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308%Brookport%IL%62910%6185643367%markkris@earthlink.net%F1%Dear CEQ, Check this out if you want to find out what NEPA should be and what Congress intended. One of the biggest legislative/judicial frauds of our time is when the Supreme Court interpreted NEPA to be only procedural and not substantive. We need to get back to making NEPA what it was meant to be - a law that truly protects the environment. Please accept these comments on the record for the NEPA task force. Mark Donham

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Student Article

IT'S TIME TO PUT NEPA BACK ON COURSE

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Introduction

The first and most far-reaching of the environmental legislation enacted by Congress, the National Environmental Policy Act (NEPA or the Act), 1 begins with a declaration that its purpose is "to promote efforts which will prevent or eliminate damage to the environment and biosphere." 2 More specifically, NEPA makes it "the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources . . . [so as to] attain the widest range of beneficial uses of the environment without degradation" 3

Despite this plain language, the Supreme Court has repeatedly ruled that although NEPA requires agencies to prepare environmental impact statements (EISs) and weigh alternatives, it does not mandate federal agencies to make decisions that promote environmental goals. Despite evident contrary congressional intent, the Court has concluded that NEPA is procedural and not substantive; the Act requires agencies to consider the effects of their decisions on air, water, and land but not to avoid or mitigate adverse environmental effects. This Article examines how NEPA was cut loose from its substantive moorings and what Congress or the Executive can do to restore NEPA to its intended role. In Part I, I explore the courts' initial confusion about whether to interpret NEPA as a substantive or a procedural statute. In Part II, I discuss the Supreme Court's conclusion*100 that NEPA is procedural only. In Part III, I illustrate how the conclusion that NEPA has no substantive component conflicts with congressional intent. In Part IV, I demonstrate that state analogues to NEPA that contain a substantive component more effectively implement the purpose of NEPA than does the federal statute. In Part V, I consider the role of the Council on Environmental Quality (CEQ) regulations in implementing NEPA's policy goals. Finally, in my conclusion I assert that Congress, or the EPA if given the CEQ's rule-making powers, should amend NEPA to require mitigation of environmental harms, thereby restoring the statute's substantive component.

I. NEPA's Purpose: Substantive or Merely Procedural?

When Congress first introduced NEPA, the federal courts recognized the Act's substantive dimension. In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 4 Judge Skelly Wright, writing for the Court of Appeals for the District of Columbia Circuit, noted that the Act contained a substantive component mandating "that the federal government 'use all practicable means and measures' to protect environmental values." 5 NEPA, the court held, "makes environmental protection a part of the mandate of every federal agency and department," 6 requiring agencies to balance environmental concerns against "economic and technical considerations." 7 "Clearly," the court noted, "it is pointless to 'consider' environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate . . . stage of an agency's proceedings." 8

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The wording of NEPA itself makes clear that the Act requires agencies to accomplish substantive environmental goals. In section 102 of NEPA, Congress directs that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter," 9 including the policy of "attain[ing] the widest range of beneficial uses of the environment without degradation." 10 Court decisions throughout the 1970s reflected this congressional mandate. As the Eighth Circuit held in a 1972 case, the "[c]ourts have an obligation to review substantive agency decisions on the merits to determine if they are in accord with NEPA. . . [including] whether the actual balance of costs and benefits struck by the agency according to these [NEPA-imposed] standards . . . clearly gave insufficient weight to environmental factors." 11 In short, "NEPA requires that construction projects be completed in accordance with its substantive provisions." 12

The court in *Environmental Defense Fund, Inc. v. Froehle* quoted Senator Henry M. Jackson, the principal Senate sponsor of NEPA, as stating, "If an environmental policy is to become more than rhetoric, [c]oncern for environmental quality must be part of every phase of Federal action." 13

Senator Jackson's statements on the floor furnished even clearer proof of congressional intent that NEPA provides substantive environmental protection. He described NEPA as "a Congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind [or] do irreparable damage to the air, land and water which support life on earth." 14

In a decision upholding federal action and approving an environmental impact statement, the Fifth Circuit noted in 1975 that "NEPA's procedural requirements do not exist to dictate *102 form but to insure that judgments are no longer based on old values." 15

When litigation under NEPA reached the Supreme Court, however, the Court weakened the Act's substantive underpinnings. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (NRDC) 16 (a challenge based mainly on the Atomic Energy Act of 1954 17 and Administrative Procedure Act 18 and only incidentally on NEPA) the Court upheld a Nuclear Regulatory Commission rule requiring consideration of nuclear waste disposal in proceedings to license power plants. The plaintiffs' chief procedural challenge was that because of its environmental implications, NEPA required the Commission to afford discovery and cross-examination before adopting a rule. The Court rejected this claim, noting that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." 19

