and *considered* the EIS—even though environmentally friendlier alternatives existed. The Second Circuit had held below that the U.S. Department of Housing and Urban Development's selection of a construction site for a low and middle income housing facility was outweighed by adverse urban environmental effects.⁴⁶ However, the Supreme Court firmly rejected the interpretation that "environmental factors . . . should be given determinative weight."⁴⁷

On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."⁴⁸

The Supreme Court stated that an agency need not elevate environmental concerns over other appropriate considerations, and offered no guidance regarding the extent to which environmental factors should be addressed by an agency.⁴⁹

Nine years later, in *Robertson v. Methow Valley Citizens Council*, the Court further clarified its view that NEPA is purely procedural:

If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. In this case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd.

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

45. *Strycker's Bay*, 444 U.S. at 227 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978)). See also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

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

47. *Id.*

48. *Id.* at 227-28. See also *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

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

*Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.*⁵⁰

Unfortunately, while the Court stated that NEPA will “inevitably bring pressure to bear on agencies ‘to respond to the needs of environmental quality,’”⁵¹ it provided no mechanism through which to enforce such a response and referred to the environmental polices listed in section 101 of NEPA as merely “precatory.”⁵² Such an interpretation appears to fly in the face of other NEPA provisions, which direct that NEPA’s goals be implemented “to the fullest extent possible.”⁵³ It also seems to flout CEQ regulations that require agencies to “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”⁵⁴

A possible reconciliation of these two points is that the Court believes that NEPA’s procedural mandates are sufficient to safeguard against substantively problematic agency decisions. But if so, then it must provide some mechanism for NEPA to be more than a “paper tiger.”⁵⁵ The Court first says that the statutory provisions of NEPA only require that the proper procedures are followed, and second, that the statutory provisions of NEPA do not require any review of the agency decision. However, as will be discussed in the following section, integrating the APA with NEPA provides such a mechanism, upholding the mandates of both sets of statutes. Courts should be required to review whether significant environmental risks were factors in the decision to undertake a proposed action—that is, to undertake substantive analysis in addition to ensuring that NEPA’s procedures were followed.

50. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (emphases added).

51. *Id.* at 349 (citing 115 Cong. Rec. 40425 (1969) (remarks of Sen. Muskie)).

52. *Id.* It is not uncommon for members of the Court to consider statutory provisions as expressing a desire but not creating a legal obligation or affirmative duty. *See Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 631 (1980) (Rehnquist, J., concurring) (“Read literally, the relevant portion of § 6(b)(5) [of the Occupational Safety and Health Act] is completely precatory”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (“[T]he provision is precatory; it does not require the implementing authority actually to grant asylum to all those who are eligible.”).

53. 42 U.S.C. § 4332.

54. 40 C.F.R. § 1505.2(c).

55. *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (“Congress did not intend the Act to be such a paper tiger.”).

IV. THE APA'S ROLE

Created by a group of scholars and practitioners "on the basis of many years of meticulous study of the legal system, the political structure of the government, the roles played by agencies, and the decision making procedures used by agencies,"⁵⁶ the Administrative Procedure Act⁵⁷ is "a remedial statute that is designed to insure uniformity, impartiality and fairness in the procedures employed by federal administrative agencies."⁵⁸ The APA requires agencies to keep the public informed of agency procedures and rules, provides for public participation in the rulemaking process, and prescribes uniform standards for the conduct of formal rulemaking and adjudicatory proceedings.⁵⁹

Under the APA, which governs judicial review of NEPA,⁶⁰ agency decisions will be overturned if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁶¹ Originally described in *Citizens to Preserve Overton Park v. Volpe*, the arbitrary and capricious test of section 706(2)(a) requires agencies to engage in careful consideration of relevant factors in the decision-making process.⁶² The Supreme Court clarified *Overton Park* in *Kleppe v. Sierra Club*, in which it explicitly held that courts are required to take a "hard look"⁶³ at the

56. Richard Pierce Jr., Symposium, *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 82 (1996) (citing KENNETH C. DAVIS & RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 1.4 (3d ed. 1994)).

57. Pub. L. No. 404, 60 Stat. 237 (1946), codified at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372.

58. 2 Fed. Proc., L. Ed. § 2:1 (2005) (citing 5 U.S.C. § 551 (2004)), *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); *Pan Atl. S.S. Corp. v. Atl. Coast Line R. Co.*, 353 U.S. 436 (1957); *Home Loan Bank Bd. v. Malonee*, 196 F.2d 336 (9th Cir. 1952); *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Director, Office of Workers' Comp. Programs, Dep't. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Morton v. Ruiz*, 415 U.S. 199 (1974)).

59. U.S. DEPARTMENT OF LABOR, *Attorney General's Manual on the Administrative Procedure Act* 9 (2005), available at <http://www.oalj.dol.gov/public/apa/refrnc/ag01.htm#a> (last visited Nov. 15, 2005) (on file with author).

60. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375-76 (1989) ("We conclude that review of the narrow question before us whether the Corps' determination that the FEISS need not be supplemented should be set aside is controlled by the 'arbitrary and capricious' standard of § 706(2)(A) [of the APA].").

61. 5 U.S.C. § 706 (2005).

62. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

63. This hard look takes place "within the framework of normal arbitrary and capricious review." Shilton, *supra* note 43, at 563, n.53.

environmental effects of their proposed action.⁶⁴ This doctrine provides for searching judicial review, requiring agencies to offer a clear explanation of the weight they give to various factors in the decision-making process.⁶⁵ An action will be deemed arbitrary and capricious if an agency has relied on factors that Congress did not intend it to consider, has failed to consider an important aspect of the problem, or has offered an explanation that either runs counter to the evidence with which the agency was presented or is so implausible that it cannot be the honest result of an impartial decision-making process.⁶⁶

Courts are required to closely scrutinize the decisional record;⁶⁷ indeed, the hard look doctrine was adopted in part because of distrust of agencies.⁶⁸ While the Supreme Court has rejected Judge David Bazelon's "procedural" hard look view of the APA, which suggests that courts should make "sure that the administrative procedures were fulsome enough to guarantee truth-finding,"⁶⁹ it arguably supports the "substantive" hard look view advanced by Bazelon's colleague on the D.C. Circuit, Judge Harold Leventhal.⁷⁰ Leventhal's approach suggests that courts must review agency action to ensure that agencies engaged in *reasoned*, not merely

64. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (citing *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

65. Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 223 & n.72 (1987) (citing Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985)) (arguing that the hard look doctrine demands "that the agency accompany its decision with a clear explanation of the factors considered, the weights assigned to them, and the reasons they dictated the decision ultimately adopted"). See also *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) (stating that an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made"))).

66. *State Farm*, 463 U.S. at 43-44.

67. *Nat'l Lime Ass'n v. Envtl. Prot. Agency*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (explaining that hard look review is a rigorous standard of judicial review).

68. See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2599 (2002) ("In part, hard look review resulted from pervasive distrust of administrative agencies and the growth of public interest regulation.").

69. Patricia M. Wald, *Thirty Years of Administrative Law in the D.C. Circuit* (2005), http://www.dcbar.org/for%5Flawyers/sections/administrative_law_and_agency_practice/wald.cfm (last visited Nov. 15, 2005) (on file with author).

70. *State Farm*, 463 U.S. at 29. This hard look takes place "within the framework of normal arbitrary and capricious review." Shilton, *supra* note 43, at 563 n.53.

informed, decision-making.⁷¹ This approach, according to Judge Patricia Wald, requires agencies to articulate “in the best possible way the reasons why the agency is making its hard choices.”⁷² Thus, the APA, as interpreted and implemented both by courts and by comprehensive agency documentation, provides a check against arbitrariness on mission-oriented⁷³ agencies that might otherwise fail to consider environmental risks in pursuing a project.⁷⁴

V. GIVING WEIGHT TO ENVIRONMENTAL FACTORS UNDER NEPA AND THE APA

What if agencies give no weight to environmental factors in the decision-making process? *Strycker's Bay Neighborhood Council, Inc. v. Karlen* indicates that even if less weight is given to environmental factors than to other considerations, the decision does not violate NEPA as long as environmental factors have been “considered” by the agency.⁷⁵ This requirement is satisfied as long as, at a minimum, the factors are included in the required and prepared procedural documents and recognized by the agency—even if they do not affect the final decision.⁷⁶ Thus, despite NEPA’s ambitious textual mandates,⁷⁷ construction has rendered its requirements

71. Wald, *supra* note 69.

72. *Id.*

73. See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

74. See, e.g., Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686 (2004); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 555 (1974) (“The rule of administrative law, as applied to congressional mandates for a clean environment, ensures that mission-oriented agencies, where NEPA is applied, will take due cognizance of environmental matters.”). In other words, judicial review, in addition to political accountability, is necessary for agency legitimacy.

75. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (“[T]he only role for a court is to insure that the agency has considered the environmental consequences”); see also Andreen, *supra* note 34, at 210 (“The missing link is that the agency which prepared the EIS may or may not actually use that document in framing its ultimate decision Having ‘considered’ the environmental impacts of the proposal, therefore, an agency can do just about anything it chooses.”).

76. This is not to say such information can be merely included but not looked at. See, e.g., *Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1117 (D.C. Cir. 1971) (indicating that it is not “enough that environmental data and evaluations merely ‘accompany’ an application through the review process, but receive no consideration”).

77. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970).

largely procedural.⁷⁸ Under NEPA's existing interpretations, courts will not "set aside an agency's decision on the basis that it gave insufficient weight to the substantive objectives of NEPA."⁷⁹ The Supreme Court has ruled that an agency's substantive decision will not be overturned if it was based on full and good faith consideration, and "a court may not set up a different standard in reviewing agency compliance with NEPA's mandate than would be required under the APA."⁸⁰ Yet the APA allows courts to take a "hard look" at agency decisions to ensure that they are not "arbitrary and capricious." This gives the APA a role in the judicial determination of compliance with NEPA. This role must be defined in the NEPA context in order to evaluate the "absolute" weight given to environmental considerations (i.e., the amount of weight given to environmental factors alone, absent comparing environmental risks with other risks and benefits).

It is fairly clear that giving at least *some* weight to environmental factors is sufficient to satisfy the APA's requirements.⁸¹ "Some argue that the Court's failure to consider the weight given to environmental factors by agencies leaves out the 'clear error of judgment' factor of the arbitrary and capricious test established in *Overton Park*."⁸² But so long as an agency decision is reasoned and informed, giving too little weight to environmental factors will never constitute clear error.⁸³ The notion that courts are ill-

78. See *Stryker's Bay*, 444 U.S. at 227 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978)); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); see also Part III, *supra*.

79. Barton, *supra* note 42, at 887 (citing Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 12-13 (1983), *infra* note 81).

80. Lawrence R. Lieberman, *The Council on Environmental Quality's Regulations to Implement the National Environmental Policy Act—Will They Further NEPA's Substantive Mandate?*, 10 ENVTL. L. REP. 50,039, 50,042 (1980) (citing Letter from CEQ General Counsel Nicholas C. Yost to Philip Cummings, Counsel, Comm. on Env. and Public Works, U.S. Senate (Feb. 4, 1980)).

81. "*Stryker's Bay* thus holds that a federal court may not set aside agency action as 'arbitrary and capricious' on the theory that the agency gave insufficient weight to the substantive goals enumerated in NEPA." Richard I. Goldsmith & William C. Banks, *Environmental Values: Institutional Responsibility and the Supreme Court*, 7 HARV. ENVTL. L. REV. 1, 11 (1983).

82. Barton, *supra* note 42, at 887 (citing Goldsmith & Banks, *supra* note 81, at 12). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that in reviewing agency decisions, courts must consider "whether the decision was based on a consideration of relevant factors and whether there ha[d] been a clear error of judgment").

83. See *Stryker's Bay*, 444 U.S. at 227 (quoting *Vermont Yankee*, 435 U.S. at 558) (stating

equipped to second-guess the cost-benefit calculations of environmental harms that agencies utilize in making decisions supports this result. However, since courts are in a good position to evaluate the decision-making *process*, they may be well suited to decide on whether any weight has been given. A conclusion that an agency gave no weight to environmental factors differs from a conclusion that environmental factors were given comparatively too little weight; in the former case, the determination is that regardless of the “considered” environmental effects, the potential severity of these effects would not change the agency’s decision.

Indeed, courts should review decision-making processes (a concern of both NEPA and the APA) to ensure that environmental factors carry at least some weight—a very different prospect than second-guessing agency decision-making. After all, even given a requirement that agencies “consider” environmental consequences, substantive review of agency action under NEPA is still required under the APA’s “arbitrary and capricious” standard. NEPA establishes a set of factors relevant to an agency’s decision. It would be arbitrary to give no substantive weight to those factors, and would allow an agency to disregard environmental factors altogether while jumping through NEPA’s procedural hoops. In his *Strycker’s Bay* dissent, Justice Marshall wrote:

Further, I do not subscribe to the Court’s apparent suggestion that *Vermont Yankee* limits the reviewing court to the essentially mindless task of determining whether an agency “considered” environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion Our cases establish that the arbitrary-or-capricious standard prescribes a “searching and careful” judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner.⁸⁴

Although Marshall disagrees with the majority’s interpretation of NEPA, his conclusion is sound under an APA analysis; it would be arbitrary and capricious to give no weight to environmental factors in light of NEPA’s mandate that agencies use “all practicable means” to protect the environment. The APA allows for a searching review of the administrative decision-making process—a review that has the potential to reveal an agency’s failure to give weight to environmental factors.

that NEPA is designed “to insure fully informed and well-considered decisions”).

84. *Strycker’s Bay*, 444 U.S. at 231 (Marshall, J., dissenting) (citing *Overton Park*, 401 U.S. at 416).

Perhaps this type of review is what Justice O'Connor was advocating in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*,⁸⁵ decided just three years after *Strycker's Bay*. In *Baltimore Gas*, the Court held it permissible to develop a generic determination of the environmental consequences of spent nuclear fuel, and that individual proceedings were not required.⁸⁶ The question for the Court was not whether environmental risks should affect a decision at all, but how risks should be assessed—that is, by general rule or individual analysis. Thus, the majority held that “an agency must allow all significant environmental risks to be factored into the decision whether to undertake a proposed action.”⁸⁷ This is commensurate with the prevailing views of lower courts and the CEQ, and is not inconsistent with the majority's holding in *Strycker's Bay*. In fact, in *Strycker's Bay*, the Secretary of Housing and Urban Development conceded, “if an agency gave . . . no weight to environmental values its decision might be arbitrary and capricious.”⁸⁸ The majority's statement in *Baltimore Gas* comes close to granting NEPA substantive force under the APA's

85. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983).

