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A New Approach to Review of NEPA Findings of No Significant Impact

On New Year's Day, 1970, Congress recognized formally the need for a unified national environmental policy by enacting the National Environmental Policy Act of 1969 (NEPA).¹ Congress enacted NEPA in response to growing nationwide concern² over increasing environmental harm resulting from uncontrolled population growth, high-density urbanization, rapid industrial expansion, resource exploitation, and unchecked technological advances.³ The national policy embodied in the statute emphasized long-term environmental awareness and the responsibility of present generations to future ones for negative environmental consequences.⁴ On a more practical level, NEPA elevated environmental concerns to a position of parity with more traditional factors, particularly economic factors, in federal administrative decisionmaking.⁵ In short, NEPA reflected the mood of an environmentally enlightened nation and promised progressive change.⁶

The first sections of NEPA state its broad national policy goals.⁷

1. 42 U.S.C. §§ 4321-47 (1982); see F. ANDERSON, *NEPA IN THE COURTS* 1 (1973).

2. The enactment of NEPA capped a long period of national debate over the pervasiveness of negative environmental effects of modern society's activities. See F. ANDERSON, *supra* note 1, at 1.

3. See 42 U.S.C. § 4331(a) (1982). NEPA's legislative history concludes that "[t]he most dangerous of all [the enemies of human survival] is man's own undirected technology." H.R. REP. NO. 378, 91st Cong., 1st Sess. 3, *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2751, 2753.

4. See 42 U.S.C. § 4331(a), (b)(1) (1982).

5. See 42 U.S.C. § 4332(2)(B); *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1177 (9th Cir. 1982).

6. Initially, the federal agencies reacted sluggishly to NEPA. An early study found that "despite legislation, administrative rules, and public pressure, little had changed in the decision-making and environmental practices of most federal agencies." D. MAZMANIAN & J. NIENABER, *CAN ORGANIZATIONS CHANGE?* vii (1979). While this situation has undoubtedly changed, a subsequent study showed that many agencies were extremely slow in complying with NEPA's directives. See N. ORLOFF, *THE ENVIRONMENTAL IMPACT STATEMENT PROCESS* 39-43 (1978).

Furthermore, the general public becomes less concerned with environmental issues when other public issues appear more pressing. One commentator noted in 1976 that "[c]urrent energy problems and the economic crisis facing the nation [had] greatly reduced public enthusiasm for environmental constraints upon constructive economic activity." Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 260 (1976). The lower visibility today of the environmental crises that triggered the environmental movement in the 1970s suggests that the general public's concern with environmental problems has not returned to its former level. See Ruckelshaus, *Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad*, 15 ENVTL. L. 455, 455-58 (1985).

7. The statute establishes six goals for the nation: (1) to act as "trustee of the environment for succeeding generations;" (2) to assure "safe, healthful, productive, and esthetically and culturally pleasing surroundings;" (3) to "attain the widest range of beneficial uses of the environ-

The statute's bite, however, is the administrative reform⁸ it promotes through its "action-forcing" provisions,⁹ which include the requirement that agencies prepare a detailed environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."¹⁰ Under NEPA, the preparation and use of an EIS requires several primary agency decisions.¹¹ The most impor-

ment without degradation, risk to health or safety, or other undesirable and unintended consequences;" (4) to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain . . . an environment which supports diversity and variety of individual choice;" (5) to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities;" and (6) to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." 42 U.S.C. § 4331(b) (1982).

8. See F. ANDERSON, *supra* note 1, at viii, where NEPA is described as "an administrative reform statute." The environmental movement in the 1960s was aimed in part at administrative agencies, which were "some of the worst offenders against the environment." D. MAZMANIAN & J. NIENABER, *supra* note 6, at vii (listing the Atomic Energy Commission, the Forest Service, the Department of Transportation, the Department of Interior, and the Army Corps of Engineers as examples). The danger of allowing federal agencies to consider environmental impacts of their actions with unchecked discretion is noted in the legislative history of NEPA. See H.R. REP. NO. 378, 91st Cong., 1st Sess. 3, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2751, 2753-54.

9. The term "action-forcing" was used in the legislative history, 115 CONG. REC. 19,008, 19,010 (1969), and has been adopted by commentators. See, e.g., F. ANDERSON, *supra* note 1, at 2; 42 U.S.C. §§ 4332-35 (1982); see also 40 C.F.R. § 1500.1(a) (1986).

10. 42 U.S.C. § 4332(2)(C) (1982). An EIS is a statement analyzing in detail the environmental impacts of an agency action. The section states in part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

....

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible agency on —

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

In addition to the EIS requirement, NEPA requires agencies to apply a "systematic, interdisciplinary approach," including use of environment-related sciences, in taking action that may affect the environment, 42 U.S.C. § 4332(2)(A); to develop procedures, with the assistance of the Council on Environmental Quality, for complying with the statute, 42 U.S.C. § 4332(2)(B); and, whether or not an EIS is required, to consider alternatives to actions that involve "unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

11. See F. ANDERSON, *supra* note 1, at viii. Three primary decisions have been identified. The first decision is whether the agency action requires an EIS. The second concerns the content and adequacy of an EIS. The third is whether to proceed with or forgo an action based on the information the EIS reveals. See Peltz & Weinman, *NEPA Threshold Determinations: A Framework of Analysis*, 31 U. MIAMI L. REV. 71, 76 (1976) (identifying these decisions and suggesting that each requires a different legal analysis).

tant step in ensuring at least minimal compliance with NEPA's objectives is the threshold decision¹² whether the environmental impact of a proposed action is potentially significant enough to warrant preparation of an EIS.¹³ If the agency decides an EIS is necessary, it rigorously balances environmental considerations against each other and against economic and social considerations, detailing its findings in an extensive report — the EIS.¹⁴ If the agency decides that an EIS is not required,¹⁵ NEPA essentially mandates no further consideration of environmental factors, and any significant environmental effects that preparation of an EIS might have revealed remain unknown and unaddressed until they actually cause environmental harm.¹⁶

Judicial review of agency interpretations of NEPA usually involves an analysis of whether the agency has met the EIS requirement.¹⁷ In reviewing agency findings that the environmental impact of an action is not significant enough to require an EIS, the federal courts have developed different approaches. The conflict is one between the First, Second, Fourth, and Seventh Circuits, which review the threshold decision under the Administrative Procedure Act's (APA)¹⁸ "arbitrary and capricious" standard of review,¹⁹ and the Fifth, Eighth, Ninth, and Tenth Circuits, which employ a "reasonableness" standard.²⁰ The District of Columbia Circuit applies a modified "arbitrary and capricious" standard that employs a four-part test.²¹

The development of both the reasonableness standard and the arbitrary and capricious standard in the various circuits has yielded review

12. An agency's decision to prepare or not to prepare an EIS is commonly called the "threshold decision" or "threshold determination."

13. An EIS may not be required for reasons other than insignificance of environmental impact. See the cases cited in note 53 *infra* for examples. Congress recognized that in certain cases compliance with NEPA to "the fullest extent possible" would preclude preparation of an EIS. See H.R. CONF. REP. NO. 765, 91st Cong., 1st Sess. 9, *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2767, 2770.

14. The essential elements of an EIS are spelled out in 42 U.S.C. § 4332(2)(C) (1982). See note 10 *supra*.

15. This decision is termed a "Finding of No Significant Impact" (FONSI). See note 38 *infra* and accompanying text.

16. See text accompanying notes 102-07 *infra* for a discussion of different views on the likelihood of significant impact that should trigger preparation of an EIS.

17. See F. ANDERSON, *supra* note 1, at 275.

18. 5 U.S.C. §§ 701-06 (1982).

19. 5 U.S.C. § 706(2)(A) (1982); see, e.g., *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985); *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986); *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014 (4th Cir. 1985); *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

20. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985); *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172 (9th Cir. 1982); *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1973); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

21. See notes 114-19 *infra* and accompanying text.

approaches that range from nearly total deference to the agency²² to almost de novo review by the court.²³ The varying degree of judicial deference given agency threshold decisions may well stem from conflicting application of several Supreme Court decisions and disagreement over whether to characterize the threshold decision as one of fact or law. In addition, courts impose different burdens of proof on an opponent of the agency decision.