It is difficult to argue with that conclusion. But the Vermont Yankee Court also had to deal with a substantive NEPA claim. The Commission's initial

view in this case was that it did not have to consider nuclear waste in individual licensing proceedings. The Commission then shifted its position to adopt the challenged rule, stating that it could consider waste. In Vermont Yankee, the Court rejected the utility's contention that the Commission lacked authority to examine the environmental implications of nuclear waste disposal, finding that waste was reviewable under NEPA. 20 This holding went beyond requiring an EIS or the consideration*103 of alternatives. It explicitly upheld the agency's authority to consider nuclear waste disposal in licensing power plants.

However, in almost a post-script to its decision, the Court rejected a claim by environmentalists that a report on the hazards of nuclear waste prepared by the Commission's Advisory Committee on Reactor Safeguards should be recast "in terms understandable to a layman." 21 The Court characterized the court of appeals's order requiring the Commission to redo the report as "judicial intervention run riot." 22 The Court also lambasted the bulk of the lower court's decision, concluding with the oft-quoted dictum that "NEPA does set forth significant substantive goals for the Nation, but its mandate is essentially procedural." 23 This was odd language indeed for a Court that treated NEPA substantively in the one area of this complex decision where a major claim of that nature was made -- the rebuff of the utilities' argument that waste need not be considered in licensing.

The following year a perhaps chastened court of appeals -- the same court the Supreme Court unanimously reversed in Vermont Yankee 24 -- held in NRDC v. Berkland 25 that NEPA did not require the Department of the Interior to reject a qualified applicant seeking to lease coal on federal lands on the ground that the lease would inflict environmental harm. Citing Vermont Yankee, the court noted that "not even the policies of NEPA, which are of the utmost importance to the survival of our environment, can rewrite section 201(b) [of the Mineral Leasing Act] 26 to undermine the property rights of prospecting permittee lease applicants." 27 The court stopped short of holding that NEPA lacked substantive effect but concluded that the limit of the substantive mandate of NEPA section 102(1) 28 is reached "when NEPA policies conflict with an existing statutory scheme." 29

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II. The Supreme Court Holds That NEPA Is Procedural Only

These decisions were followed by the Supreme Court's remarkable per curiam opinion in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 30 in which the Court rejected the notion that NEPA contains a substantive component. Strycker's Bay involved federally financed public housing on Manhattan's West Side. The construction did not require that the Department of Housing and Urban Development (HUD) write an EIS since the project was to replace existing apartment houses in an already congested area. Instead, the controversy was over whether HUD had adequately addressed alternatives, including alternative locations for the housing which would relieve congestion, as required by NEPA. With respect to this issue, HUD conceded that there were possibly other sites which were environmentally preferable in terms of reducing low-income housing congestion, but the agency justified its decision on the grounds that switching to a different site would delay the already-postponed project for another two years. 31

This "West Side Story" ended with NEPA as its victim. The Supreme Court, reversing the Second Circuit, rejected that court's "conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations." 32 Instead, the Court held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to ensure 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.'" 33

The Court cited *Kleppe v. Sierra Club* 34 for the quoted portion of the above sentence although the language actually stems from an earlier court of appeals case, *NRDC v. Morton*. 35 Neither of these cases, however, decided whether NEPA is a substantive statute. The issue in *Kleppe* was the necessity of a *105 programmatic EIS for coal leasing on federal lands in an entire region. The issue in *NRDC v. Morton* was the extent of an agency's obligation to consider alternatives to a proposed offshore oil leasing action. The language quoted in *Strycker's Bay* was no more than a rhetorical disavowal of the courts' power to dictate a particular "choice of the action to be taken," a power the plaintiffs never asserted.