86. The Court wrote:

Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S-3 rule, of its evaluation. The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA. The environmental effects of much of the fuel cycle are not plant specific, for any plant, regardless of its particular attributes, will create additional wastes that must be stored in a common long-term repository. Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event.

Id. at 100-01 (citations omitted).

87. *Id.* at 100.

88. *Strycker's Bay*, 444 U.S. at 231 n.* (Marshall, J., dissenting) (citing Petition for Writ of Certiorari, *Strycker's Bay*, 444 U.S. 223 (No. 79-184), at 15 n.16). One could also argue that the majority's footnote indicates that it did not understand the Second Circuit to have found the agency's action arbitrary and capricious. *Strycker's Bay*, 444 U.S. at 228 n.2. Some have concluded on the basis of this footnote that a reviewing court is not forbidden from “setting aside or modifying action [as] . . . arbitrary and capricious as tested by the APA and the substantive goals and policies of section 101(b) of NEPA.” U.S. COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 26, at 376. Going this far may be inconsistent with the procedural history of the Second Circuit which concluded the agency had acted arbitrarily, see Goldsmith & Banks, *supra* note 81, at 10-11 (citing *Strycker's Bay*, 444 U.S. 228), but it is difficult to ignore the express language of the Court. While it is tempting to circumvent the Court's holding through this footnote, neither interpretation adversely affects the suggestion that giving no weight to environmental concerns would violate the APA.

arbitrariness standard; any decision would be unreasonable if no weight was given to environmental risks. This is an *APA* solution to making environmental concerns an integral part of agency decision-making, and goes well beyond the Court's construction of NEPA by itself.

Although a court must respect agency discretion (even if it finds contrary views more persuasive), a reviewing court is still required to undertake a "searching and careful" review of the administrative record.⁸⁹ Courts can discern whether an agency has given no weight to environmental consequences or to project alternatives by invoking the hard look doctrine—the judicial mechanism that determines whether an agency decision-making process was arbitrary and capricious under the *APA*.⁹⁰ Specifically, the hard look doctrine provides a heightened, more searching scope of judicial review, and demands that agency decisions contain a clear explanation of how much weight has been assigned to different factors considered in the decision-making process.⁹¹ Agencies must exercise their authority through the processes required by the *APA*, and NEPA "supplement[s] rather than displace[s] the *APA*'s requirements."⁹² The *APA*, as interpreted in *Overton Park*, "represents a transition from political to judicial controls over decisions"⁹³ where political controls prove insufficient, or where a court might interpret NEPA as "soft law,"⁹⁴ merely requiring the production of information. The *APA* shifts

89. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Overton Park*, 401 U.S. at 416).

90. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (explaining that the court's role "is to insure the agency has taken a 'hard look' at environmental consequences . . ."). This hard look takes place "within the framework of the normal arbitrary and capricious review." Shilton, *supra* note 43, at 562 n.53.

91. Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 223, & 253 n.72 (1987) (citing Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985)).

92. Steven P. Croley, *The Administrative Procedure Act and Regulatory Reform: A Reconciliation*, 10 ADMIN. L.J. AM. U. 35, 37 (1996).

93. Peter L. Strauss, *Administrative Law Stories: Citizens to Preserve Overton Park v. Volpe* (Columbia Law and Economics Working Paper No. 267, 2004) available at <http://ssrn.com/abstract=650482> (last visited Nov. 15, 2005) (on file with author).

94. Cf. Louise G. Trubek, Symposium, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575, 600 (2002) ("In response to the criticism that there cannot be law without regulation, or a sanctioning system that will require people to follow the system, is the recent discussion of 'soft law.' Soft law is a term used to refer to guidelines, recommendations, policy suggestions, and other government systems designed to influence behavior without imposing formal legal obligations.").

the remedy out of politics and back to the judicial branch. Thus, even if, as the Supreme Court has held, NEPA does not demand particular substantive results,⁹⁵ the APA *can* determine what it means to comply with that process.