This Note examines the confused array of judicial approaches for reviewing agency findings of no significant environmental impact and proposes a standardized, comprehensive approach that ensures compliance with both the procedural and substantive aspects of NEPA.²⁴ Part I reviews agency procedures mandated by NEPA which ensure that agencies develop a detailed record for judicial scrutiny and constitute the legal basis against which to check agency threshold decisions. Part II examines the conflicting approaches of the lower courts, emphasizing their reliance on Supreme Court decisions, their characterization of the threshold decision as legal or factual, and the burden of proof each places on opponents of the agency decision.

Part III proposes an intermediate approach toward judicial review that builds upon the District of Columbia Circuit's four-part inquiry. The proposed approach avoids the confusing terminology (such as "arbitrary and capricious" and "reasonableness") that characterizes current review standards. Instead, it prompts courts to make an individual analysis of several interrelated parts of the threshold decision and to adopt a moderate burden of proof for the decision's challengers. The approach thus leads to a less deferential and more in-depth review, which this Note argues is appropriate given that agencies governed by NEPA frequently lack environmental expertise.

I. NEPA PROCEDURES AND THE EIS REQUIREMENT

Congress intended NEPA to have substantive impact on adminis-

22. See, e.g., *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986); *Hanly v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); see also Note, *Threshold Determinations Under Section 102(2)(C) of NEPA: The Case for "Reasonableness" as a Standard for Judicial Review*, 16 WM. & MARY L. REV. 107, 114-20 (1974).

23. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (10th Cir. 1973).

24. Although the Supreme Court has stated that NEPA's "mandate to the agencies is essentially procedural," see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978), this Note argues that its substantive policy goals require agencies to err in favor of preparation of an EIS when an agency determines that an action is *likely to*, not that it *necessarily will*, have a significant environmental impact. See notes 128-30 *infra* and accompanying text; see also W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* 750 (1977); cf. *City of Davis v. Coleman*, 521 F.2d 661, 670 n.12 (9th Cir. 1975) (noting the broad substantive objectives of NEPA in addition to its narrower procedural elements).

trative decisionmaking.²⁵ Rather than requiring agencies to reach statutorily defined goals, however, Congress pursued agency reform through procedural mandates. It recognized that procedures requiring serious consideration of environmental factors will, in some cases, significantly influence administrative decisions. Because NEPA can influence substantive agency decisions *only* through its procedural mandates, strict agency adherence to those procedures is crucial.

NEPA procedures require preparation of an EIS for every major federal action significantly²⁶ affecting the quality of the human environment. Unlike most other organic statutes,²⁷ NEPA applies to all federal agencies. Even development-oriented agencies such as the Army Corps of Engineers are required to consider environmental concerns that may conflict with their primary objectives.²⁸ NEPA therefore further established the Council on Environmental Quality (CEQ)²⁹ to assist the various agencies in developing standardized procedures for complying with the EIS requirement.³⁰

To fulfill this directive, the CEQ has promulgated regulations³¹

25. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation . . ."); see also R. ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE 137 (1976) (noting that "[t]he effectiveness of NEPA . . . must ultimately be measured not by the policies, procedures, and organizational structures through which it is translated, but by its influence on the substantive activities that are those organizations' outputs").

26. Although NEPA's language mandates the preparation of an EIS for every *major* federal action significantly affecting the environment, the Council on Environmental Quality (CEQ) regulations promulgated under NEPA, 40 C.F.R. § 1508.18 (1986), and the vast majority of courts stipulate that the term "major" has no meaning independent of the term "significantly." See Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. ENVTL. AFF. L.J. 63, 68-74 (1980). Thus, this Note treats the meaning of "significantly" as the cornerstone of the NEPA threshold decision.

27. Organic statutes are statutes that establish a body such as a federal agency and the laws governing it. See BLACK'S LAW DICTIONARY 990 (5th ed. 1979) (definition of "Organic Act").

28. See F. ANDERSON, *supra* note 1, at 104; W. RODGERS, *supra* note 24, at 698; Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 515 (1974). For example, the Army Corps of Engineers, one of the oldest and busiest federal agencies, has as its primary objective the building and maintenance of numerous public works projects such as dams and navigational facilities. Often these objectives or the procedures to achieve them are in direct conflict with environmental concerns. See generally D. MAZMANIAN & J. NIENABER, *supra* note 6, at 8-12. See also Peltz & Weinman, *supra* note 11, at 89 ("[A]gencies often become carried away with their own abilities and defiantly refuse to comply with laws which they feel might hinder their operation. They may seek to insulate themselves from the law and judicial scrutiny, hiding behind the shield of expertise and a self-proclaimed autonomy.").

29. See 42 U.S.C. §§ 4341-47 (1982). The legislative history of NEPA reveals that Congress realized that because the policies of different federal agencies often conflict with each other and with the public interest, a central agency was needed. See H.R. REP. NO. 378, 91st Cong., 1st Sess. 3, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2751, 2753-54.

30. 42 U.S.C. § 4332(2)(B) (1982).

31. 40 C.F.R. §§ 1500-08 (1986). Federal agencies are subject to both the CEQ regulations and any procedures they develop internally for complying with NEPA. See, e.g., 33 C.F.R. Part 230 (1986) (Army Corps of Engineers policy and procedures for implementing NEPA); 40 C.F.R. Part 6 (1986) (similar Environmental Protection Agency regulations). The agency procedures are typically based on the CEQ regulations, but are tailored more closely to the internal operation of the agency. For example, while the CEQ regulations suggest generally that agencies

that are binding on all federal agencies.³² The CEQ procedures require agencies initially to prepare an Environmental Assessment (EA), a brief³³ document containing sufficient evidence and analysis for the agency to decide whether an EIS is required.³⁴ An agency can avoid preparing an EA only if the agency has already "categorically excluded"³⁵ the type of action proposed from those potentially requiring an EIS, if the agency has already decided to prepare an EIS,³⁶ or if the agency's organic legislation mandates procedures for consideration of environmental factors that are "functional equivalents" of the EIS process.³⁷ If, after producing an EA, the agency decides an EIS is unnecessary, it must state the reasons for that decision in a "finding of no significant impact," a document commonly known as a FONSI.³⁸

The CEQ regulations thus contemplate situations in which an agency can legitimately terminate environmental inquiry because the

identify classes of actions that will typically either have or not have significant environmental impact, 40 C.F.R. § 1501.4 (1986), an agency's internal procedures will usually give examples. *See, e.g.*, 33 C.F.R. § 230.6 (1986) (actions normally requiring an EIS); 33 C.F.R. § 230.7 (actions normally requiring an Environmental Assessment (EA), but not an EIS). *But see* N. ORLOFF, *supra* note 6, at 39-43 (many agencies have been slow in following or have failed to follow CEQ directives).

32. 40 C.F.R. § 1500.3 (1986). The CEQ regulations were initially in the form of nonbinding guidelines, but were made binding by a Presidential Order requiring the CEQ to issue regulations on NEPA procedures. *See* Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985); Foundation on Economic Trends v. Heckler, 756 F.2d 143, 147 (D.C. Cir. 1985); Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982); National Indian Youth Council v. Watt, 664 F.2d 220, 225 (10th Cir. 1981). Even where its regulations have not been made binding, the "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

33. *See* *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985); 33 C.F.R. Part 230, App. B, Para. 8.a. (1985) ("The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project . . . could have significant effects on the environment . . .").

34. 40 C.F.R. § 1508.9 (1986).

35. 40 C.F.R. § 1508.4 (1986); *see also* 40 C.F.R. § 1501.4(a)(2) (1986) (noting that the first step in deciding whether or not to prepare an EIS is to determine if the proposed action qualifies as a categorical exclusion). A categorical exclusion applies to categories of actions that an agency has found not to have a significant effect on the environment, either individually or cumulatively. However, the CEQ regulations require agencies to provide for special cases in which a normally excluded action may have a significant environmental effect. 40 C.F.R. § 1508.4 (1986).

There are few cases dealing with the validity of categorical exclusions. For an example, *see* *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014 (4th Cir. 1985) (categorical exclusion of highway projects in general and exclusion of particular project upheld as not arbitrary or capricious).

36. 40 C.F.R. § 1501.3(a) (1986).

37. *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 367 n.51 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981). For example, § 111 of the Clean Air Act, 42 U.S.C. § 7411 (1982), has been held to require the "functional equivalent" of an EIS. *See* *Sierra Club v. Costle*, 657 F.2d 298, 331 (D.C. Cir. 1981).