Justice Marshall alone dissented in *Strycker's Bay*, asserting that "Vermont Yankee does not stand for the broad proposition that the majority advances today." 36 He pointed out that the comment that NEPA's "mandate is essentially procedural" was tossed off in the context of a "further observation" about the case. 37 The real issue here, he noted, was "whether HUD was free under NEPA to reject an alternative acknowledged to be environmentally preferable solely on the ground that any change in sites would cause delay." 38 In other words, this is "essentially a restatement of the question whether HUD in considering the environmental consequences of its proposed action gave those consequences a 'hard look,' which is exactly the proper question for the reviewing court to ask." 39 Justice Marshall ended by rejecting the majority's position 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." 40

Justice Marshall's dissent suggests that the question of whether NEPA is substantive is the same as the question of whether the agency gave the environmental consequences of its proposed action a hard look. However, these two concepts are not synonymous. An agency might well give the impacts of a proposal a hard look yet decide to proceed despite those impacts, as HUD did in *Strycker's Bay*. The real issue is whether NEPA mandates the agency not only to examine impacts but to mitigate those impacts as well. The statute, after all, "directs that, to the fullest extent possible the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance*106 with" NEPA. 41 Furthermore, NEPA imposes the "responsibility . . . to use all practicable means [to] attain the widest range of beneficial uses of the environment without degradation." 42

A second interesting question is whether the task of ensuring procedural compliance with NEPA is, as Marshall suggests, an essentially mindless one. Whether or not the Act requires agencies to mitigate environmental harms, as I believe it should, the long history of harmful projects that were ameliorated or totally rejected due to agency consideration of their impacts and alternatives suggests that this is inaccurate. The courts prevented New York's ill-conceived *Westway*, for example, which would have narrowed the Hudson River and decimated its commercial striped bass fishery, when they overturned an inadequate EIS. 43 The weighing of alternatives mandated by NEPA in *NRDC v. Morton* 44 resulted in the protection of an important waterfowl refuge in the Gulf of Mexico from offshore oil drilling, 45 and NEPA litigation over depositing dredge spoil laden with heavy metals in Long Island Sound has twice led to protection of fishing and shellfishing grounds. 46 In addition to these major cases there are numerous instances in which federal agencies have modified their actions following consideration of environmental impacts and alternatives. 47 Nonetheless, *Strycker's Bay* definitely diminished NEPA's substantive component.

Although a couple of decisions rendered shortly after *Strycker's Bay* continued to suggest that NEPA was substantive, 48 most decisions have followed the *Strycker's Bay* approach. 49 The final blow to any lingering

notion that NEPA *107 might contain a substantive component fell in *Robertson v. Methow Valley Citizens Council*. 50 In this case the United States Forest Service granted a special use permit to a developer to build a ski resort in Washington State's North Cascade Mountains. All parties agreed that this grant was a major federal action significantly affecting the environment and that as such it required an EIS. 51 Section 102 of NEPA requires that every EIS discuss any adverse environmental effects which cannot be avoided if the proposal is implemented, 52 and the CEQ regulations which interpret NEPA explicitly mandate that an EIS discuss mitigation measures. 53 The EIS prepared by the Forest Service in *Robertson* did discuss mitigation strategies as to air quality concerns resulting from increased traffic and wood stoves. It also discussed the impact on wildlife, primarily on the state's largest migratory deer herd. 54 The EIS acknowledged, however, that the mitigation measures it outlined were merely conceptual and would " 'be made more specific as part of the design and implementation stages of the planning process.' " 55 The appellate court held that the EIS was inadequate because it failed to "include a thorough discussion of measures to mitigate the adverse environmental impacts of [the] proposed action." 56 In dicta the appellate court also asserted that NEPA substantively required that "action be taken to mitigate the adverse effects of major federal actions." 57

In a reversing opinion by Justice Stevens, a virtually unanimous Supreme Court held it "now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." 58 The Court continued, "[o]ther statutes may *108 impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed -- rather than unwise -- agency action." 59 Strikingly, the Court asserted that "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 the special use permit, notwithstanding the loss of 15%, 50%, or even 100% of the mule deer herd." 60

Given the impact of the above cases, one writer concluded that "the Supreme Court, starting with a basic lack of commitment to the Act as conceived by Congress [and] a dominant allegiance to traditional legal doctrines that undermined Congress's intent to superimpose NEPA upon those doctrines, . . . deprive[d] the nation of the full reach of Congress's purpose in enacting the statute." 61

III. The Courts Have Not Adhered to the Congressional Intent Underpinning NEPA

What happened to NEPA between the *Calvert Cliffs*' holding that agencies are "not only permitted, but compelled, to take environmental values into account" 62 and *Strycker's Bay*'s conclusion that agencies need only consider environmental impacts but need not act to avert them? Although NEPA's legislative history is surprisingly sparse, 63 the little that does exist indicates that Congress intended that NEPA have a substantive component. The court in *Calvert Cliffs*' quoted the Act's chief sponsor, *109 Senator Jackson, explaining the purpose behind NEPA section 102:

"[This section] establishes a procedure designed to insure that in instances where a proposed major Federal action would have a significant impact on the environment that . . . any adverse effects which cannot be avoided are justified by some other stated consideration of national policy . . . [and] that any irreversible and irretrievable commitments of resources are warranted." 64

NEPA stems from a 1959 bill proposing a national policy in favor of conservation and the creation of a Council of Environmental Advisors. 65 Senator Jackson added an express requirement that federal agencies prepare findings on environmental impact -- the genesis of the EIS requirement. 66 The House version of NEPA, significantly, originally contained language that

"nothing in this Act shall increase, decrease, or change any responsibility of any Federal official or agency." 67 The fact that this wording was deleted by the House-Senate Conference underscores the congressional intent that NEPA mandate substantive mitigation of environmental impacts.