Courts should review the administrative record to determine whether an agency failed to give weight to environmental consequences. (In some cases, courts will be required to engage in extra record review.⁹⁶) This can be assessed by "comparing what is in [the] administrative record with what is not."⁹⁷ But what information might suggest a failure to weigh environmental risks? A number of these "steamroll" indicators can be considered collectively, including: (1) whether the agency exhibited tunnel vision⁹⁸ or strong-armed its way towards a preferred outcome;⁹⁹ (2)

95. STEVE FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 70 (2d ed. 2001).

96. Extra record review may be necessary to determine whether an agency has considered all relevant factors and explained its decision, or whether it has acted in bad faith. See *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (declaring extra record investigation "appropriate" when "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of the agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency's choice" (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971))). See also *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (stating the conditions under which extra-record review is permissible); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) (providing for review of evidence in addition to the administrative record to determine whether the agency adequately considered the environmental effects of a particular project); Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review* "On the Record," 10 ADMIN. L. J. AM. U. 179, 227 (1996). However, extra record review is somewhat "at odds with the norms of administrative law and typical judicial review of agency action." *Lands Council v. Powell*, 379 F.3d 738, 747 (9th Cir. 2004). The Supreme Court has advanced the general rule that judicial review of agency decisions is limited to the administrative record. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). However, there are exceptions to this rule which are more frequently made in review of agency NEPA decisions than in review of other agency decisions. See *Hoffman*, 132 F.3d at 14 (citing Susannah T. French, Comment, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929, 955-76 (1993)).

97. Young, *supra* note 96, at 227. Unlike what happens in practice, "[f]rom a descriptive point of view . . . the Supreme Court's general model for arbitrary and capricious review is more constraining than the model for review permitted under NEPA." *Id.*

98. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985) ("In limiting the scope of its inquiry, the Corps acted improperly and contrary to the mandates of NEPA. The Corps' decision to assess only those impacts physically dependent upon activities within its redefined jurisdiction, i.e., the river and its immediate banks, was tantamount to limiting its assessment to primary impacts. The Corps proceeded to assess

whether the agency ignored scientific data related to environmental risks or alternatives;¹⁰⁰ or (3) whether the agency made irretrievable commitments to a predetermined course of action.¹⁰¹ Certainly, some of these indicators overlap with one another—and other factors might also evidence “steamrolling.” But these three begin to flesh out the concern that an agency might pursue a predetermined result entirely impervious—substantively, at least—to NEPA. Accordingly, there is concern that final agency choices will be the same as the originally proposed projects despite environmental concerns.¹⁰² In this scenario, no consideration is given to environmental concerns that might force a decisional change. Certainly, this would not fulfill NEPA; courts should consider whether a final decision might have been reached as a result of steamrolling behavior.¹⁰³ For example, would

the project with *tunnel vision*.”) (emphasis added).

99. See *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989); see also *Pac. Rivers Council v. Thomas*, Civil No. 92-1322-MA, 1994 U.S. Dist. LEXIS 21351, at *17-18 (D. Or. 1994) (stating that in cases arising under the Endangered Species Act, the challenged activities do not involve the commitment of “vast financial resources,” and thus, “the potential to ‘steamroll’ these projects through without the benefit of prior consultation to secure its completion is not threatened”); *Puerto Rico Conservation Found. v. Larson*, 797 F. Supp. 1066, 1073 (D. P.R. 1992) (granting a preliminary injunction where injury was the “result of improper agency decision to steamroll the implementation of its plans”).

100. See *infra* notes 106 and 107 and accompanying text.

101. These “steamroll indicators” used to determine whether environmental concerns are given any weight in the NEPA process might be considered a subset of Judge Leventhal’s “danger signals” used to determine whether an agency has “really taken a ‘hard look’ at the salient problems” as required by the APA. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

102. The NEPA process is similar to the notice and comment procedures of agency decisions and rulemaking in that both attempt to influence decision-making. See *Natural Res. Def. Council v. Env’tl. Protection Agency*, 279 F.3d 1180, 1186 (9th Cir. 2002) (stating that the final permit, granted under the National Pollutant Discharge Elimination System, “need not be identical to the to the draft permit” because “[t]hat would be antithetical to the whole concept of notice and comment.”); *Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm’n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980) (“The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.”).

103. “Bad faith” is another situation in which courts should engage in more searching review of agency action—but courts often use this term carelessly. “Bad faith” occurs where an agency intentionally fails to disclose information (for example, the presence of a protected species) or engages in corruption. Courts are permitted to depart from the administrative record in these cases, and proof could be sufficient for a court to award declaratory and injunctive relief. This Article is concerned with situations in which mission-oriented agencies exercise inadequate “consideration,” not situations in which agencies engage in intentional deceit or corruption. While some courts might view this systemic problem as engaging NEPA in “bad faith,” see *infra* notes 109 & 113, courts would still be allowed to depart from the administrative record in these cases and determine if all

environmental concerns have *ever* provoked a decisional change in that particular agency's process? In other words, hard look review is triggered when the final proposed action is identical to initial agency recommendation prior to the consideration of environmental risks pursuant to NEPA.