38. *See* 40 C.F.R. § 1508.13 (1986). Under the CEQ regulations, FONSI's and EIS's are both considered environmental documents which are open to public and judicial scrutiny. *See* 40 C.F.R. § 1508.10 (1986); *see also* Leventhal, *supra* note 28, at 521 ("The courts have evolved a requirement that an agency which believes an impact statement is unnecessary must give a statement of its reasons.").

EA it prepares supports a FONSI. Nonetheless, while an EA can provide support for a FONSI and a decision not to prepare an EIS, agencies should not attempt to substitute an EA for an EIS if indeed the action is likely to have a significant impact.³⁹ Unlike an EIS, an EA identifies the presence or absence of potential significant environmental impacts after engaging in only a minimal balancing of environmental, social, economic, and other factors.⁴⁰ By contrast, the EIS is a much longer⁴¹ document that studies environmental factors in greater detail and includes extensive balancing of factors. Moreover, it focuses more extensively on alternatives to the action,⁴² identifies “irreversible and irretrievable commitments of resources”⁴³ to a project, and provides greater opportunity for comment from other agencies and the public.⁴⁴

In sum, an EIS and an EA supporting a FONSI convey to the public significantly different messages. The EA, if it makes accurate findings, suggests that the agency action is environmentally sound in all respects, thereby justifying a relaxed view toward environmental aspects of the action. The EIS, by contrast, acknowledges that the action might result in environmental harm and thus establishes a basis for ongoing environmental sensitivity. Furthermore, because an EIS identifies latent environmental impacts and analyzes existing environ-

39. For an excellent discussion of the differences between EAs and EISs, see *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (arguing that it is dangerous to treat an EA as if it were an EIS because the two documents play different roles). See also *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985). But see *River Road Alliance, Inc. v. Corps of Engrs. of the United States Army*, 764 F.2d 445, 451 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986) (“The necessary judgments [in analyzing environmental impacts] are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a[n] . . . [EIS].”).

40. See *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985).

41. See, e.g., 40 C.F.R. § 1502.7 (1986), which states that EISs shall normally be less than 150 pages and that even unusually detailed EISs shall be less than 300 pages. But cf. *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986) (acknowledging an EIS of 858 pages plus two appendices).

42. NEPA mandates discussion of alternatives in both the EIS provision, 42 U.S.C. § 4332(2)(C) (1982), and in 42 U.S.C. § 4332(2)(E) (1982), which applies to all agency actions, regardless of significant environmental impact, having “unresolved conflicts concerning alternative uses of available resources.” An EA may discuss alternatives, and in some cases an agency’s internal procedures for compliance with NEPA require such a discussion. See, e.g., 33 C.F.R. Part 230, App. B, Para. 8.a. (1986) (“[T]he EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the impact of the applicant’s proposal is not significant, there are no ‘unresolved conflicts concerning alternative uses of available resource [sic] . . .’ and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives . . .”).

43. 42 U.S.C. § 4332(2)(C)(v) (1982).

44. *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985). Although some outside advice is envisioned under 40 C.F.R. § 1501.4(b), the comment period for an EA coupled with a FONSI is limited to thirty days and, in some cases, is not required at all. 40 C.F.R. § 1501.4(e)(2) (1986). The outside input requirement for an EIS, on the other hand, involves a broad range of participants. See generally 40 C.F.R. Part 1503 (1986). Furthermore, the comment period for a draft EIS is ninety days and for a final EIS thirty days. 40 C.F.R. § 1506.10 (1986).

mental impacts in much greater detail than an EA, it provides a sounder basis for the exercise of agency discretion regarding the ultimate substantive decision to continue, modify, or even reject the proposed action.

II. JUDICIAL TREATMENT OF THE EIS THRESHOLD DECISION

In NEPA's early years, federal courts applied as many as five standards of review⁴⁵ to agency decisions not to prepare an EIS. The reasonableness standard⁴⁶ and the arbitrary and capricious standard⁴⁷ are the only ones that have survived subsequent judicial refinements, and the development of the respective standards has at times produced inconsistent variations.⁴⁸ Many courts, however, have simply concluded that in practice the two standards are the same.⁴⁹

The difference among the circuits can best be characterized as a dispute over the proper degree of deference due agency threshold decisions. This application of different degrees of deference reflects the courts' fundamental disagreement over the strength of NEPA as an administrative reform statute and on the willingness and ability of di-

45. See Peltz & Weinman, *supra* note 11, at 82-86 (identifying applications of the arbitrary and capricious standard, a substantial evidence test, a rational basis test, the reasonableness standard, and *de novo* review); Note, *supra* note 22, at 117-26 (identifying the same five standards).

46. See note 20 *supra* and accompanying text.

47. See note 19 *supra* and accompanying text.

48. For example, compare *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (applying the arbitrary and capricious standard and requiring the challenger to show a substantial possibility of significant environmental impact), *Providence Road Community Assn. v. EPA*, 683 F.2d 80, 82 & n.3 (4th Cir. 1982) (applying the arbitrary and capricious standard and distinguishing standards of review that require challengers to raise a substantial environmental issue), and *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 432 (5th Cir. 1985) (applying the reasonableness standard and requiring the challenger to raise a substantial environmental issue).

49. See, e.g., *Sierra Club v. Marsh*, 769 F.2d 868, 871 (1st Cir. 1985); *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986); *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir. 1985); *Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981); see also Note, *Judicial Review of Agency Action*, 32 U. KAN. L. REV. 884, 897 (1984) ("Courts would do better to state their interpretation of the 'arbitrary and capricious' test in terms of simple 'reasonableness' and avoid the temptation to recite the over-developed list of synonymous phrases.").

The Supreme Court has also suggested that the two standards are similar. See *Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87 (1983). The Court noted that the courts' role "is simply to ensure that the agency has adequately considered and disclosed the environmental impacts of its actions and that its decision is not *arbitrary and capricious*." 462 U.S. at 97-98 (emphasis added). Later, the Court found that "[i]t is not *unreasonable* for the Commission to counteract the uncertainties in postsealing releases by balancing them with an overestimate of presealing releases." 462 U.S. at 103 (emphasis added). But cf. *Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting from denial of certiorari) (The conflict among the circuits "is not merely semantic or academic."); *Fritiofson v. Alexander*, 772 F.2d 1225, 1237-38 (5th Cir. 1985) ("The reasonableness standard is clearly 'a more rigorous standard . . . than the rule of arbitrary and capricious review that ordinarily governs agency actions.' . . . It is clear . . . that a court applying the reasonableness test may, in certain circumstances, receive and weigh evidence beyond that in the administrative record.") (quoting *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985)).

verse federal agencies to comply adequately with NEPA's procedural mandates. In justifying their positions, courts employ conflicting interpretations of relevant Supreme Court decisions and disagree whether to characterize the threshold decision as legal or factual. As a result, the courts apply different burdens of proof to challengers of agency FONSI's.

The use of Supreme Court decisions is particularly unhelpful in resolving the standard of review conflict. The Supreme Court has not yet come close to examining in detail the issues surrounding the threshold decision or heard persuasive arguments for adopting one approach over others. Similarly, the debate over the characterization of the threshold decision as factual or legal is misdirected because the decision is concededly one involving both factual and legal elements.⁵⁰ Choosing one characterization over the other oversimplifies what should be a careful and detailed judicial analysis. The burden of proof issue is a critical starting point in review of FONSI's that deserves a more reasoned resolution than it presently receives. The next three sections examine these factors in turn.

A. *Disparate Interpretations of Supreme Court Decisions*

Supreme Court cases interpreting NEPA primarily involve agency decisions made in the course of preparing an EIS,⁵¹ or an agency's failure to consider environmental concerns when preparation of an EIS was concededly not at issue.⁵² Supreme Court cases that examine the threshold decision not to prepare an EIS focus on whether the EIS provisions of NEPA apply at all to the type of action involved, rather than on the significance of the proposed action's environmental impact.⁵³ The Court has refused two opportunities to resolve the circuit split over the proper standard of review of an agency's decision not to prepare an EIS.⁵⁴ In spite of this silence, lower courts regularly have

50. See notes 87-101 *infra* and accompanying text.

51. See, e.g., *Baltimore Gas & Elec. v. Natural Resources Defense Council*, 462 U.S. 87 (1983) (challenge of an EIS which was based on the assumption that permanent storage of certain nuclear waste would have no significant impact); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (challenge of an EIS for failure to consider energy conservation as an alternative to nuclear energy).

52. See, e.g., *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (*per curiam*) (agency failure to consider alternatives pursuant to 42 U.S.C. § 4332(2)(E), a requirement independent of the EIS requirement).