It is admittedly hard to discern the specific details of congressional intent behind NEPA. As one scholar has aptly noted, "[w]hether Congress understood what it legislated, and expected that the environmental impact statement would become a major instrument of environmental review, is far from clear." 68

It is clear, however, that the Second Circuit's far-reaching decision in *Scenic Hudson Preservation Conference v. Federal Power Commission*, 69 a precursor to NEPA (though not expressly discussed in the Act's legislative history), 70 imposed a substantive mandate on a federal agency. In that case the Commission, 71 in licensing a major hydroelectric plant, refused to consider the project's impact on the Hudson River's scenic, recreational and fishing resources and refused to consider any alternatives*110 to the plant. The court read the Federal Power Act 72 to require the Commission to weigh those impacts, as well as alternatives, in determining whether to license the plant. As the court also noted, the Commission may not simply "act as an umpire blindly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." 73 The court's interpretation of the Federal Power Act to require an agency to weigh environmental concerns in its decision making prior to the advent of the EIS requirement suggests that to the extent Congress was aware of this highly publicized case, it probably intended that NEPA achieve the same substantive results, since other statutes lacked the Power Act's broad language. 74 It appears from this history that until Congress's intentions were thwarted in *Strycker's Bay*, NEPA was intended to be a substantive statute.

IV. The State Statutes: Stronger Than NEPA

Shortly after NEPA's enactment, a number of states began to enact statutes using NEPA as a model. California's Environmental Quality Act (CEQA), enacted in 1970, was the first such initiative. 75 CEQA imposed substantive mandates at the outset on agencies not only to discuss, but also to mitigate, environmental harms. The CEQA statute explicitly requires agencies to "mitigate or avoid the significant environmental effects . . . as identified in the completed environmental impact report." 76 The California courts, in their enforcement of CEQA, have not hesitated to set aside project approvals because of an agency's failure *111 to mitigate. 77 Similarly, Washington's State Environmental Policy Act 78 authorizes government agencies "to condition or deny a request for action on the basis of specific adverse environmental impacts." 79

New York's State Environmental Quality Review Act, 80 modeled in large measure on the California legislation, 81 likewise requires that an agency funding, approving, or implementing an action which was the subject of an EIS "make an explicit finding that . . . consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the [EIS] process will be minimized or avoided." 82 The Act contains language strikingly similar to that of NEPA, 83 which requires agencies to "use all practicable means to realize the policies and goals set forth in the article, and [to] act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." 84 Courts in New York, as in California and Washington, have found that these provisions impose a duty on agencies to mitigate environmental harm. 85 As one court held, the New York act "requires an approving agency to act affirmatively upon the adverse environmental impacts revealed in an EIS,"

to ensure that the EIS is "not a mere disclosure statement *112 but rather . . . an aid in an agency's decision-making process to evaluate and balance the competing factors." 86 Put simply, these courts have interpreted the statutes to require mitigation.

Experience with these state statutes has shown that a substantive dimension has made them far more effective than NEPA. One New York court, annulling approval of an action for failure to mitigate demonstrated impacts, noted, "the traffic issue must be addressed adequately under the [act], and wishful thinking, a la Dickens's eternal optimist, Wilkins Micawber, that this project should proceed anyway because, undoubtedly, 'something will turn up,' does not satisfy the statutory requirements and the clear legislative intent." 87

The state statutes, unlike NEPA, "screen out environmentally unsound proposals by modifying them to reduce environmental impacts or by deterring agencies and developers from proposing projects which would be environmentally unsound or controversial." 88 Of course, NEPA, even with its substantive dimension extirpated, plainly retains some effect on projects. The airing of impacts and alternatives, allowing public scrutiny and comment in advance on what earlier would have been a fait accompli, has delayed, modified, and even averted some environmentally damaging actions. 89 Even the Methow Valley decision acknowledged that "[s]imply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." 90 Without substantive impact, however, NEPA is only half as effective as it might be. 91