Consider the first steamrolling indicator above. If a court finds that an agency's NEPA process was a "charade" or "the outcome a 'foregone conclusion'" because no weight was given to environmental concerns, then the court should strike down the agency decision as arbitrary and capricious.¹⁰⁴

Courts recognize the difficulty in proving that an agency would not have changed its initial choice regardless of the environmental harms the NEPA process forecast. After all, an agency must plan ahead to be effective; discussions between agency decision-makers and public officials will necessarily take place *before* a final decision is made.¹⁰⁵ Nevertheless, courts can, and should, evaluate these discussions and other extrinsic evidence when steamroll indicators are present. A thorough evaluation of an agency's deliberations may well reveal the extent to which the agency was, at the time of the NEPA process, honestly open to altering its project based on new information about the project's likely environmental effects.

The second steamroll indicator listed above is closely related; ignoring science that might undermine a decision¹⁰⁶ or relying on scientific methodology that leads to obviously inaccurate results¹⁰⁷

relevant factors have been considered. *See supra* note 96. That is, this Article's analysis remains relevant in "bad faith" cases, even though courts' power to offer relief in these cases goes beyond this Article's purview.

104. *County of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1390 (2d Cir. 1977). *See also* *Australians for Animals v. Evans*, No. C-04-0086 SC, 2004 U.S. Dist. LEXIS 753, at *5 (N.D. Ca. 2004) (suggesting that if evidence demonstrated "[a] basis for any assertion that Defendants deliberately ignored evidence, manipulated the process or engaged in otherwise objectionable behavior," the APA would be violated); *Thousand Friends of Iowa v. Iowa Dep't of Transp.*, 257 F. Supp. 2d 1204, 1205-06 (S.D. Iowa 2002) (complaint alleging manipulation of the NEPA review process by colluding and agreement to preconstruction projects prior to completion of NEPA review process).

105. *County of Suffolk*, 562 F.2d at 1389 (quoting lower courts that have found it "[un]realistic to assume that discussion and debate among high public officials and decisionmakers will not take place prior to a final decision").

106. *See Rybachek v. Envtl. Protection Agency*, 904 F.2d 1276, 1297 (9th Cir. 1990) (reviewing whether "EPA failed to comply with its statutory mandate by not truthfully considering environmental impacts other than water quality or by considering them only superficially"). *See also Stewart Park & Reserve Coal, Inc. v. Slater*, 352 F.3d 545, 558-59 (2d Cir. 2003) (finding that defendants did not "whitewash" traffic and transportation data by ignoring it or withholding it from the EIS).

107. *See Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002)

would indicate that an agency's decision-making process violated the APA. As suggested earlier, there is always a possibility that an agency might ignore information about environmental risks while plodding "through the NEPA motions in order to validate the decisions previously made."¹⁰⁸ But the second steamroll indicator is useful nonetheless, suggesting a more precise and searching review by courts in order to determine whether the APA's mandate that an agency weigh the environmental costs under NEPA—even if little weight is given—is genuinely satisfied.

Finally, as the third steamroll indicator suggests, evidence that an agency has acted on a project before a final decision is made suggests that the agency gave no weight to environmental considerations in its process.¹⁰⁹ Courts should search for irretrievable commitments to a pre-selected alternative.¹¹⁰ The NEPA regulations, created by CEQ, require that environmental impact statements and environmental assessments "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."¹¹¹ "Agencies shall not commit resources prejudicing selection of alternatives before making a final decision."¹¹² Irretrievable commitments can include money, tangible resources such as labor and raw materials, or pre-existing political and policy commitments that demand a

(finding that the Forest Service's methodology did not "reasonably ensure viable populations of the species at issue").

108. *County of Suffolk*, 562 F.2d at 1389 (quoting the district court).

109. *See, e.g., Hirt v. Richardson*, 127 F. Supp. 2d 833, 840-41, 849 (W.D. Mich. 1999) (denying motion for preliminary injunction because of the weighty governmental executive interests in foreign policy and nuclear non-proliferation, despite plaintiff's argument that the assessment was made in bad faith, as evidenced by the fact that the U.S. Department of Energy began fabricating the fuel rods for transport even before the Environmental Assessment was started). *But see also City of Oak Creek v. Milwaukee Metro. Sewerage Dist.*, 576 F. Supp. 482, 488-90 (E.D. Wis. 1983) (holding that NEPA does not require an agency to "refrain from committing resources toward the acquisition of a proposed landfill site until the environmental consequences . . . are presented and considered," despite plaintiff's assertion that these expenditures would preclude meaningful weight to environmental consequences). Irretrievable commitments, while not per se violations of NEPA, may indicate that due weight has not been given to environmental consequences. In order to prevail, plaintiffs must provide evidence that shows the project was a foregone conclusion, and that resources were expended prior to consideration of alternatives. *See Becker v. Fed. R.R. Admin.*, 999 F. Supp. 240, 244-45 (D. Conn. 1996).

110. *Hirt*, 127 F. Supp. at 841 (noting that commitment of resources is not bad faith per se, but raises that possibility).

111. 40 C.F.R. § 1502.2(g) (2005).