53. See, e.g., *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981) (EIS not required for a naval facility capable of storing nuclear weapons because of national security reasons); *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (EIS not required for appropriations requests); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (regional EIS not required in addition to comprehensive national EIS because the agency did not have a regional program, proposal or recommendation); *Flint Ridge Dev. Co. v. Scenic Rivers Assn. of Okla.*, 426 U.S. 776 (1976) (EIS not required because of a conflict of statutory duty).

54. In order to resolve the split, Justice White, joined by Justices Brennan and Marshall, would have granted certiorari in *Gee v. Boyd*, *cert. denied*, 471 U.S. 1058 (1985), noting that the

relied on several Supreme Court decisions to support conflicting standards of review.

*Citizens to Preserve Overton Park v. Volpe*⁵⁵ is one Supreme Court case often cited in the conflicting lower court decisions. Although *Overton Park* did not involve NEPA,⁵⁶ courts have applied it to a broad range of administrative actions, relying on its extensive discussion of the scope of review provisions in the Administrative Procedures Act (APA),⁵⁷ particularly the Court's construction of the APA's arbitrary and capricious standard. The Court in *Overton Park* established a broad category of actions that "must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."⁵⁸ The Court noted that under the arbitrary and capricious standard the agency decision at issue is entitled to a "presumption of regularity."⁵⁹ However, it added that

"conflict is not merely semantic or academic." 471 U.S. at 1060. In *Morningside Renewal Council v. Atomic Energy Commn.*, cert. denied, 417 U.S. 951 (1974), Justice Douglas dissented from the denial of certiorari, partly in recognition of the conflict between courts that applied the arbitrary and capricious standard and those that applied the reasonableness standard.

55. 401 U.S. 402 (1971).

56. *Overton Park* upheld a citizens group's challenge of the Secretary of Transportation's failure to consider alternatives to the proposed route of a highway through a public park. Federal statutes prohibited the Secretary from issuing funds for a highway running through a public park if a "feasible and prudent" alternative route existed. See 401 U.S. at 405.

The statute in *Overton Park* has been distinguished from NEPA. Judge Leventhal has noted that

[w]hereas the statutory provision construed in *Overton Park* gives environmental values dominant significance under certain circumstances, NEPA does not assign a relative weight to environmental concerns and therefore leads the courts to recognize much broader governmental discretion in deciding whether or not those concerns should prevail in a given case. Leventhal, *supra* note 28, at 520.

57. 5 U.S.C. § 706 (1982). The section reads:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

58. 401 U.S. at 414.

59. 401 U.S. at 415. One commentator has noted that while many courts have read the "presumption of regularity" language as signaling that the agency decision under review is substantively correct, the more probable meaning of the phrase is that the Court will presume that

this presumption does not shield the decision from a “thorough, probing, in-depth review.”⁶⁰ Without explaining this apparent ambiguity, the Court then described the mechanics of review under the arbitrary and capricious standard. The initial inquiry is whether “on the facts the [agency’s] decision can *reasonably* be said” to be within the agency’s statutory range of choices. Second, the reviewing court must find that the actual decision was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”⁶¹ a test which is met if the decision was based on consideration of relevant factors and was not a “clear error of judgment.”⁶² Finally, the court must ensure that the agency complied with procedural requirements.⁶³

The lower courts have drawn upon the ambiguous terminology employed in *Overton Park* to support both a relatively deferential arbitrary and capricious standard⁶⁴ and a more rigorous reasonableness standard.⁶⁵ The use of *Overton Park* to support the arbitrary and capricious standard is fairly predictable given *Overton Park*’s attempt to define the standard explicitly. Courts applying the arbitrary and capricious standard, however, risk overreliance on agency discretion in a context where the judicial check on agency action is particularly important.⁶⁶ More importantly, application of the arbitrary and capricious standard does not necessarily ensure systematic judicial review of an agency’s compliance with NEPA’s procedures.

The more persuasive cases are those applying *Overton Park* to support the reasonableness standard. Some of these cases have determined that review of the threshold EIS decision is governed by the first part of the *Overton Park* inquiry, which asks whether the decision is “reasonably” within the range of choices the agency is allowed by statute to make.⁶⁷ Others, apparently relying more on the second part

the agency acted within its delegated authority and require a challenger to the agency action to assert more than unsupported allegations of error in order to prevail. See Stever, *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation — Thoughts on Varying Judicial Applications of the Rule*, 6 W. NEW ENG. L. REV. 35, 42-44 (1983).

60. 401 U.S. at 415.

61. 401 U.S. at 416 (emphasis added) (quoting 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V)).

62. 401 U.S. at 416. The Court describes this standard as a narrow one that does not allow the court to substitute its judgment for that of the agency.

63. 401 U.S. at 417.

64. See, e.g., *City of Alexandria v. Federal Highway Admin.*, 756 F.2d 1014, 1017 (4th Cir. 1985); *Hanly v. Kleindienst*, 471 F.2d 823, 829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); see also *Shea*, supra note 26, at 83, 100.

65. See, e.g., *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

66. See, e.g., *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, 106 S. Ct. 1283 (1986) (“[R]ealism about the danger of abuse does not require a change in the [arbitrary and capricious] standard of review.”).

67. *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1320 & n.17 (8th Cir. 1974); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

of the *Overton Park* test, have applied the reasonableness standard to the type of discretion referred to in the "abuse of discretion" phrase of the arbitrary and capricious standard when reviewing threshold EIS decisions in light of NEPA's "mandatory requirements and high standards."⁶⁸

At least two circuits that apply the reasonableness standard to the decision not to prepare an EIS rely on *Overton Park* to apply the less rigorous arbitrary and capricious standard to an agency's ultimate decision either to proceed with or to abandon an action based on a full weighing of environmental considerations in an EIS.⁶⁹ These cases treat the agency's decision not to prepare an EIS as potentially beyond its statutory range of legally permissible choices — a decision measured by reasonableness — and the agency's ultimate decision on whether to proceed with an action based on a completed EIS as one deserving greater judicial deference. The absence of a thorough weighing of environmental and nonenvironmental factors in an EA and the possibility that significant impacts might become apparent only after the completion of the detailed study involved in an EIS buttress the logic of applying these different tests to different agency decisions under NEPA.⁷⁰ Furthermore, the fact that Congress chose to influence substantive agency choices by requiring agencies to follow NEPA's procedures to the "fullest extent possible"⁷¹ implies that agency discretion regarding those procedures is much narrower than agency discretion exercised after preparing an EIS.⁷²

Nonetheless, the vague term "reasonableness," while arguably ensuring that courts take an especially detailed look at threshold decisions under NEPA, fails to ensure that courts review agencies' compliance with NEPA's specific procedural requirements. The common failure of the "reasonableness" and "arbitrary and capricious" standards to ensure such compliance suggests that courts have given inadequate attention to the final part of the *Overton Park* test, which emphasizes judicial attention to procedural requirements.⁷³

More recently, courts using some version of the arbitrary and capricious standard have relied on the Supreme Court opinions in *Kleppe*

68. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973).

69. *See Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973).

70. *See* note 11 *supra* and accompanying text.

71. *See* 42 U.S.C. § 4332(2)(C) (1982).

72. *See Save Our Ten Acres*, 472 F.2d at 466 (footnote omitted):

While the Court made it clear that the ultimate merit decision based upon a weighing of these environmental considerations should be reviewed under the arbitrary, capricious, or abuse of discretion standard, a thorough study of *Overton Park* teaches that a more penetrating inquiry is appropriate for court-testing the entry-way determination of whether all relevant factors should ever be considered by the agency.

73. *See* note 63 *supra*.