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V. The CEQ Regulations: An Uncertain Trumpet

In order to understand NEPA one must understand the implementing regulations that the Council on Environmental Quality (CEQ) adopted in 1978. NEPA created this three-member agency within the Executive Office of the President to develop "national policies to foster and promote the improvement of environmental quality." 92 The CEQ regulations, 93 binding on all federal agencies, 94 have frequently been used by the courts as authoritative interpretations of the Act. 95

By their terms, the CEQ regulations call for the implementation of "the procedural provisions of [NEPA]." 96 However, they flatly state as part of their purpose that "it is not better documents but better decisions that count, [and that] [t]he NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 97 Despite this language, the courts have not found that the CEQ regulations, any more than NEPA itself, require substantive mitigation.

Whether the CEQ regulations could be amended to require federal agencies to mitigate environmental harms, or whether such a change would require congressional action, turns on whether the courts would view the CEQ as improperly usurping legislative power. In NEPA, Congress granted authority to the CEQ "to develop and recommend to the President national policies to foster and promote the improvement of environmental *114 quality." 98 As discussed earlier, 99 the specific authority to enact the regulations that control federal agencies' compliance with NEPA stems from an Executive Order issued by President Carter.

In recent decades the Supreme Court has consistently sustained the authority of administrative agencies to adopt regulations, rejecting claims of unlawful delegation of congressional power. The Court annulled administrative agency regulations on these grounds in two egregious decisions from the mid-

1930s, now thoroughly discredited, 100 *Schechter Poultry Co. v. United States* 101 and *Panama Refining Co. v. Ryan*. 102 Since then the Court has upheld the authority of agencies to promulgate regulations on a wide variety of subjects, invariably rejecting delegation claims. In *American Textile Manufacturers Institute, Inc. v. Donovan* 103 the Court sustained the authority of the Secretary of Labor to adopt workplace standards under the Occupational Safety and Health Act, 104 although Justice Rehnquist, in a dissent joined by Chief Justice Burger, contended that legislative authority had been improperly delegated. 105 In *Lichter v. United States* 106 the Court upheld delegation to the War Department of the authority to prohibit "excessive profits" during World War II, and in *American Power & Light Co. v. Securities & Exchange Commission* 107 it sustained delegation to the Securities and Exchange Commission of authority to regulate utility holding companies. It is unlikely that that powerful current will be reversed. As Justice Marshall points out in his concurring opinion in *Federal Power Commission v. New England Power Co.*, 108 "[t]he notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in *115 vogue in the 1930s, had been virtually abandoned by the Court for all practical purposes." 109

Delegating authority to administrative agencies is necessary because Congress cannot anticipate each particular problem that an individual agency will encounter. With regard to NEPA, as one writer noted, "[t]he only sensible way to legislate was by delegating the power to decide each problem in the light of the facts of that problem." 110 Delegation to CEQ of the authority to require agencies to mitigate environmental harms should follow from the fact that CEQ possesses the authority to regulate the preparation of EISs as well as the discussion of mitigation measures.

The argument could be made that legislation, not just an amendment to the regulations, is needed to overturn the Supreme Court decisions in *Strycker's Bay* 111 and *Methow Valley*. 112 Some courts have found the refusal of state legislatures to enact a law to be an element favoring the conclusion that an agency was without authority to make rules to reach the forbidden goal. 113 However the solid history of nearly six decades of Supreme Court rejection of the unlawful delegation argument makes such a result unlikely here. 114

As part of the Clinton Administration's effort to reduce the staff in the office of the President, the White House intends to abolish CEQ. 115 The White House seeks to transfer responsibility for overseeing NEPA to EPA or to a new White House Office of NEPA Compliance, and bills relating to the proposed transfer to the EPA, as well as to the elevation of EPA to cabinet-level, *116 are under consideration by the House and Senate. 116 Although it is still unclear exactly where authority for administering NEPA will reside, either Congress or the agency replacing the CEQ, as appropriate, should amend NEPA to make clear its substantive mandate.

Conclusion

NEPA has aptly been called the "Magna Carta of environmental protection in America." 117 The Magna Carta itself required substantial development before it truly evolved into a Constitution safeguarding life, liberty, and property from despotism. 118 The importance of environmental protection demands that the courts' unduly grudging construction of NEPA be set aside and that the statute be amended to require mitigation of environmental harms. The experience of the states in which comparable legislation has worked effectively for nearly two decades 119 suggests that no dire drawbacks would follow from such an amendment. Therefore Congress, or the agency given the CEQ's rule-making powers, should enact this amendment as soon as possible.