112. 40 C.F.R. § 1502.2(f) (2005).

given choice.¹¹³

The presence of steamroll indicators such as these suggests that an agency has exercised its will and not its judgment, and that it has failed to consider environmental factors as NEPA requires.¹¹⁴ Inquiry into these "steamroll indicators" may reveal that an agency gave no weight to environmental considerations—or it might reveal that even though these factors were present, environmental concerns had a role in the decision-making. But the failure to give environmental concerns *any* weight means these concerns had no effect on the final decision-making process. Only through a more searching review of the NEPA process, as required by the APA, can courts ensure that agencies might actually change their minds on the basis of environmental factors.¹¹⁵

Of course, this implicates the crux of the substantive-procedural dilemma: courts cannot substantively evaluate agency actions, and so unless the courts employ strict procedural evaluations, agency NEPA decisions are largely unreviewable. A question emerges as to whether or not agencies can always claim that they gave some weight to environmental considerations, simply making NEPA a paperwork-generating statute. For example, couldn't an agency considering placement of a landfill simply explain in its EIS that landfills cause land degradation and may have adverse groundwater implications—and then state that these considerations were not determinative? That is, are the cost-benefit calculations involving environmental harms almost always uncertain enough that a savvy agency decision-maker could make a plausible claim that the benefits of the project outweigh the environmental harms? Such a criticism, however valid, misses

113. *Hirt*, 127 F. Supp. 2d at 841 (explaining that when evaluating plaintiffs' bad faith claim, the court found most convincing the defendants' "extensive testimony that the United States has a political strategy to use the shipment of American MOX rods as political leverage This strategy, which the United States has evidently pursued for a long time, combined with the fact that the MOX rods were fabricated before the EA was even started . . . suggests a likelihood that DOE had already committed itself to the Paralex Project long before the EA was completed").

114. Judge Leventhal stated that a court must intervene "if [it] becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

115. This is consistent with CEQ regulations. *See, e.g.*, 40 C.F.R. § 1502.9(a) (2005) ("The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.").

NEPA's central consideration; even under its most environmentally friendly reading, NEPA does not call for courts to examine the cost-benefit decision, but rather to evaluate the *process*—an evaluation that necessarily supposes that agencies' process is sufficient, or at least useful, in assessing the character of the decision made.

By looking collectively at steamroll indicators such as those this Article identifies, courts can engage in a searching review of the NEPA process that scrutinizes agency decision-making processes. Through use of steamroll indicators, courts can attempt to ferret out agencies that do not engage in a good faith effort to follow through with NEPA and the APA (i.e., those agencies that follow NEPA's procedures, but eschew meaningful cost-benefit calculus because environmental concerns will always lose).

Additionally, skeptics might suggest that if a court *recognizes* evidence of steamroll indicators (such as an irretrievable commitment of resources) such evidence is insufficient to compel relief because it will be difficult to prove that an agency gave zero weight to environmental concerns (plaintiff wins) versus little weight (plaintiff loses) because the agency satisfactorily completed its NEPA documents. But this concern misunderstands both the problem and the remedy. If significant steamroll indicators exist, the problem is "consideration," which may result in insufficient weight. The APA's remedy is further agency explanation, only after which can a winner or loser be declared based on the appropriateness of the weight given to environmental consequences that likely will then result in an agency win. Thus, regardless of the amount of weight given to environmental concerns in an individual case, judicial hard look in the NEPA context changes in the institutional relationship between the courts and agencies. Application of the hard look doctrine here would force agencies to better explain their decisions, to explain why they engaged in those factors that suggest they were mission-oriented, to avoid any ignorance of certain environmental concerns, or to wait to spend significant resources on a project. Any option agencies choose will increase the likelihood that the project can change during the course of the decision-making process.

VI. APPLICATION OF APA HARD LOOK REVIEW TO NEPA

To illustrate how courts would use these "steamroll indicators,"

consider *City of Oak Creek v. Milwaukee Metropolitan Sewerage District*.¹¹⁶ The Milwaukee Metropolitan Sewerage District (MMSD) sought to build a landfill facility in Oak Creek, a suburb of Milwaukee.¹¹⁷ Although MMSD admitted that the U.S. Environmental Protection Agency (EPA) and the Wisconsin Department of Natural Resources (DNR) still needed to complete an EIS in order for the landfill construction to proceed,¹¹⁸ MMSD began condemnation proceedings to acquire the property and began spending federal funds for planning purposes.¹¹⁹ Plaintiffs (the City of Oak Creek and owners of the land proposed to be taken) argued that if MMSD continued to make expenditures to acquire the landfill property, then MMSD would be "presented with a *fait accompli* when it finally decides whether to begin construction of a landfill facility at the Oak Creek location."¹²⁰ Thus, plaintiffs argued, "[t]he condemnation and site acquisition activities will place so much momentum behind the selection of [the] site . . . that a full and fair consideration of environmental consequences will be impossible."¹²¹ The court held that NEPA does not require the preparation of an EIS *before* site acquisition activities are undertaken.