*v. Sierra Club*⁷⁴ and *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*.⁷⁵ *Kleppe* concerned the necessity of a regional EIS when the Department of Interior had already prepared EISs for a national program authorizing coal leases and for several local mining operations under the program. The Court held that NEPA did not require the Department to prepare a regional EIS because the Department had no regional plan, recommendation, or proposal.⁷⁶ Proponents applying the arbitrary and capricious standard to threshold decisions have relied on the *Kleppe* Court's statement that the agency's discretion could be challenged successfully only upon a showing of "arbitrary action."⁷⁷

The *Kleppe* review standard, however, cannot be extended to EIS threshold decisions. None of the parties in *Kleppe* argued that the impact of coal mining in the region would be *insignificant*. The appropriate extent of agency discretion in the decision at issue in *Kleppe* — whether to prepare two EISs — is clearly greater than agency discretion to forgo preparing an EIS altogether. The latter decision effectively prevents any detailed environmental inquiry while the former merely concludes that one context for preparing an EIS is preferable to another.⁷⁸

Similarly, *Baltimore Gas* has been advanced in support of the arbitrary and capricious standard.⁷⁹ In *Baltimore Gas*, opponents challenged the agency's decision to ignore uncertainties in the environmental effects of nuclear waste storage. The agency assumed that such storage would result in no release of radiation to the environment but conceded that if the zero-release assumption was wrong, the environmental impacts would be significant. Nonetheless, the agency decided that the possibility of radiation release was too uncertain to factor into individual licensing decisions. The decision states broadly that the judicial role under NEPA is merely to ensure that agencies give adequate consideration to environmental factors and that

74. 427 U.S. 390 (1976).

75. 462 U.S. 87 (1983).

76. 427 U.S. at 399.

77. 427 U.S. at 412. See *Providence Road Community Assn. v. EPA*, 683 F.2d 80, 82 (4th Cir. 1982) (quoting *Kleppe*, 427 U.S. at 412); *Shea*, *supra* note 26, at 100 ("There is no discernable basis for distinguishing the decision to prepare a regional or comprehensive impact statement from more specific statements."); see also *Aertsen v. Landrieu*, 488 F. Supp. 314, 321 n.4 (D. Mass.), *order aff'd*, 637 F.2d 12 (1st Cir. 1980) (suggesting that *Kleppe* might foreclose use of the more stringent reasonableness standard, but applying that standard anyway in the absence of a more explicit statement by the Court).

78. See 427 U.S. at 414-15 ("[T]here exists no proposal for regionwide action that could require a regional impact statement . . .").

79. See *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985). In that case, while adopting the seemingly deferential arbitrary and capricious standard, the court nonetheless stated that "courts must play a cardinal role in the realization of NEPA's mandate." 756 F.2d at 151.

their decisions are not arbitrary and capricious.⁸⁰

Reliance on *Baltimore Gas* to support a deferential arbitrary and capricious standard in the present context is not entirely appropriate. First, the case does not involve a threshold decision.⁸¹ Second, and more significantly, the zero-release assumption was based on a set of documents that, for all practical purposes, already amounted to an EIS,⁸² and thus the Court's review was more characteristic of review of EIS-type balancing than of EA-type determination of significance.

In short, the Supreme Court's failure to enunciate the proper standard of review for threshold EIS decisions has left courts without needed guidance in this area. The Court has established general principles recognizing that NEPA is essentially a procedural statute,⁸³ and that a court may not substitute its judgment for that of the agency in reviewing NEPA decisions.⁸⁴ Similarly, the Court has stated that courts cannot compel agencies to give environmental considerations determinative weight⁸⁵ or require procedures beyond those required by NEPA⁸⁶ in their overall decisionmaking. Yet, neither these principles nor the cases decided in related areas have provided lower courts with a clear and workable standard for review. Instead, courts have apparently manipulated the vague terminology of Supreme Court cases resolving issues related to, but distinguishable from, the review of threshold decisions to support their predetermined standards of review.

B. *Significant Impact: Question of Fact or Question of Law?*

A court's choice to characterize the threshold decision as either factual or legal influences the degree of deference it will apply to the decision. Courts espousing the arbitrary and capricious standard tend to characterize the decision as primarily factual, thus warranting greater deference to agency discretion. Those following the reasonableness standard view the threshold decision as a legal one, warranting more expanded judicial scrutiny on review.⁸⁷

80. 462 U.S. at 97-98.

81. The threshold decision is distinct from other types of decisions under NEPA. See note 44 *supra* and accompanying text.

82. See 462 U.S. at 99 n.12.

83. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

84. See 435 U.S. at 555; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

85. See *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (*per curiam*).

86. See *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 524, 528.

87. Compare *Hanly v. Kleindienst*, 471 F.2d 823, 829-30 (2d Cir. 1972) ("[T]he APA standard permits effective judicial scrutiny of agency action and concomitantly [sic] permits the agencies to have some leeway in applying the law to factual contexts in which they possess expertise."), *cert. denied*, 412 U.S. 908 (1973), and *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985) ("The statutory concept of 'significant'

The disagreement over characterization of the threshold decision as a question of law or of fact is illustrated by two early interpretations of NEPA. In *Hanly v. Kleindienst*,⁸⁸ business and residential members of a Manhattan neighborhood sought to enjoin the construction of a federal criminal detention center in the neighborhood until an EIS was prepared. The Second Circuit identified in the threshold decision both a question of law — the meaning of the term “significantly” — and a question of fact — whether an action will have a significant impact.⁸⁹ Although the Court recognized the “possible availability” of a reasonableness standard to review the mixed question of law and fact,⁹⁰ it relied on *Overton Park*, holding that the crucial, primarily factual determination of whether an action has a significant impact should be reviewed under the less demanding APA arbitrary and capricious standard.⁹¹ Importantly, the *Hanly* court found that the arbitrary and capricious standard “permits the agencies to have some leeway in applying the law to factual contexts in which they have expertise.”⁹² Similarly, other courts that apply this standard have been willing to defer to the agency’s “good faith judgment.”⁹³

In *Wyoming Outdoor Coordinating Council v. Butz*,⁹⁴ on the other hand, the Tenth Circuit held that because the EIS requirement is stated in mandatory terms, its applicability involves an essentially legal determination.⁹⁵ In that case, an environmental group chal-

impact has no determinate meaning, and to interpret it sensibly . . . requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides. The nature of the required judgment explains why we have held that an agency’s decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion.”), *cert. denied*, 412 U.S. 1283 (1986), and *Sierra Club v. United States Dept. of Transp.*, 753 F.2d 120, 126 (D.C. Cir. 1985) (“If a finding of no significant impact is made after analyzing the EA, then preparation of an EIS is unnecessary. An agency has broad discretion in making this determination. . . .”) (citation omitted), with *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1177 n.24 (9th Cir. 1982) (“We believe that the ‘arbitrary and capricious’ standard is primarily applicable to reviewing an agency’s discretionary decisions. The decision to prepare an EIS, however, is not committed to the agency’s discretion.”), and *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) (“We are persuaded that the general reference to discretion in [the APA] . . . does not apply here to the agency’s determination under NEPA.”), and *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973) (“The spirit of the Act would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review.”).

88. 471 F.2d 823 (2d Cir. 1972) (applying the arbitrary and capricious standard), *cert. denied*, 412 U.S. 908 (1973).

89. 471 F.2d at 828.

90. 471 F.2d at 829.

91. 471 F.2d at 829-30.

92. 471 F.2d at 829-30.

93. See, e.g., *Nucleus of Chicago Homeowners Assn. v. Lynn*, 524 F.2d 225, 229 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

94. 484 F.2d 1244 (10th Cir. 1973) (applying the reasonableness standard).

95. 484 F.2d at 1248-49.

lenged the Forest Service's decision to authorize a timber sale without preparing an EIS. Unlike the *Hanly* court, the *Wyoming Outdoor Council* court held that NEPA does not leave the decision to unlimited agency discretion; instead, "the compass of the judgment to be made is narrow."⁹⁶ The court concluded that the reasonableness standard it chose to apply is consistent with the last phrase of the APA arbitrary and capricious standard, which requires courts to overturn agency decisions not "in accordance with law."⁹⁷ The court stressed that "[t]he sweep of NEPA is extremely broad."⁹⁸

Ultimately, the disagreement over the proper characterization of the threshold decision as a question of law or of fact is a pointless debate, and of little importance to courts reviewing EIS threshold decisions since *Hanly* and *Wyoming Outdoor Council*.⁹⁹ Legal scholars have often noted that questions of law can be recharacterized to look like questions of fact and vice versa.¹⁰⁰ Indeed, skeptics have concluded that courts usually characterize a decision as one of fact or law only after deciding the appropriate degree of judicial intervention.¹⁰¹

C. Burden of Proof Issues

In addition to the standard of review, courts have also disagreed on the closely related issue of what burden of proof must be imposed on the party challenging the agency decision not to prepare an EIS.¹⁰² Specifically, courts have differed over whether a challenger must show (1) that an action *will* have a significant impact;¹⁰³ (2) that *a substantial possibility exists that the action will* have a significant impact;¹⁰⁴ or

96. 484 F.2d at 1249.

97. See, e.g., Note, *supra* note 22, at 118.

98. 484 F.2d at 1249 (citing *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971)).

99. For a discussion of the disagreement among scholars, particularly Professors Davis and Jaffe, see Note, *supra* note 22, at 114-17; Comment, *Judicial Review of a NEPA Negative Statement*, 53 B.U. L. REV. 879, 893 (1973).

100. See, e.g., L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-47 (1965) ("[I]n many situations it is difficult, perhaps indeed impossible, to make a clean distinction between fact and law; that the difference is one of degree, that the relation of fact and law can be described as a spectrum with finding of fact shading imperceptibly into conclusion of law.").

101. See, e.g., Peltz & Weinman, *supra* note 11, at 90 ("[I]t is naive to assume that courts determine the proper scope based upon whether they find the issue involved to be legal or factual. It is submitted that more often than not, courts attach the law or fact label *after* they have determined what scope of review to employ.") (emphasis in original).

102. The burden of proof issue has been addressed primarily by those jurisdictions employing the reasonableness standard. For the earliest example of such a discussion, see *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466-67 (5th Cir. 1973). But see *Sierra Club v. Marsh*, 769 F.2d 868, 870-71 (1st Cir. 1985) (discussing burden of proof but applying the arbitrary and capricious standard).

103. See, e.g., *Louisiana v. Lee*, 596 F. Supp. 645, 651-52 (E.D. La. 1984), *vacated and remanded*, 758 F.2d 1081 (5th Cir. 1985).

104. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985); *City of Davis v. Cole-*

(3) that the action *might* have a significant impact.¹⁰⁵ Courts advocating the heaviest burden of proof fear manipulation of agencies by opponents of proposed actions.¹⁰⁶ Courts imposing an easier burden on challengers cite the possibility that significant environmental impacts may be revealed only after the preparation of a full-fledged EIS, and add that agency opponents required to meet a high burden of proof essentially would have to conduct their own EIS-type investigation to succeed.¹⁰⁷

The courts have also differed as to whether a challenger's satisfaction of the burden of proof is sufficient to compel preparation of an EIS¹⁰⁸ or whether it merely shifts the burden to the agency to prove the reasonableness of its decision.¹⁰⁹ Finally, one court requires the challenger to raise substantial issues not considered in the administrative record in order to satisfy the burden of proof,¹¹⁰ essentially precluding review if the challenger merely attacks issues actually considered by the agency in making its decision. Because these differences over the burden of proof can significantly effect the outcome of challenges to agency FONSI's, an attempt to resolve them is in order.

III. ALTERNATIVE APPROACHES TO REVIEW OF THE EIS THRESHOLD DECISION

The divergent approaches the federal courts have developed for review of EIS threshold decisions, although given the conclusory labels "reasonableness" and "arbitrary and capricious," in fact range from a narrow to a broad review. Any approach must incorporate existing Supreme Court principles governing interpretation of NEPA.¹¹¹ However, because the cases the Court has decided involved situations in which the agencies had already given environmental factors at least some weight, those decisions do not provide sufficient guidance concerning review of the threshold decision. At the threshold stage, a reviewing court should be concerned whether environmental concerns, if they exist and are significant, will be given any weight at all beyond

man, 521 F.2d 661, 673 (9th Cir. 1975); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973).

105. See, e.g., *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

106. See, e.g., *Hanly v. Kleindienst*, 471 F.2d 823, 830 & n.9A (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

107. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985); *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975).

108. See, e.g., *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

109. See, e.g., *Winnebago Tribe v. Ray*, 621 F.2d 269, 271 (8th Cir. 1980). This approach, however, raises the problem of post-hoc rationalizations. See notes 144-47 *infra* and accompanying text.

110. See, e.g., *Winnebago Tribe*, 621 F.2d at 271.

111. See notes 83-86 *supra* and accompanying text.

the cursory treatment in an EA.¹¹²

The key problem with almost every existing judicial approach is the courts' insistence on using a single-step standard of review to scrutinize an agency's determination of environmental insignificance instead of examining the several decisions that make up the agency's determination. A more consistent judicial approach would focus scrutiny on agency compliance with NEPA procedures leading to the threshold decision, examining different points in the agency's analysis in order to determine the overall acceptability of the agency's decision. The four-part test developed by the District of Columbia Circuit provides a starting point for such an inquiry.¹¹³

A. *The Test of the District of Columbia Circuit*

The District of Columbia Circuit's approach to the review of an agency's decision not to prepare an EIS involves a four-part inquiry. First, the reviewing court must conclude that the agency took a "hard look" at the problem generally and did not simply make bald conclusions.¹¹⁴ In part, this portion of the inquiry reiterates the need for an adequate record, which is now also required by the CEQ regulations

112. See *Louisiana v. Lee*, 758 F.2d 1081, 1084 (5th Cir. 1985) ("Any decision based on an environmental assessment is necessarily more speculative than one made after the preparation and full consideration required by an impact statement.").

113. For the earliest enunciation of this test, see Judge Leventhal's opinion in *Maryland-Natl. Capital Park & Planning Commn. v. United States Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973). In announcing the test, Judge Leventhal emphasized that "in cases involving genuine issues as to health, and environmental resources, there is a relatively low threshold for impact statements." 487 F.2d at 1040. Interestingly, Judge Leventhal did not purport to choose either the reasonableness or the arbitrary and capricious standard, stating instead that the issue was "whether the Postal Service 'unreasonably' or 'arbitrarily' failed to file an environmental impact statement." 487 F.2d at 1035. Subsequent decisions in the circuit have used the test in conjunction with the arbitrary and capricious standard. See, e.g., *Sierra Club v. United States Dept. of Transp.*, 753 F.2d 120, 126-27 (D.C. Cir. 1985); see also *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983) (basically adopting the D.C. test for the Second Circuit, which ordinarily applies the arbitrary and capricious standard of review), *cert. denied*, 465 U.S. 1099 (1984).

114. *Maryland-Natl. Capital Park*, 487 F.2d at 1040. The District of Columbia Circuit first enunciated the "hard look" doctrine in *Greater Boston Television Corp. v. Federal Communications Commn.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The court stated that

[i]ts supervisory function calls on the court to intervene not merely in the case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. . . . If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may be reasonably discerned, though of course the court must not be left to guess as to the agency's findings or reasons.

444 F.2d at 851 (footnotes omitted).

The "hard look" test was extended by the Supreme Court to decisions involving NEPA in *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("The only role for a court is to insure that the agency has taken a 'hard look' at the environmental consequences . . ."). See also *Baltimore*

and judicial precedent.¹¹⁵ Second, the agency must have identified the relevant areas of environmental concern,¹¹⁶ a requirement inherent in those decisions requiring a challenger to allege factors not considered by the agency.¹¹⁷ Third, the agency must make a “convincing case” for its finding that factors it did consider will have no significant impact.¹¹⁸ Finally, the agency must show convincingly that any planned modifications in the proposed action will reduce the significance of impacts below that compelling preparation of an EIS.¹¹⁹

The major strength of this test is that by questioning different steps in the agency’s decision, it avoids substitution of the court’s judgment for that of the agency, while exposing flaws in the agency’s consideration of environmental concerns. Its weakness is its reliance on the vague “hard look” and “convincing case” tests. In the context of the EIS threshold decision, the term “hard look” is misleading in that the entire issue is whether the agency will indeed take the “hard look” inherent in the preparation of an EIS. Furthermore, courts must have a better sense of the most important points of inquiry in reviewing agency FONSI’s if the “convincing case” test is to provide a uniform basis for determining whether the agency has complied with NEPA’s procedural mandates. The following proposed approach incorporates the strengths of the District of Columbia’s test but provides a more standardized method of review.

B. *A Proposed Systematic Standard of Review*

This proposed approach for review of EIS threshold decisions identifies decisional factors that require heightened judicial scrutiny. The approach calls for courts to scrutinize the distinction between the EA and the EIS, the consistency of the agency’s decision with other decisions of that agency and other agencies, the agency’s use of post hoc rationalizations and proposed modifications, and the agency’s treatment of scientific controversy and public opposition. The approach intentionally avoids conclusory labels such as “reasonableness,” “arbitrary and capricious,” “hard look,” and “convincing case,” and does not attempt to characterize the threshold decision as a

Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983); Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 229 (1980) (Marshall, J., dissenting).

115. See note 38 *supra* and accompanying text.

116. *Maryland-Natl. Capital Park*, 487 F.2d at 1040.