This conclusion makes some sense in light of the intended role of NEPA.¹²² While making such commitments raises flags that an agency may have steamrolled to its preferred choice, this is not necessarily so; irretrievable commitments do not always mean that an EIS was improperly prepared,¹²³ or that it did not influence decision-making. On the other hand, irretrievable commitments undoubtedly provide evidence to bolster plaintiffs' assertion to the contrary, and a court could engage in an inquiry—looking at the steamroll indicators collectively—as to whether *any* weight was given to environmental considerations. In this scenario, the plaintiffs would argue that the agencies exhibited tunnel vision, and would present other evidence suggesting that no

116. *City of Oak Creek v. Milwaukee Metro. Sewerage Dist.*, 576 F.Supp. 482 (E. D. Wis. 1983).

117. *Id.* at 484.

118. *Id.* at 488.

119. *Id.* at 489.

120. *Id.* at 488.

121. *Id.*

122. Although, this likely contradicts CEQ regulations. See 40 C.F.R. § 1502.2(f) (2005).

123. *City of Oak Creek*, 576 F. Supp. at 489 n.2.

environmental concerns could have sidetracked the foregone conclusion of the original proposed project. If a court agreed, it should declare the NEPA process unlawful as arbitrary and capricious under the APA. The court would not declare the final decision wrong, but would declare the decision-making process improper. The court could then remand the decision back to the agency for consideration of environmental harms. A skeptic of this process might suggest that this is all likely to be futile, since the decision would be remanded back to the same agency—an agency whose processes would have already been deemed questionable. This criticism, however, is subject to the same refutation as its counterpart above; that is, NEPA's purpose is to ensure process, not results. And in any case, an agency under such severe scrutiny would be likely to reform its NEPA processes in some manner.

Following remand, the agency could then, as required by the APA, support its decision with an explanation of the weight given to environmental concerns and how the project benefits outweighed these costs.¹²⁴ As stated earlier, this type of measured cost-benefit calculation could not be overruled by a reviewing court.¹²⁵ This solution comports with the goal of preventing mission-oriented agencies or corrupt influences from pervading administrative decision-making by requiring agencies to give

124. A possible parallel can also be drawn to expanding judicial review of agency inaction (where inaction is defined as an "instance in which an agency fails to take desired or desirable action"). Bressman, *supra* note 74, at 1664. Judicial review should be "concerned with inhibiting administrative decisionmaking that reflects narrow interests rather than public purposes," and courts in reviewing agency non-enforcement decisions, like decisions not to choose environmentally friendly alternatives, should require agencies to articulate their reasons. *Id.* at 1660, 1686. Scholars continually debate whether such additional agency tasks results in agency ossification. See, e.g., Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 605 (2004); William S. Jordan, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Thomas O. Sargentich, *The Critique of Active Judicial Review of Administrative Agencies: A Reevaluation*, 49 ADMIN. L. REV. 599 (1997). However, the question remains whether explanation in the NEPA process results in the same "ossifying" concerns as in the informal rulemaking context. Cf. John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-to-Know*, 12 KAN. J.L. & PUB. POL'Y 579, 609 (2003) (stating that the "process of agency 'ossification' catalyzed by extensive judicial review means that agencies will launch fewer new initiatives to protect public health and the environment").

125. See Bressman, *supra* note 74, at 1697 ("If an agency bases a nonenforcement decision on legitimate reasons of resource allocation and priority setting, then it is entitled to demand judicial respect.").

explanations for their decisions, accompanied by judicial review.¹²⁶

VII. CONCLUSION

For proponents of an enforcement of NEPA adequate to its actual textual mandate, NEPA's merely procedural construction is disappointing. Giving little weight to environmental factors in agency decision-making does not run afoul of NEPA or the APA. But at the very least, existing law suggests that giving *no* weight to environmental factors is arbitrary and capricious, and courts can engage in a searching review of the administrative record to ensure that the environment plays some role in the decision-making process. By looking at a collection of steamroll indicators—such as ignoring scientific data, making irretrievable commitments, and exhibiting tunnel vision—courts can, and should, prevent agencies from simply going through NEPA's procedural motions to reach a preferred policy choice, impervious to environmental concerns. The APA requires that reasoned analysis under NEPA gives weight to environmental factors in the decision-making process, and that, once these factors are considered, agencies must explain how these are trumped by other benefits. Only through comprehensive agency explanation of the weight given to environmental costs, in a decision-making record thorough enough to survive hard look review, can "environmental concerns be integrated into the very process of agency decisionmaking"¹²⁷ with the potential of facilitating an environmentally friendly decisional change—which is, after all, NEPA's goal.

126. See also *id.* at 1693-94.

127. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981) (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)).