117. See *Winnebago Tribe v. Ray*, 621 F.2d 269, 271 (8th. Cir. 1980).

118. *Maryland-Natl. Capital Park*, 487 F.2d at 1040; cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (“[T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . [T]his inquiry into the facts is to be searching and careful . . .”).

119. 487 F.2d at 1040. For a detailed discussion of the appropriate role of project modifications as a justification for forgoing preparation of an EIS, see notes 148-52 *infra* and accompanying text.

question of fact or of law. Instead, it focuses judicial attention on agency compliance with NEPA's procedural mandates,¹²⁰ the key to the statute's substantive impact.

Concededly, the test requires rigorous judicial analysis of agency decisions and in that respect may be viewed as relatively nondeferential. A rigorous judicial analysis is favored by NEPA's mandatory terms,¹²¹ the EIS requirement's applicability to all agencies — including those without expertise in environmental matters¹²² — the pretermission of further environmental inquiry occasioned by a FONSI,¹²³ NEPA's lack of precise language or legislative history,¹²⁴ and the perpetual tension between primary agency concerns and environmental concerns in agency decisionmaking.¹²⁵ Furthermore, closer scrutiny parallels the reasoning of those courts applying the first step in the *Overton Park* analysis to the EIS threshold decision.¹²⁶

Various courts have given considerable weight to many of the factors incorporated in this approach.¹²⁷ Consistent testing of FONSI's against all of these factors would greatly improve the uniformity of review in this area. The need for uniformity and the importance of a judicial check on administrative discretion in FONSI's call for judicial resolution of the burden of proof issue as a starting point.

1. *Burden of Proof of a Challenger to an Agency FONSI*

The initial goal of the reviewing court should be to ensure that those who challenge an agency's decision not to prepare an EIS demonstrate that there is a substantial possibility that the proposed action will significantly affect the environment. Since NEPA and the CEQ regulations clearly contemplate situations not requiring EISs,¹²⁸ challengers should be required to show more than a mere possibility that the action may have a significant impact; otherwise, an EIS will

120. Under the APA standards, the reviewing court is required to set aside agency decisions made "without observance of procedure required by law." 5 U.S.C. § 706(2)(D) (1982).

121. See, e.g., *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973).

122. See F. ANDERSON, *supra* note 1, at 104-05. But see *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986).

123. See, e.g., *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985); see also *City of Davis v. Coleman*, 521 F.2d 661, 670 (9th Cir. 1975); Comment, *supra* note 11, at 82.

124. See Note, *supra* note 22, at 115.

125. See note 28 *supra* and accompanying text.

126. See notes 55-73 *supra* and accompanying text.

127. See, e.g., *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985) (proper distinction between EA and EIS); 769 F.2d at 873 (agency's consultations with other agencies); *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (inconsistency with agency's prior decisions); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (public opposition distinguished from scientific controversy).

128. See notes 38-39 *supra* and accompanying text.

almost always be required. On the other hand, given the possibility that significant impacts might be revealed only after the detailed analysis an EIS entails,¹²⁹ the court should require less than a clear showing that the action will have a significant impact. Furthermore, courts that require the challenger to address issues not considered in the administrative record, in addition to inadequate treatment of issues that the agency did consider, should allow the challenger to rely on information both in and outside of the record.¹³⁰ The most sensible burden of proof for the challenger, therefore, is to raise a substantial possibility, not yet considered or inadequately addressed by the agency, that the action will have a significant impact on the environment.

2. *Proper Distinction Between the EA and the EIS*

The court should also ensure that the agency has not attempted to substitute an EA for an EIS.¹³¹ The critical factors in making this determination are the length of the EA and the extent to which it balances relevant factors.¹³² A long EA that discusses environmental concerns in detail should be considered highly suspect if used to support a FONSI, as it most likely indicates the existence of significant impacts and thus the need for an EIS. Courts suggesting that a detailed EA is often a substitute for an EIS¹³³ ignore the fundamental difference in the purposes of EAs and EISs.¹³⁴ A detailed EA should

129. See note 107 *supra* and accompanying text.

130. Cf. note 110 *supra* and accompanying text.

131. Recently, the Seventh Circuit sanctioned such a substitution in *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986). The court interpreted the role of the EA to be to determine "whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement," 764 F.2d at 449, and held that EAs are typically thorough enough to allow the court to apply a higher threshold of significance before requiring an agency to prepare an EIS. 764 F.2d at 451. Cf. *Maryland-Natl. Capital Park and Planning Commn. v. United States Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973) ("[I]n cases involving genuine issues as to health, and environmental resources, there is a relatively low threshold for impact statements . . ."). In *River Road Alliance*, Judge Posner noted "evidence in the recent cases of a loosening of the judicial reins on agency decisions not to require environmental impact statements." 764 F.2d at 450. However, while accepting the legal realism inherent in his position — that courts today can allow an EA to do the work of an EIS because EAs are somehow more thorough today than in the past — Posner explicitly rejected consideration of the "realism about the danger of abuse" that exists when nonenvironmental agencies are forced statutorily to consider environmental concerns "to the fullest extent possible" in making decisions. See 764 F.2d at 449. For an opposite view on consideration of administrative resource allocation, see S. TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* 75 (1984); Note, *Does NEPA Require an Impact Statement on Inaction?*, 81 MICH. L. REV. 1337, 1368 (1983).

132. See notes 40-44 *supra* and accompanying text.

133. See, e.g., *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 451 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986).

134. See *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985); notes 33-44 *supra* and accompanying text.

be convertible into a sufficient EIS with little time and expense.¹³⁵ Furthermore, judicial refusal to allow EAs to substitute for EISs would most likely reduce the time and expense of litigation that is likely to result when EISs are not prepared in borderline cases.

Examination of the extent to which an EA balances factors is crucial in evaluating the validity of a FONSI. While an agency is free to recognize social and economic factors that favor an action, those factors can never justify the decision to forgo an EIS. Only after preparation of an EIS can an agency determine that economic and social factors outweigh significant environmental impacts and thereby justify a decision to proceed with an action.

3. *Consistency with Other Decisions of the Agency*

The court should allow challengers of the agency decision to present evidence that the agency required EISs for similar actions. If a pattern of significant environmental effects from a certain type of action is apparent,¹³⁶ the court should then impose a burden of persuasion on the agency to support its atypical decision not to prepare an EIS. A type of action that has never been considered by the agency should also trigger more skeptical review.¹³⁷ Conversely, an action that the agency has "categorically excluded,"¹³⁸ in accordance with the CEQ regulations and its own internal procedures, should trigger greater deference to the agency's decision.

4. *Consistency with Advice of Other Agencies*

The problem with relying on agency discretion is intensified when the agency making the threshold EIS decision has primary concerns that conflict with environmental concerns.¹³⁹ Both NEPA and the CEQ regulations thus contemplate interagency consultation prior to making the threshold decision.¹⁴⁰ An agency decision that does not

135. See *Marsh*, 769 F.2d at 875.

136. See *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (noting that the Corps of Engineers' decision not to prepare an EIS for a shell-dredging project was inconsistent with its prior decisions to prepare EISs for several other shell-dredging projects that produced fewer shells); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 n.9 (10th Cir. 1973) (noting that the Forest Service had issued a directive to Regional Foresters requiring EISs for timber sales similar to the one being challenged).

137. See *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 145 (D.C. Cir. 1985) (reviewing the National Institutes of Health's decision to approve the first deliberate release of genetically engineered recombinant-DNA-containing organisms, and noting the court's role in ensuring "that the bold words and vigorous spirit of NEPA are not . . . lost or misdirected in the brisk frontiers of science"); cf. 40 C.F.R. § 1501.4(e)(2)(ii) (1986) (requiring agencies, before deciding whether to prepare an EIS, to allow an extended public comment period for proposed FONSI relating to actions "without precedent").

138. See note 35 *supra* and accompanying text.

139. See note 28 *supra* and accompanying text.

140. See 42 U.S.C. § 4332(C) (1982) ("Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has

consider the advice of other agencies should be considered highly suspect, especially when a primarily nonenvironmental agency ignores the advice of an agency with expertise in environmental matters.¹⁴¹

As a corollary, courts should permit challengers of the agency decision to attack any administrative record that does not include any references to advice obtained from environmental agencies. An agency that fails to obtain such information contravenes clear mandates from NEPA, the CEQ regulations, and, often, the agency's own regulations,¹⁴² and thus commits a procedural error.¹⁴³

5. *Post-hoc Rationalizations*

Courts should be wary of an agency's use of "post-hoc rationalizations" to support a FONSI.¹⁴⁴ In the *Overton Park* decision,¹⁴⁵ the Supreme Court found that litigation affidavits used by the agency to explain its decision constituted an inadequate basis for review because they were not a reliable reflection of the agency's decisionmaking process.¹⁴⁶ One circuit relied on this part of *Overton Park* to hold that an EA revised by an agency in response to a challenge of a decision not to prepare an EIS amounts to a post-hoc rationalization that the reviewing court must view critically and without deference to the agency.¹⁴⁷

Such nondeferential treatment of post-hoc rationalizations is proper because they are necessarily produced in an atmosphere of controversy which is likely to exacerbate any tension between the agency's possible development-oriented motives and environmental concerns.

jurisdiction by law or special expertise with respect to any environmental impact involved."); 40 C.F.R. § 1501.4(b) (1985) ("The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments . . ."); cf. 33 C.F.R. § 230.9(c) (1986) (Corps of Engineers provision requiring EAs to include a list of agencies consulted during preparation of the EA, but not specifying that other agencies *must* be consulted).

Although the requirement to consult other agencies appears in NEPA in the section describing actual preparation of an EIS, at least one court has applied it to EA preparation. See *Sierra Club v. Marsh*, 769 F.2d 868, 873 (1st Cir. 1985); see also *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (Corps of Engineers decision not to prepare an EIS upheld; court notes approval of environmental agencies such as the Environmental Protection Agency and the Fish and Wildlife Service).

141. See *Sierra Club v. Marsh*, 769 F.2d 868, 868 (1st Cir. 1985); *River Road Alliance, Inc. v. Corps of Engrs. of United States Army*, 764 F.2d 445, 458 (7th Cir. 1985) (Wood, J., dissenting), cert. denied, 106 S. Ct. 1283 (1986); see also *W. RODGERS*, *supra* note 24, at 753.

142. See note 140 *supra*.

143. At least one court would remand cases involving procedural errors in the agency's determination of no significant impact. In cases in which the court determines that the action *may* have a significant impact, the court would require the agency to prepare an EIS. See *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985).

144. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

145. 401 U.S. 402 (1971).

146. 401 U.S. at 419. The Court cited *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-69 (1962) (courts may not accept an agency's rationale in litigation if that rationale was not evinced in the official explanation of the agency's action).

147. *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985).

Thus, the court must ensure that agency explanations given subsequent to an opponent's challenge were developed through proper reinspection of the relevant factors, such as by obtaining external advice, and not through adaptative reiteration of flawed reasoning.

6. *Modifications*

The courts have been unclear concerning the weight to give to planned project modifications that purport to reduce environmental impacts below the degree of significance triggering an EIS.¹⁴⁸ While the apparent consensus is that modifications should be able to support a decision not to prepare an EIS,¹⁴⁹ most courts have established that the mere promise that a modification will mitigate environmental impact is insufficient.¹⁵⁰ Otherwise, there is too great a possibility that the agency may subsequently alter the proposed modifications so that the significance of environmental impacts increases, and therefore that agencies could use *possible* mitigation measures as an excuse for sidestepping the EIS requirement.¹⁵¹ In order to weigh modifications properly, a reviewing court should require that the agency be legally bound to carry out modifications reducing the significance of the action's environmental impact.¹⁵²

7. *Treatment of Controversy*

Courts have disagreed over the proper treatment of scientific controversy about and public opposition to proposed actions. Both the CEQ regulations¹⁵³ and several internal agency procedures¹⁵⁴ identify "controversy" as one factor in determining the environmental signifi-

148. Compare *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) ("[S]o long as significant measures are undertaken to 'mitigate the project's effects,' they need not *completely compensate* for adverse environmental impacts.") (emphasis in original), with *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982) ("[M]odifications may make the preparation of an EIS unnecessary, [but they] must be more than vague statements of good intentions.").

149. See Leventhal, *supra* note 28, at 524; *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,038 (1981) [hereinafter *Forty Most Asked Questions*].

150. See *Sierra Club v. Marsh*, 769 F.2d 868, 877 (1st Cir. 1985); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982).

151. See *Forty Most Asked Questions*, *supra* note 149, at 18,038.

152. The CEQ has stated explicitly that agencies may rely on project modifications to make FONSI's "only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal." *Forty Most Asked Questions*, *supra* note 149, at 18,038. Thus, in *Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986), the court upheld a Corps of Engineers after-the-fact permit allowing a developer to fill a wetland where the permit was conditioned on a mitigation agreement requiring the developer to purchase substitute land and convert it to wetlands. But see *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) ("The 'Forty Questions' publication . . . is merely an informal statement, not a regulation, and we do not find it to be persuasive authority.").

153. See 40 C.F.R. § 1508.27(b)(4) (1986).

154. See, e.g., 33 C.F.R. § 230.4 (1986) (Corps of Engineers regulations incorporating the

cance of an action but fail to define the term adequately. Some courts, however, have made a sensible distinction between opposition and controversy.¹⁵⁵ According to these courts, opposition alone should not be sufficient cause for overturning or remanding a FONSI if the scientific community is in relative agreement over the potential effects of an action.¹⁵⁶ By contrast, these courts define controversy as existing when reasoned theories on the environmental impact of an action conflict.¹⁵⁷ In that case, courts should require the agency to make a stronger showing that an EIS is not needed to resolve the conflict.

The rationale for distinguishing opposition from controversy is that allowing public opposition alone to force agencies to prepare EISs surrenders the threshold decision to agency opponents. For example, courts should not require agencies to bend to opposition based on factors that are not legitimate subjects of the NEPA review process.¹⁵⁸ On the other hand, substantial disputes in the scientific community over the environmental impacts of an action logically indicate the need for more detailed study in an EIS.

IV. CONCLUSION

In the context of the decision to forgo an EIS, "abuse of discretion" must be considered a flexible term, given that federal agencies with diverse and sometimes environmentally insensitive objectives are all subject to the same requirement to consider environmental factors

CEQ definitions by reference); 40 C.F.R. § 6.509(b) (1986) (Environmental Protection Agency regulations).

155. See, e.g., *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986-87 (9th Cir. 1985) (distinguishing *Foundation for N. Am. Wild Sheep v. United States Dept. of Agric.*, 681 F.2d 1172 (9th Cir. 1982), in which the court referred to "numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and *all disputing the EA's conclusion*," from the situation in which "virtual agreement exists among local, state, and federal government officials, private parties, and local environmentalists.") (emphasis in original); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (public controversy is only an important factor "where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use."); *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); see also *Como-Falcon Community Coalition, Inc. v. United States Dept. of Labor*, 609 F.2d 342, 345-46 (8th Cir. 1979) (public opposition based on socio-economic factors alone not enough to warrant preparation of an EIS), *cert. denied*, 446 U.S. 936 (1980). But cf. J. HEER & D. HAGERTY, ENVIRONMENTAL ASSESSMENTS AND STATEMENTS 111-12 (1977) ("When in doubt as to the applicability of NEPA to a particular action which has been challenged by a citizen's environmental group, the courts appear to have taken the attitude that if doubt does exist or if public opposition is significant, an impact statement should be prepared.").

156. See note 155 *supra*.

157. Courts sometimes express their unwillingness to rule on the "relative merits of competing scientific opinion." See, e.g., *Sierra Club v. United States Dept. of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) (citing *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971)). In the context of the threshold decision, however, a court does not necessarily choose between competing technical positions by requiring further detailed study.

158. See *Como-Falcon Community Coalition, Inc. v. United States Dept. of Labor*, 609 F.2d 342, 345-46 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

in decisionmaking. The NEPA threshold decision is particularly susceptible to agency abuse because many federal agencies have primary development-oriented concerns inherently at odds with environmental considerations. Furthermore, because NEPA is designed to influence substantive agency decisions through procedural mandates, the judicial role in reviewing agency decisions to cut short those procedures must be especially rigorous.

A careful review of the different approaches for reviewing agency decisions not to prepare an EIS reveals that both the reasonableness and the arbitrary and capricious standards fail to provide a consistent approach for reviewing FONSI's. The goal in enunciating a proper standard should be to identify crucial points of inquiry for determining the appropriate degree of deference a court should give an agency determination that an action will have no significant impact. This Note outlines an approach that achieves that goal.

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